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p. 791. McDONALD *v.* BRITISH TRANSPORT COMMISSION. Line F.4: for " plaintiff " read " defendants ".

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NATIONAL ASSISTANCE BOARD *v.* PARKES.

[COURT OF APPEAL (Denning, Birkett and Romer, L.JJ.), July 6, 7, 8, 1955.]

National Assistance—Husband and wife—Deed of separation—Wife's covenant not to claim any financial provision from husband—Grant of national assistance to wife—Liability of husband to National Assistance Board—National Assistance Act, 1948 (11 *&* 12 *Geo*. 6 *c*. 29), *s*. 42 (1) (*a*), *s*. 43 (1), (2).

A covenant in a separation agreement between a husband and wife provided that: "The wife will not at any future time be or claim to be entitled to any financial provision whatsoever from the husband in respect of herself and [their] child or either of them . . ." The wife later fell on bad times and received national assistance from the National Assistance Board, who made a complaint against the husband asking that he should contribute towards the weekly amount which they were paying under s. 43 (2) of the National Assistance Act, 1948.

Held: although circumstances relieving the husband of his obligation in law to maintain his wife were among circumstances to which the court was required to have regard in deciding whether to make an order for the husband to contribute under s. 43 (2), yet a covenant by the wife not to ask for maintenance did not oust the duty of the husband to maintain the wife and the board were entitled to an order for contribution from him.

Tulip v. *Tulip* ([1951] 2 All E.R. 91) and *National Assistance Board* v. *Prisk* ([1954] 1 All E.R. 400) applied.

Decision of the DIVISIONAL COURT ([1955] 1 All E.R. 700) affirmed.

[**Editorial Note.** Apart from the decision stated above the judgments in the present case explain the considerations which arise when the defence to a claim by the National Assistance Board for contribution is that the assisted party to the marriage has been guilty of a matrimonial offence. Adultery or desertion by the wife is an answer to a claim against the husband to contribute to the cost of public assistance to her; see *National Assistance Board* v. *Wilkinson* ([1952] 2 All E.R. 255). It is explained, however, that the true reason for this consequence is that the matrimonial offence is a circumstance which may be taken into consideration under s. 43 (2) of the National Assistance Act, 1948, and is strong enough to oust the husband's liability, but the reason is not that such an offence results in the spouses not being husband and wife within the meaning of the enactment while the marriage still subsists (see, particularly, per ROMER, L.J., at pp. 8, 9, post, and compare per DENNING, L.J., at p. 3, letter E, post).

For the National Assistance Act, 1948, s. 42 and s. 43, see 16 HALSBURY'S STATUTES (2nd Edn.) 968, 969.]

Cases referred to:

(1) *Culley* v. *Charman*, (1881), 7 Q.B.D. 89; 50 L.J.M.C. 111; 45 L.T. 28; 45 J.P. 768; 37 Digest 233, *256*.
(2) *National Assistance Board* v. *Wilkinson*, [1952] 2 All E.R. 255; [1952] 2 Q.B. 648; 116 J.P. 428; 3rd Digest Supp.
(3) *Price* v. *Price*, [1951] 2 All E.R. 580, n.; [1951] P. 413; 115 J.P. 468, n.; 2nd Digest Supp.
(4) *Tulip* v. *Tulip*, [1951] 2 All E.R. 91; [1951] P. 378; 2nd Digest Supp.
(5) *Dowell* v. *Dowell*, [1952] 2 All E.R. 141; 116 J.P. 350; 3rd Digest Supp.
(6) *National Assistance Board* v. *Prisk*, [1954] 1 All E.R. 400; 118 J.P. 194; 3rd Digest Supp.
(7) *Baker* v. *Baker*, (1949), 66 (pt. 1) T.L.R. 81; 2nd Digest Supp.
(8) *Chapman* v. *Chapman* (Apr. 4, 1951), Not reported (cited in *Stringer* v. *Stringer*, [1952] 1 All E.R. 373).
(9) *Stringer* v. *Stringer*, [1952] 1 All E.R. 373; [1952] P. 171; 116 J.P. 102; 3rd Digest Supp.
(10) *Hyman* v. *Hyman*, [1929] A.C. 601; 98 L.J.P. 81; 141 L.T. 329; 93 J.P. 209; 27 Digest (Repl.) 235, *1888*.

Appeal.

On July 3, 1954, the National Assistance Board preferred a complaint against the husband to the magistrates for the county of Flint, alleging that under s. 42 of the National Assistance Act, 1948, he was liable to maintain his wife, then in receipt of national assistance, and applying for a summons to be served on him to show cause why an order should not be made on him under s. 43 (2) of the Act to pay such sum as the court might consider appropriate towards such assistance. The husband contended that his liability under the section was subject to the common law defences open to him and that a separation agreement between the husband and the wife in which the wife had agreed not to claim or to be entitled to any financial provision from the husband was a bar to the board's obtaining the order sought. The magistrates heard the complaint at Rhyl on July 28, 29, 1954. They upheld the husband's contention and dismissed the complaint. On Mar. 2, 1955, the Divisional Court of the Queen's Bench Division (LORD GODDARD, C.J., ORMEROD and GORMAN, JJ.), reported [1955] 1 All E.R. 700, allowed the board's appeal against that decision, holding that the board were entitled to recover from the husband such sum as the magistrates thought reasonable. The husband appealed.

R. I. Threlfall for the husband.
Rodger Winn for the National Assistance Board.

DENNING, L.J.: On Mar. 21, 1950, Mr. and Mrs. Parkes were married. On Aug. 9, 1952, whilst they were living in Kenya, they entered into a separation agreement in which they agreed to live separate and apart from one another. The wife covenanted that she would not claim any maintenance or any financial provision from her husband in respect of herself or her child and would not petition any court at any time. She came back to England, but later she fell on bad times, so much so that she had to ask for national assistance. The husband is paying £2 a week for the child's maintenance, but nothing for the wife. The National Assistance Board have paid 39s. 6d. a week to the wife and now bring a summons against the husband asking that he should contribute towards the amount which they are paying to her. They point out that the husband is in receipt of a gross wage of £900 a year, £500 salary and £400 local allowance. The husband makes answer and says that, by reason of the deed, he is under no obligation to maintain his wife at all, and, therefore, the National Assistance Board have no right against him either.

The claim of the board depends on the National Assistance Act, 1948, which abolished the old poor law, and put in its place provisions whereby people in need could receive national assistance. It is specifically enacted in s. 42 (1):

> "For the purposes of this Act—(a) a man shall be liable to maintain his wife and his children, and (b) a woman shall be liable to maintain her husband and her children."

Then, by s. 43 (1), when assistance is given, the board

> ". . . may make a complaint to the court against any other person who for the purposes of this Act is liable to maintain the person assisted."

Sub-section (2) says:

> "On a complaint under this section the court shall have regard to all the circumstances and in particular to the resources of the defendant, and may order the defendant to pay such sum, weekly or otherwise, as the court may consider appropriate."

By s. 42 (1) it is laid down that a man is liable to maintain his wife and his children for the purposes of the Act, and vice versa a woman is liable to maintain her husband and her children. That is a change in the law which must be given proper effect, but the important provision for present purposes is that the court is to "have regard to all the circumstances". I think that under that provision the court must have regard, amongst other things, to any circumstances recognised by the law as sufficient to relieve a husband of his obligation to maintain his wife. From the very earliest times, both in the ecclesiastical courts and in the common law courts, a husband has been under no liability to maintain his wife if she has been guilty of adultery or desertion, and, when various statutes have been passed, the courts have held that his statutory duty is subject to the same exception. In *Culley* v. *Charman* (1) (1881) (7 Q.B.D. 89) it was so held on a statute which enabled the court to consider all the circumstances of the case. Likewise, it has been held by the Divisional Court in *National Assistance Board* v. *Wilkinson* (2) ([1952] 2 All E.R. 255), that a husband has an answer in law to any summons by the National Assistance Board if his wife has been guilty of adultery or desertion. That decision, I think, was perfectly right on this ground, that her guilt is one of the circumstances of the case to which the magistrates must have regard. It is so strong a circumstance that it affords an answer in law to the claim.

In this case counsel for the husband says that there is an additional circumstance which gives the husband an answer to the wife's claim, and, therefore, should give an answer to the claim by the board. That circumstance, he says, is the presence of a separation agreement by which the wife has said she will ask for no maintenance. In my judgment, the presence of such a separation deed does not ipso facto destroy the husband's obligation to maintain his wife. It did not do so at common law and does not do so now. So the whole foundation of counsel's argument, in my judgment, fails.

Separation by consent is not itself a bar to maintenance. The husband's duty to maintain his wife continues: see *Price* v. *Price* (3) ([1951] P. 413); but the extent of the duty depends on the circumstances. Sometimes it happens that, when the parties separate, the husband agrees to pay the wife a fixed sum, which is sufficient for her maintenance in her then situation, having regard to her own earning capacity. In such a case the husband fulfils his duty by paying that sum so long as that situation continues. He is not under any obligation to pay more unless new circumstances arise in which she needs more, as, for instance, if she is stricken with illness, or if money changes in value, so that the named sum is inadequate. If she brings these new circumstances to his notice and he has the means to pay more, then he is under a duty to increase the sum, notwithstanding the prior agreement. If he does not pay her more according to her needs in the new situation, he is guilty of wilful neglect to maintain her: see *Tulip* v. *Tulip* (4) ([1951] 2 All E.R. 91), *Dowell* v. *Dowell* (5) ([1952] 2 All E.R. 141), and *National Assistance Board* v. *Prisk* (6) ([1954] 1 All E.R. 400).

Sometimes, however, it happens that, when the parties separate, they make no agreement for maintenance, for the simple reason that the wife does not ask for maintenance. She may have means of her own, or be able to earn, or can live with her parents. She may even agree, as here, that she will never claim maintenance from him. In such a case, so long as things remain the same, the husband is not under any obligation to pay any maintenance to her. But new circumstances may arise to alter the situation. The wife may fall on evil days when she is unable to earn. She may lose her parents and be unable to look to them for support. She may even, as here, have to fall back on national assistance. If these facts are brought to the husband's notice and he has the means to pay, then he is under a duty to maintain her, notwithstanding the prior agreement that he should pay nothing. The principle of *Tulip* v. *Tulip* (4) applies, I think, just as much when there is an agreement to pay nothing as when a fixed sum is to be paid, and it overrides anything said previously in *Baker* v. *Baker* (7) (1949) (66 (pt. 1) T.L.R. 81) and *Chapman* v. *Chapman* (8) (cited in *Stringer* v. *Stringer* (9)). So long as the husband is ignorant of the new situation he is under no such duty, and is not guilty of wilful neglect to maintain her. That is, I think, the effect of the decision in *Stringer* v. *Stringer* (9) ([1952] 1 All E.R. 373).

There is one remaining case to consider. It may sometimes happen that, when the parties separate, the husband refuses to pay enough to his wife, but only agrees to pay her a small sum, little or nothing, though he could well pay more: and she for the sake of peace agrees to it. It may even be his intention that she should resort to public assistance so as to relieve his pocket. I do not think that he could thereby escape from his duty to maintain her. Even though there may be no new circumstances, nevertheless a husband cannot shift his responsibility on to the rest of the community in that way. His duty to maintain her remains, despite the agreement.

The truth is that, on a separation by consent, the existence of an agreement for fixed maintenance, or for no maintenance, does not oust the duty of the husband to maintain his wife. As LORD ATKIN said in *Hyman* v. *Hyman* (10), in another connection, but I think his words are apposite here also ([1929] A.C. at p. 629):

> "The wife's right to future maintenance is a matter of public concern, which she cannot barter away."

In the great majority of cases the husband, by fulfilling his agreement, fulfils his duty, but circumstances may arise when the wife is in need and the husband knows of it and can and ought to pay for her. The private agreement of the parties must then give place to the overriding duty of a man to maintain his wife. His duty only ceases when she has been guilty of a grave fault, such as adultery or desertion, by which she forfeits her right to maintenance.

I ought perhaps to say that, when a separation deed is overridden in this way, it does, I suppose, cease thenceforward to bind the parties to separate. The way is open to reconciliation. Either side can make a genuine offer to return and make a home again, and the one who refuses must take the consequences.

In the present case the wife became in such need that she had to resort to national assistance. When the husband knew of it, it became his duty to maintain her, despite the deed. She could, I think, have applied to the court on the ground of his wilful neglect to maintain her, and have obtained an order against him. The National Assistance Board can in these circumstances claim a contribution from him towards the amount they have paid. It will, of course, be open to the magistrates to consider all the circumstances before they decide what amount, if any, the husband should contribute. All that we decide today is that the deed of separation is not itself a bar to the claim. I think that the decision of the Divisional Court was right and that the appeal should be dismissed.

BIRKETT, L.J.: I am of the same opinion. I should like to say how much the court is indebted to counsel for the husband for his argument detailing the history of the legislation with which we are concerned. Although counsel for the National Assistance Board said: " I am not concerned with the history of that matter, for the Act of 1948, in my submission, creates quite a new situation ", it was of great help to have the background of the history of the legislation of which the Act of 1948 forms rather a culminating point. It is rather curious to observe why, until 1927, no statute made the husband liable to maintain his wife. The Poor Relief Act, 1601, s. 7, provided that a father, a grandfather, a mother, a grandmother and children should maintain a poor person, but no mention was made of a husband. At common law a husband was liable to maintain his wife, although that liability might be displaced by her adultery, or it might be suspended by her desertion.

Under Acts of the nineteenth century, steps were taken to recover from the husband sums of public money paid by the guardians in respect of poor persons. Some of the language of the Poor Law Amendment Act, 1868, s. 33, is incorporated in one of the sections of the Act of 1948, particularly the phrase " all the circumstances " in s. 43 (2). The husband also might be criminally liable under the Vagrancy Act, 1824, s. 3, but the authorities had a statutory right under those statutes to recover public moneys paid out for the relief of poor persons. By the Poor Law Act, 1927, the husband was added to that category of father, grandfather, mother, grandmother, and so on, for the first time, provided he had sufficient means—a very important qualification. In various other statutes the guardians were substituted for the local assistance board, and so on.

A revolutionary change was made by the National Assistance Act, 1948, which was passed at a time when social legislation was much to the fore and great social changes were being brought about. The long title is highly significant in the construction of the sections we have to deal with:

> " An Act to terminate the existing poor law and to provide in lieu thereof for the assistance of persons in need by the National Assistance Board and by local authorities; to make further provision for the welfare of disabled, sick, aged and other persons and for regulating homes for disabled and aged persons and charities for disabled persons; to amend the law relating to non-contributory old age pensions; to make provision as to the burial or cremation of deceased persons; and for purposes connected with the matters aforesaid."

That, like the statute, covers an exceedingly wide field. Section 1, Part 1, says:

> " The existing poor law shall cease to have effect, and shall be replaced by the provisions of Part 2 of this Act as to the rendering, out of moneys provided by Parliament, of assistance to persons in need, the provisions of Part 3 of this Act as to accommodation and other services to be provided by local authorities, and the related provisions of Part 4 of this Act."

We are concerned with only Part 2 and Part 4, though the other sections of the Act make far-reaching changes in the existing state of affairs dealing with the poor. Section 4 of Part 2 says:

> " It shall be the duty of the board in accordance with the following provisions of this Part of this Act to assist persons in Great Britain who are without resources to meet their requirements, or whose resources (including benefits receivable under the National Insurance Acts, 1946) must be supplemented in order to meet their requirements."

That is the first great provision of the Act, the duty of the board to assist persons in Great Britain who are without resources. Then, s. 5 (1) says:

> " The question whether a person is in need of assistance, and the nature and extent of any assistance to be given to him, shall, subject to the provisions of this Act as to appeals, be decided by the board."

There are many other sub-sections which I need not read. So the Act is purporting plainly to say: " We sweep away all the provisions " set out in very long schedules—some sections of the Summary Jurisdiction Acts and many sections of the Poor Law Acts, sweeping away in fact the poor law as it existed at that time and substituting for it something, at least on the face of it, much simpler. Though counsel for the husband admitted it was a little complicated, it is a simpler method of dealing with the matter.

In those circumstances we have to consider s. 42 (1) which is under the heading " Recovery of expenses ":

> " For the purposes of this Act—(a) a man shall be liable to maintain his wife and his children, and (b) a woman shall be liable to maintain her husband and her children."

There are references to putative fathers, etc., but that is the main provision. The father, mother, grandfather and grandmother have all gone. All the argument in this case has turned on the construction of that section. Counsel for the husband says it must be read subject to a very important qualification, not simply " for the purposes of this Act ", but " subject to the legal decisions which have placed the husband in certain respects in a particular position ", and so on. Section 43 (1) provides:

> " Where assistance is given or applied for by reference to the requirements of any person (in this section referred to as a person assisted), the board or the local authority concerned may make a complaint to the court against any other person who for the purposes of this Act is liable to maintain the person assisted."

A man shall be liable to maintain his wife. The board may make a complaint to the court against a man who is liable to maintain his wife, i.e., the person who has been assisted by the National Assistance Board. Then, sub-s. (2) says:

> " On a complaint under this section the court shall have regard to all the circumstances and in particular to the resources of the defendant, and may order the defendant to pay such sum, weekly or otherwise, as the court may consider appropriate."

According to the Case Stated, the marriage took place on Mar. 21, 1950. On Aug. 9, 1952, slightly over two years later, the husband and the wife entered into the separation agreement which is attached to the Case Stated, and they agreed to live separate and apart. The wife covenanted as follows:

> " The wife will not at any future time be or claim to be entitled to any financial provision whatsoever from the husband in respect of herself and the said child or either of them And that she will not at any future time pledge the credit of the husband and will at all future times keep the husband and his estate and effects fully and effectually indemnified against all debts and liabilities hereafter contracted or incurred by the wife and against all actions proceedings claims demands costs damages losses and expenses in respect and on account thereof."

Then there is the usual non-molestation clause. Whether the wife was then able to earn and said " I will not be dependent on you, I am capable of looking after myself ", we do not know, but in 1952 that situation, if it ever existed, did not exist any longer. The wife was in need within the meaning of s. 4 of the National Assistance Act, 1948. The Case Stated states that the wife was in need of assistance and had received it to the extent of 39s. 6d. a week. On July 1, 1954, the husband was summoned under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, as a person who, for the purpose of the Acts, was liable to maintain the wife. The summons stated: " You have wilfully neglected to maintain your wife ". That summons was withdrawn because apparently an undertaking was entered into whereby the husband consented to an order being made under the Guardianship of Infants Acts, 1886 and 1925, for the payment of certain moneys purely for the maintenance of the child.

According to the Case Stated, evidence was taken in this case of the means of the husband which showed that he was well able to pay. The arguments were set out. On behalf of the board, it was said: " This husband is liable to maintain his wife because the statute says so. She has committed no matrimonial offence ", and under s. 43 (1) and (2) the board said: " We are entitled to an order from this court as the statute directs ". They said finally: " The separation agreement of Aug. 9, 1952, is irrelevant and does not in any sense debar the National Assistance Board from claiming the sum from the husband which they have had to pay to the wife because she was in need within the meaning of the Act ". For the husband it was said that s. 43, under which the board moved, was subject to the common law defences open to the husband. It was not simple and straightforward, but was hedged about by the legal position of the husband, as laid down in the decided cases. It was said that, for example, if the wife had committed adultery, there would have been no liability at all, and, if she had been in desertion, there would have been no liability for the time being at least, i.e., any liability would have been suspended. It was said also that the existence of this separation agreement into which the wife had admittedly entered saying " I do not want any maintenance and I will not ask for it " was a bar to the National Assistance Board applying to the court under this section. The magistrates stated their view for the opinion of the High Court. They said that the moment that agreement to separate was entered into, in which the wife covenanted not to accept maintenance or to ask for it, the liability of the husband to maintain the wife ended. They said: " That agreement is a complete bar to the wife obtaining an order and the National Assistance Board cannot be in any better position than the wife, and if she could not succeed, they cannot. Therefore, we decide that this husband is not liable to the National Assistance Board for the repayment of public moneys ", which had admittedly been paid to the wife under the Act because she was in need.

In the Divisional Court, LORD GODDARD, C.J., delivered the judgment of the court. Two cases were tried together. In principle they amounted to the same thing, though they were looked at from different points of view. LORD GODDARD, C.J., said on this case ([1955] 1 All E.R. at p. 706):

> " The wife became destitute and had to apply to the National Assistance Board . . . [and] the justices held that the deed was a bar to their making any order on the husband. In my opinion, that decision cannot be supported and it is entirely contrary to the true ground on which *Prisk's* case (6) was decided. In *Prisk's* case (6), the husband had agreed in 1938 . . . to pay £1 a week to the wife, but that sum was not enough for her maintenance, because of the fall in the value of money; and when the National Assistance Board had increased her income by giving her assistance, this court decided that the husband was bound to repay. What difference can it make that, in one case, the husband agreed to give £1 a week to the wife, and, in the other case, an agreement was made under which the husband was to undertake no liability ? The answer is that the Act of 1948 does not require the court to be bound by the agreement between the parties. The court has to consider what is reasonable maintenance for the wife, and, if the wife has not committed any matrimonial offence, any reasonable allowance which the National Assistance Board give her can be recovered from the husband."

I will not deal with the cases which counsel for the husband cited to us, though I have them well in mind. I am satisfied that ASQUITH, L.J., in the passage from his judgment (in *Chapman* v. *Chapman* (8), cited in *Stringer* v. *Stringer* (9), [1952] 1 All E.R. at p. 377) which was so strenuously relied on, was not contemplating the kind of situation which has arisen in this case for this reason:

Chapman v. *Chapman* (8) was heard on Apr. 4, 1951. *Tulip* v. *Tulip* (4) was heard the next day and the following day. The court reserved judgment and delivered it on May 10. Asquith, L.J., had then become Lord Asquith, but he was a member of the court which decided *Tulip* v. *Tulip* (4) and, although he did not deliver a judgment of his own, he expressly empowered me in delivering my judgment to say that he had read it and expressly agreed with it. The other member of the court, Harman, J., dissented. In that case Barnard, J., had decided that, where there was a separation agreement in existence, as there was, and the wife admittedly had agreed to accept a certain sum as maintenance, as she had, she could not come to the court under the Matrimonial Causes Act, 1950, or at all, and say: " It is inadequate, or insufficient; I want more ". That view was taken by Harman, J., in his dissenting judgment. This husband had been written to and been told: " The agreement we entered into was very long ago when money values were so very different, and it is no longer applicable today ". My recollection is that the agreement was entered into about thirty years previously, and there was evidence that the husband's means had very much increased and the wife's had very much decreased, but he was not willing to do anything but say " There is the agreement ". This court said: " She is perfectly entitled to come and ask, and that is the right which she has been denied hitherto. It may very well be that on the facts the court might make no alteration, but that is another matter. That she has a right to come and put her case is not denied ". Lord Asquith agreed in that judgment.

The position in the present case, therefore, is that there is a separation agreement, with no covenant for maintenance and a covenant not to apply for maintenance. Some time later the wife is in need and the National Assistance Board under the National Assistance Act, 1948, grant her assistance. They then come to the court and ask for the husband to pay. The answer is: " No, I stand on the covenant ". I am utterly unable to understand the difference in principle between an agreement to separate, where the maintenance is said to be £1 but conditions alter and the wife says it ought to be £2 or £3, and a separation agreement with an agreement to pay nothing where conditions alter and the wife is in need. In the first case, if the argument is valid, a man ought to be allowed to say: " I bargained that you should have £1 a week and never at any time any more ". The courts have already said that will not do. In this case the husband says: " I bargained you should have nothing and you will never have any more ". I cannot see why that distinction should be drawn, and I decline to draw it. I think it would be a most unjust thing, if the wife was in need and somebody had to maintain her and the National Assistance Board had stepped in, for the husband to be able to say: "You cannot touch me because I had a private bargain that I should never be touched ". Where public money is expended in that way, it would be quite wrong to say that a private bargain should overrule the right and power contained in the statute, which provides that public money in appropriate circumstances should be recovered. For these reasons, I am of opinion that the Divisional Court came to a right conclusion.

ROMER, L.J.: I agree. I only add a word or two because, I think, there may be some little misapprehension as to the true construction of s. 42 and s. 43 arising from the decision of the Divisional Court in *Wilkinson's* case (2). Although I respectfully and entirely agree with the result of that decision, I cannot myself accept what I believe to be the ground on which the decision was founded. The result of the decision was to exempt from the class of persons mentioned in s. 42 (1) of the National Assistance Act, 1948, a husband whose wife had committed a matrimonial offence. That result was in my opinion quite right: but it seems to me that the conclusion of the court (as especially appears from the judgment of Devlin, J.) was reached by excluding from the category of persons referred to in s. 42 (1) of the Act such a husband as I have mentioned.

A It appears to me that the language of s. 42 (1) is too clear to allow of any such exclusion. It says:

> "For the purposes of this Act—(a) a man shall be liable to maintain his wife . . .",

and then in s. 43 (1) it is provided:

B
> "Where assistance is given or applied for by reference to the requirements of any person (in this section referred to as a person assisted), the board or the local authority concerned may make a complaint to the court against any other person who for the purposes of this Act is liable to maintain the person assisted."

It appears to me to be perfectly plain that one of the purposes of the Act which C is referred to in s. 42 is that comprised in s. 43, from which I think it is clear that the definitions in s. 42 apply and the board can make a complaint against any married man that he should recoup the assistance which the board has given to his wife. If the construction which the Divisional Court put on s. 42 is right, then the board would have to find out (and they would have no certain means of ascertaining) whether the separation was due to the wife having left the D husband without any reasonable pretext and as to the circumstances generally of a separation before they could serve a complaint on the husband. The clear effect of s. 42 and s. 43 is that the board can bring before the justices a married man whose marriage is still subsisting, but, when he comes before the court, the circumstances which are referred to in s. 43 (2) are brought into play, and, as my Lord has pointed out in his judgment, a highly relevant circumstance, and E it may be a conclusive circumstance, which would prevent the magistrates from making an order under s. 43, would be the fact established by the husband—if it was established—that his wife had committed a matrimonial offence. I think one arrives at the conclusion at which the Divisional Court arrived in *Wilkinson's* case (2) by bringing a husband whose wife had committed a matrimonial offence within the category of s. 43 (1) and then exempting him if such F offence be established.

If that be the true position, as I conceive it to be, then the husband here has sought to bring this case within it by saying that, just as a relevant circumstance is the fact that a husband's wife has committed a matrimonial offence which releases him from liability to maintain her, so also it would be a relevant circumstance that the husband has acquired contractual freedom from liability to G maintain his wife. On that aspect of the case, I so entirely agree with what my Lords have said that it is superfluous to add anything to their judgments. It does not appear to me that there is any foundation for that argument, because a husband cannot in law wholly contract out of his liability to maintain his wife. I accordingly agree that the appeal should be dismissed.

Appeal dismissed.

H Solicitors: *Gibson & Weldon*, agents for *Archer & Wilcock*, Nairobi, Kenya (for the husband); *Solicitor, National Assistance Board.*

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

SIMPKINS *v.* PAYS.

[CHESTER ASSIZES (Sellers, J.), June 13, 14, 1955.]

Contract—Mutuality—Intention to create legal relationship—Syndicate entry in newspaper competition—Successful entry coupon made out in name of one person, but containing forecasts by three persons—Competitors living together as a family—Whether each was entitled to share of prize.

Since 1950 the plaintiff had been living as a lodger in the house of the defendant, an elderly woman, in circumstances which had some element of a family circle. Each of the parties used to compete separately in newspaper competitions. From about the beginning of May, 1954, for a period of seven or eight weeks, the plaintiff, the defendant and the defendant's grand-daughter each sent in, each week, a separate entry on one coupon to the fashion competition of a Sunday newspaper. Each of the three contributed one forecast, and the coupon was filled in by the plaintiff but was made out in the defendant's name. The costs of postage and entry were informally shared, being sometimes paid by one and sometimes by another. When the question of sharing winnings first came to be considered between the plaintiff and defendant, the latter said that they would go shares. The grand-daughter was not present on that occasion but the plaintiff and the defendant both knew that she would join in the arrangement. The coupon sent in for June 27, 1954, was successful, the correct forecast being that of the defendant's grand-daughter, and a prize of £750 was paid to the defendant. The defendant refused to pay a third of the prize money to the plaintiff, claiming, among other things, that the arrangement to share the winnings was arrived at in a family association and was not intended to give rise to legal consequences, and that, accordingly, there was no contract.

Held: there was an enforceable contract, because there was a mutuality in the arrangement between the parties, and, therefore, the plaintiff was entitled to payment of a third share of the prize money.

Semble: the grand-daughter also would be entitled to a one-third share (see p. 13, letter E, post).

[As to agreements which are not enforceable at law, see 8 HALSBURY'S LAWS (3rd Edn.) 54, para. 90, 69, para. 118; and for cases on the subject, see 12 DIGEST (Repl.) 21-23, *2-11.*

As to mutual assent by the parties to a contract, see 8 HALSBURY'S LAWS (3rd Edn.) 80, para. 140; and for cases on the subject, see 12 DIGEST (Repl.) 102, *597-609.*]

Cases referred to:

(1) *Hoddinott* v. *Hoddinott*, [1949] 2 K.B. 406; 27 Digest (Repl.) 259, *2100.*

(2) *Balfour* v. *Balfour*, [1919] 2 K.B. 571; 88 L.J.K.B. 1054; 121 L.T. 346; 27 Digest (Repl.) 201, *1604.*

(3) *Rose & Frank Co.* v. *Crompton (J.R.) & Brothers, Ltd.*, [1925] A.C. 445; 94 L.J.K.B. 120; 132 L.T. 641; 12 Digest (Repl.) 22, *4.*

Action.

The plaintiff sought to recover from the defendant one-third of the sum of £750 received by the defendant as prize money in respect of a competition in the " Sunday Empire News ". The successful entry coupon had been made out in the defendant's name, but the plaintiff, the defendant and the defendant's grand-daughter had each taken part in making the forecasts on the coupon. It was contended on behalf of the plaintiff (i) that there was an express contract to share proceeds; (ii) that the entry was a " syndicate " entry in the nature of a joint venture and that winnings should be divided equally between syndicate members; (iii) that the prize money was money had and received to the use of the plaintiff and the other syndicate members equally; and (iv) that, as each syndicate member had contributed her skill to the entry, each should share in the prize. Counsel for the plaintiff referred to the dissenting judgment of DENNING, L.J., in *Hoddinott* v. *Hoddinott* (1) ([1949] 2 K.B. at p. 414 et seq.). On behalf of the defendant it was contended (i) that this was not a joint venture but that the plaintiff lent assistance to the defendant; (ii) that there was no agreement as to sharing the prize money; and, alternatively (iii) even if there were some agreement, there was no intention to enter into legal relations. Counsel for the defendant referred to *Hoddinott* v. *Hoddinott* (1), and, in particular, to the judgments of BUCKNILL and COHEN, L.JJ., and to *Balfour* v. *Balfour* (2) ([1919] 2 K.B. 571) and *Rose & Frank Co.* v. *J. R. Crompton & Brothers, Ltd.* (3) ([1925] A.C. 445).

Robin David (with him *D. M. Hughes*) for the plaintiff.
E. B. B. Richards for the defendant.

SELLERS, J.: Happily this is an unusual type of case to come before a court of law, and it arises out of what seems to be a popular occupation of the public—competing in a competition in a Sunday newspaper. In this particular case there was a contest, No. 397, in the " Sunday Empire News " of June 27, 1954, a competition whereby readers were invited to place, in order of merit, eight fashions, or articles of attire. The plaintiff and the defendant, along with the defendant's grand-daughter, sent in a coupon with three forecasts on it. The middle line of the second forecast chanced to be successful, as appeared in the publication of the same newspaper on Sunday, July 4, 1954. This coupon won the prize of £750, being apparently the only coupon containing what was said to be the correct forecast, and this action is brought to recover one-third of that amount, £250.

The plaintiff had been living in the defendant's house from some time in 1950, since some six months after the defendant's husband died. The defendant, who gave evidence here, was a lady of some eighty-three years of age. The plaintiff was much younger. They lived together in harmony, the plaintiff paying a weekly sum for her board and lodging to the defendant. I am satisfied that the plaintiff was greatly interested in betting and in competing, where chance was an element, for some fortuitous prize, and she had been competing for some time in newspaper competitions, including those in the " News of the World " and the " Sunday Empire News ", before she went to these premises. When she became a lodger at the defendant's premises she found that the defendant was competing in the " News of the World " competitions, and they seem to have joined forces. At the same time, however, until about the beginning of May, 1954, the plaintiff, apparently unbeknown to the defendant, was filling up alone, week by week, a similar sort of competition in the " Sunday Empire News ", which she kept in her room. About the beginning of May, 1954, something happened which brought the two parties to this action to take an interest in the " Sunday Empire News ". They do not give the same version as to how that came about, and it does not matter very much, except that it may assist one in trying to see where the truth lies. The plaintiff says that she left a copy of the " Sunday Empire News " in the living room of the house occupied by the defendant and that the defendant took it up, took an interest in it and discussed competing in the competition in the paper. The defendant says that it was the plaintiff who brought the paper down and said: " Why don't you compete in this as well ? " It may be that the truth lies somewhere between the two, but on the whole I think that the plaintiff's version is the preferable one, and that, when the defendant did get to know about the paper and they were discussing it, the plaintiff may have said to her: " Well, why don't you compete ? "

The result of it was that each week for the next seven or eight weeks the two parties to this action, together with the defendant's grand-daughter, Miss Esme Pays, sent in a coupon with forecasts on it. As far as the " Sunday Empire News " is concerned, I am satisfied that the method of doing this was for the defendant to make her forecast, put it on a piece of paper, for the grand-daughter to make hers and put it on the same piece of paper, and then, when the plaintiff came home, perhaps rather late at night, when the defendant was in bed, the plaintiff would pick this piece of paper up and would fill in the coupon in her own room, putting her own line in first, then putting the grand-daughter's line in second, and the defendant's line in third, and the coupon would be dispatched on the Monday. The evidence is a little uncertain as to who actually paid for the necessary stamps for the postage, or for the twopence-halfpenny stamps which had to be sent for each line forecast. On the final week, the winning week, payment was, I think, made by the plaintiff, but it was not a matter between them of much moment. The amount involved was not very great, and I accept the plaintiff's evidence that the payment was made by each of them more or less alternately, and possibly the defendant paid more frequently. It depended a little on who most frequently had the stamps. There was no hard and fast rule. In regard to the winning coupon, the defendant had asked the plaintiff to get the stamps and deduct the amount from her weekly payment for board and lodging, but, apparently, it was not deducted. The weekly payment was 30s., and, as I understood the defendant, the plaintiff paid 30s. that week. There may have been a little confusion there; I do not think it matters. The entrance money is not a vital matter in this sort of transaction.* It might well be done informally, one party paying one time, the other party paying another time. It might be the case that, in fact, all the stamps were bought and paid for by the defendant. The substantial matter was, on what basis were these forecasts being made ?

On each of the occasions when the plaintiff made out the coupon during those seven or eight weeks, she put down the forecasts in the way which I have indicated, and entered in the appropriate place on the coupon "Mrs. Pays, 11, Trevor Street, Wrexham ", that is to say, the defendant's name and address, as if the coupon had been the defendant's. There were, in fact, three forecasts on each coupon, and I accept the plaintiff's evidence that, when the matter first came to be considered, what was said, when they were going to do it in that way, was: " We will go shares ", or words to that effect. Whether that was said by the plaintiff or by the defendant does not really matter. " Shares " was the word used, and I do not think anything very much more specific was said. I think that that was the basis of the arrangement; and it may well be that the plaintiff was right when she said in her evidence, that the defendant said: " You're lucky, May, and if we win we will go shares ".

If my conclusion that there was an arrangement to share any prize money is not correct, the alternative position to that of these three persons competing together as a " syndicate ", as counsel for the plaintiff put it, would mean that the plaintiff, despite her propensity for having a gamble, suddenly abandoned all her interest in the competition in the " Sunday Empire News " when the defendant became interested, and handed the competition over to the defendant. I think that that is most improbable, and I accept the plaintiff's evidence that she did not do that. She combined her efforts with the defendant's in the way which I have indicated, and from then onwards she had shares in the result. In a family circle—and this household had some element of a family circle about it although there was no relationship between the plaintiff and the defendant and her grand-daughter—or even among very close friends, the facts might indicate that, if anyone rendered a service to an old lady in filling up her coupon, that person also intended to render a service by making some forecasts, and, in such a case, all that the other person was doing was to help the old lady to make her forecasts, and to give her the benefit of the other person's skill or capacity to guess, whichever it is, so that the venture would be entirely that of the person in whose name the coupon was sent. On the facts of this case, and on the

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* See per DENNING, L.J., in *Hoddinott* v. *Hoddinott* (1) ([1949] 2 K.B. at p. 414).

A probabilities as I see them, I do not think that that was what happened here, and I prefer the plaintiff's evidence to that given on behalf of the defendant as to how the arrangement came into being, and how it was carried out.

[HIS LORDSHIP reviewed the evidence, and continued:] Although the coupon sent in the defendant's name was successful, the competition was not, in fact, won by the forecast of either the plaintiff or the defendant, because the middle B line was composed, not by either of the parties, but by the defendant's grand-daughter. The defendant's case involves that, whichever forecast won—whether it was the plaintiff's or the defendant's, or the grand-daughter's—the whole prize was to go to the defendant. I think that that is highly improbable.

On the finding of fact that the plaintiff's evidence is right as to what was said about the shares, learned counsel for the defendant not unnaturally said: C "Even if that is so, the court cannot enforce this contract unless the arrangement made at the time was one which was intended to give rise to legal consequences". It may well be there are many family associations where some sort of rough and ready statement is made which would not, in a proper estimate of the circumstances, establish a contract which was contemplated to have legal consequences, but I do not so find here. I think that in the present case there D was a mutuality in the arrangement between the parties. It was not very formal, but certainly it was, in effect, agreed that every week the forecast should go in in the name of the defendant, and that if there was success, no matter who won, all should share equally. It seems to be the implication from, or the interpretation of, what was said that this was in the nature of a very informal syndicate so that they should all get the benefit of success. It would, also, E be wrong, I think, to say from what was arranged that, because the grand-daughter's forecast was the one which was successful of those submitted by the defendant, the plaintiff and the defendant should receive nothing. Although the grand-daughter was not a party before the court and I have not had the benefit of her evidence, on this arrangement she would, in my opinion, be as entitled to a third share as the others, because, although she was not, apparently, F present when this bargain was made, both the others knew, at any rate soon after the outset, that she was coming in. It is possible, of course, although the plaintiff is not concerned in this, that the grand-daughter's effort was only to assist the defendant. The grand-daughter may accept that, but it makes no difference to the fact that the plaintiff and the defendant entered into an agreement to share, and, accordingly the plaintiff was entitled to one-third. I so G find and give judgment for the amount of £250.

Judgment for the plaintiff.

Solicitors: *Mason & Moore Dutton*, Chester (for the plaintiff); *Cyril Jones, Son & Williams*, Wrexham (for the defendant).

[*Reported by* SEYS LLEWELLYN, ESQ., *Barrister-at-Law.*]

Re ROYAL SOCIETY'S CHARITABLE TRUSTS. ROYAL SOCIETY *v.* ATTORNEY-GENERAL.

[CHANCERY DIVISION (Vaisey, J.), July 8, 11, 18, 1955.]

Charity—Scheme—Jurisdiction of court to vary trusts—Consolidation of several trust funds—Extension of powers of investment—Trustee Act, 1925 (15 *&* 16 *Geo.* 5 *c.* 19), *s.* 57 (1).

Trust and Trustee—Variation of trusts by the court—Charitable trust—Consolidation of several trust funds—Extension of powers of investment—Jurisdiction by scheme—Trustee Act, 1925 (15 *&* 16 *Geo.* 5 *c.* 19), *s.* 57 (1).

The Royal Society, which was incorporated by royal charter, held as trustee on various charitable trusts a large number of trust funds differing widely in value. The Royal Society as trustee applied to the court for authority (a) to invest the trust funds beyond the range of authorised trust investments and (b) for investment and accounting purposes to consolidate different trust funds together. The ground for the application for authority (a) was that the society's activities in promoting scientific research had been severely curtailed owing to currency inflation, and authority (b) was sought because consolidation would simplify the administration of the trusts so far as investment was concerned, and also because in investing outside the range of trustee securities it was considered essential that such risks as were involved should be spread over a considerable number of investments, such spreading of risk being impracticable with small funds.

Held: while the court had no power to authorise the proposals either under the Trustee Act, 1925, s. 57 (1), or under the court's general jurisdiction as exercised in relation to ordinary trusts, the court had power under its special jurisdiction relating to charities, at the instance of the trustee, the Attorney-General consenting or not objecting, to authorise the proposals by way of scheme, but such power must be exercised sparingly and not indiscriminately.

Dicta of SIR JOHN ROMILLY, M.R., in *A.-G.* v. *Sherborne Grammar School* (*Governors, etc.*) (1854) (18 Beav. at p. 280) and LORD WATSON in *Andrews* v. *M'Guffog* (1886) (11 App. Cas. at p. 316) applied.

[As to the jurisdiction of the court to vary charitable trusts, see 4 HALSBURY'S LAWS (3rd Edn.) 418, para. 870; and for cases on the subject, see 8 DIGEST (Repl.) 450, 451, 508, *1458-1483*, *2325-2333*.]

Cases referred to:

(1) *A.-G.* v. *Sherborne Grammar School* (*Governors, etc.*), (1854), 18 Beav. 256; 24 L.J.Ch. 74; 23 L.T.O.S. 326; 18 J.P. 312; 52 E.R. 101; 8 Digest (Repl.) 453, *1505*.

(2) *A.-G.* v. *Worcester* (*Bp.*), (1851), 9 Hare, 328; 21 L.J.Ch. 25; 18 L.T.O.S. 86; 15 J.P. 831; 68 E.R. 530; 8 Digest (Repl.) 456, *1550*.

(3) *Andrews* v. *M'Guffog*, (1886), 11 App. Cas. 313; 8 Digest (Repl.) 474, *1766*.

(4) *Clephane* v. *Edinburgh Corpn.*, (1869), L.R. 1 Sc. & Div. 417; 8 Digest (Repl.) 459, *1595*.

Adjourned Summons.

The Royal Society as trustee of a large number of charitable funds applied by originating summons for the following relief: (i) that the society might be authorised to invest any funds requiring investment in specified securities not falling within the range of authorised investments; and (ii) that the society might be authorised to consolidate investments representing any one or more of the said charitable funds with the investments representing any other or others of such charitable funds or with investments representing any other charitable trust or trusts of which the Royal Society might become trustee (being a charitable trust or charitable trusts itself or themselves containing the necessary power to consolidate) to the intent that the investments representing all such trusts so consolidated might be held as one or more consolidated funds and that the trusts so consolidated might be treated for the purpose of investment and accounting as consisting of aliquot portions of the consolidated fund or funds.

J. W. Brunyate for the applicant, the Royal Society.

Denys B. Buckley for the respondent, the Attorney-General.

Cur. adv. vult.

July 18. **VAISEY, J.**, read the following judgment: This is an application by the Royal Society (sometimes known as "the Royal Society of London for the Promotion of Natural Knowledge") which was incorporated by a royal charter of His late Majesty King Charles II. Its celebrity is such as to absolve me from any necessity of either describing it or emphasing its importance. In addition to its general corporate property it holds, as trustee under a variety of charitable trusts, a number of special trust funds, and the present application relates exclusively to those funds, and is made for two purposes which I think may be more conveniently dealt with in the reverse order to that in which they are raised in the summons. It is desired in the first place to conflate and combine the trust funds in question into one combined fund or pool, in which the several trusts are to be deemed to be interested in appropriate aliquot shares. In the second place, it is desired to enlarge the scope of permissible investments for and in regard to such combined fund. The question is whether those two objects are such as I have jurisdiction to authorise. The applicant is, as I have said, the Royal Society, and the respondent is Her Majesty's Attorney-General.

I will first consider the proposed consolidation of the trust funds. I am satisfied that the proposal is on the whole advantageous. It would simplify the administration of the trusts; it would spread over a larger area the risk of depreciation, and the advantage of possible appreciation; and the operation of such a pooling has, I understand, been adopted with success in schemes formulated under the Universities and Colleges (Trusts) Act, 1943, and by the private Act called the Birmingham University Act, 1948 (11 & 12 Geo. 6 c. x). I am satisfied that in this particular case such a pooling of the trust investments is advisable, particularly in view of the small amounts of some of the funds to be pooled, and the only question is whether I have jurisdiction to authorise it.

The other proposal, viz., the extension of the permissible range of investment, is, I think, recognised as a method of correcting the ill effects of monetary inflation, and such extension, if carefully framed and judiciously utilised, possesses advantages which are, indeed, fairly obvious. I should like to give effect to this second proposal, if I can.

The case was put forward in the first instance as one which came within s. 57 of the Trustee Act, 1925, or, alternatively, under the rather ill-defined scope of the court's general jurisdiction. In my judgment this matter does not come within the section at all, nor do I think it is within the general jurisdiction of the court as exercised in relation to ordinary trusts. This matter must, in my opinion, be approached on the special ground that we are dealing here with charities.

Counsel for the Attorney-General reminds me that the Attorney-General stands for the totality of the beneficial interests under all and each of these trusts, and for that proposition he has called my attention to certain authorities.

In *A.-G.* v. *Sherborne Grammar School* (*Governors, etc.*) (1) there is a passage in the judgment of SIR JOHN ROMILLY, M.R., which reads as follows (1854) (18 Beav. at p. 280):

> "The duties and authority of this court in dealing with matters of charity, is not, I think, on this point, open to much doubt or question. This court has authority to redress a breach of trust, where the objects of the founder have been prevented or neglected. It has also authority to direct a scheme,

> in order to enforce [by which I think he means " secure "] the more complete attainment of those objects. This court has a further power and authority when the objects contemplated by the founder cannot be carried into effect, to direct the application of the revenues of the charity to promote objects in accordance with the spirit of the original foundation, the actual compliance with which has become impossible. But it has no authority to vary the original foundation, and to apply the charity estates in a manner which it conceives to be more beneficial to the public, or even such as the court may surmise that the founder would himself have contemplated, could he have foreseen the changes which have taken place by the lapse of time."

Again, in *A.-G.* v. *Bishop of Worcester* (2) SIR GEORGE TURNER, V.-C., states (1851) (9 Hare at p. 361) that the Attorney-General " acts in these cases ", i.e., in cases concerning charities, " on behalf of the Crown as parens patriae, and represents all the objects of the charity."

In *Andrews* v. *M'Guffog* (3) LORD WATSON observed (1886) (11 App. Cas. at p. 316):

> " In the case of a public charitable trust the courts have a power and discretion which does not belong to them in the case of a private trust. The rule is this, that while the court cannot alter the object of the trust, they may, according to the circumstances of each case, vary the mode of its attainment, although differing from the directions of the truster."

And he cites *Clephane* v. *Edinburgh Corpn.* (4) (1869) (L.R. 1 Sc. & Div. 417), in which the observations of LORD WESTBURY (ibid., at pp. 420, 421) are in point.

Now, on this question of jurisdiction I have come to the conclusion that the court has, at the instance of the trustees, jurisdiction, where the Attorney-General consents or does not object, to authorise such proposals as the present *by way of scheme.* I emphasise those last four words. It seems to me that, although the Attorney-General does in a sense represent all the objects of the charity, he cannot act except with the authority of the court, and in practice it may be equally true that the court cannot act without the concurrence of the Attorney-General, to whose views it must always pay the closest attention. In the present case, counsel for the Attorney-General has assisted the court by criticising and commenting on both the proposals which the applicant desires to have made operative, and subject, then, to any additions, embellishments or alterations which may be made by me in chambers, I propose, by way of scheme, to make an order in terms which I will presently mention. This is, however, in my view, an exceptional case. There is evidence that the Royal Society takes special care in selecting and varying its investments. Again, it by no means follows that the range of investment ought to be widened as of course whenever a charity finds its available income less than the trustees of it would wish. The existence of a multiplicity of trusts under the administration of one trustee ought not in every case to be regarded as justifying a pooling of investments. The jurisdiction which I hold that I have, should, in my judgment, be exercised sparingly, and not indiscriminately. The circumstances here are unusual. I have mentioned that some of the investments to be pooled are small; others are very large; and unless some kind of pooling is adopted the fair apportionment of the administrative expenses of the Royal Society in regard to these trusts must be a matter of difficulty. The order which I am about to make does not provide for two pools representing " capital " and " reserve " respectively (as suggested in the exhibit T.R.M.5), but for one only. The schedule to the order will be the same as the schedule to the summons, with any omission or addition which the Royal Society may arrange with the Attorney-General to make. This is the order by way of scheme that I am prepared to make:

SCHEME.

I. The investments and moneys representing the capital funds of the several trusts mentioned in the schedule to this scheme, together with the investments representing every or any other charitable trust of which the Royal Society may hereafter become the trustee (provided that such trust contains the necessary power to consolidate) shall be consolidated into one combined pool all of which investments and moneys as the same may from time to time be represented or constituted are hereinafter referred to as " the pool ".

II. Each of the trusts aforesaid shall be regarded and treated for all purposes as interested in an appropriate undivided aliquot portion of the pool.

III. For the purpose of settling adjusting and regulating the respective amounts for the time being of the aliquot portions of the respective trusts all necessary valuations and calculations shall be made and from time to time revised as circumstances may require, by the Royal Society.

IV. Subject to the provisos hereinafter contained moneys in or arising from the pool and requiring investment may in addition to the range of investment authorised by the general law for the investment of trust moneys (hereinafter called " the authorised range ") be invested in (i) governmental securities of the United States of America or of any state thereof or (ii) the debentures or debenture stock or preference ordinary or deferred shares or stock or other marketable security of any company incorporated in the United Kingdom under any general or special Act of Parliament or by royal charter or incorporated under the laws of the United States of America or any state thereof or of any corporation established in the United Kingdom for public purposes by or under any Act of Parliament Provided first that no funds shall be invested on any investment not within the authorised range which is not dealt in or quoted on a recognised Stock Exchange either in the United Kingdom or in the City of New York Provided secondly that no funds shall be invested outside the authorised range if the value of the investments in the pool which are within such range are then or would thereby become less than one-third of the value for the time being of all the investments and money then in the pool Provided thirdly that no moneys shall be invested in any shares or stock of a company (other than a company incorporated in the United Kingdom carrying on banking or insurance business in the United Kingdom) which by reason of not being fully paid up or otherwise carry a liability to contribute by way of calls either in the event of the company being wound-up or otherwise and Provided fourthly that no funds shall be invested in the ordinary or deferred shares or stock of any company unless at the time of investment such company shall have a paid up capital of at least £750,000 or its equivalent at the current rate of exchange and so that in the case of a company having shares of no par value such paid up capital shall be deemed to include the capital sum (other than capital surplus) appearing in the company's published accounts in respect of such shares.

Order accordingly.

Solicitors: *Bristows, Cooke & Carpmael* (for the applicant); *Treasury Solicitor.*

[*Reported by* R. D. H. Osborne, Esq., *Barrister-at-Law.*]

R. *v.* INDUSTRIAL DISPUTES TRIBUNAL, *Ex parte* PORTLAND URBAN DISTRICT COUNCIL.

[COURT OF APPEAL (Denning, Birkett and Romer, L.JJ.), May 24, 25, June 24, July 7, 1955.]

Master and Servant—Trade dispute—" Dispute "—" Issue "—Two schemes of conditions of service relating to one occupation—Whitley Council held one to be applicable—Dismissal of servant and re-employment under new designation subject to other scheme—Whether an " issue "—Industrial Disputes Order, 1951 (*S.I.* 1951 *No.* 1376), *art.* 2.

Each of two separate schemes of conditions of service, one of which provided for the miscellaneous class of local government employees (being persons whose duties were neither wholly clerical nor wholly manual) and the other of which provided for the waterworks undertaking industry, was capable of applying to an employee of a local authority who was the man in charge of a waterworks. The station engineer in charge of the water undertaking of a local authority applied to be included in the miscellaneous class under the former scheme. His application was rejected by the authority, and, following a reference by his trade union to the Whitley Council for the miscellaneous class, so also was the recommendation of that council that he be so classified. The trade union thereupon reported the matter to the Minister of Labour and National Service on the ground that an issue had arisen whether the local authority should observe the recognised terms and conditions of employment established by the Whitley Council for local authority's services for the miscellaneous class. The Minister referred the issue to the Industrial Disputes Tribunal, which made an award that the local authority should apply to the employee the scheme of conditions of service for the miscellaneous class. Under art. 10 of the Industrial Disputes Order, 1951, it thereupon became an implied term of the contract of employment between the local authority and their employee that those terms and conditions of service should apply. The local authority subsequently terminated the employee's employment, advertised for a maintenance fitter, and appointed the employee in that capacity to occupy the same house and do the same work as theretofore, but subject to the conditions of service laid down by the Whitley Council for water undertakings. The trade union again reported the matter to the Minister as an issue under art. 2 of the order, on the ground that the post of maintenance fitter was identical with that previously existing of station engineer and that the conditions of service for the miscellaneous class of officers should be applied thereto. The Minister referred the issue to the Industrial Disputes Tribunal. The local authority applied for an order of prohibition prohibiting the tribunal from dealing with the matter on the ground that there was no issue to be referred within art. 2 of the order.

Held: the order of prohibition must be refused, since the issue was properly referred by the Minister to the Industrial Disputes Tribunal notwithstanding the absence of any prior communication by the trade union to the local authority of the union's intention to report the issue to the Minister, because (i) whether or not the servant acquiesced in the action of the local authority, there was a difference between the authority and the union; (ii) even if the difference was a dispute within the meaning of art. 12 (1) of the order, it was an " issue as to whether an employer in the district should observe the recognised terms and conditions " of employment within the meaning of art. 2 of the order, the two expressions " dispute " and " issue " not being mutually exclusive, but containing some degree of overlap in their scope (dictum of ROMER, L.J., in *R.* v. *Industrial Disputes Tribunal, Ex p. Technaloy, Ltd.* ([1954] 2 All E.R. at pp. 82, 83) applied);

(iii) the trade union was under no obligation by virtue of para. 25 (2) of the scheme applicable to the miscellaneous class first to refer the difference to the Whitley Council as relating " to whether or not an employee is an officer to whom the scheme applies ", since the local authority could not simultaneously repudiate that scheme and invoke it as binding on the employee; and (iv) the local authority were not observing the terms and conditions of employment laid down merely by accepting para. 25 (2), which in any event related, not to terms and conditions of employment, but to administrative machinery for settling a difference.

Appeal allowed.

[For the Industrial Disputes Order, 1951, see 7 HALSBURY'S STATUTORY INSTRUMENTS 166.]

Cases referred to:

(1) *R.* v. *Industrial Disputes Tribunal, Ex p. Technaloy, Ltd.*, [1954] 2 All E.R. 75; [1954] 2 Q.B. 46.

(2) *R.* v. *Industrial Disputes Tribunal, Ex p. Derbyshire County Council* (Queen's Bench Division, June 11, 1952), not reported.

Appeal.

The appellant trade union appealed against an order of a Divisional Court of the Queen's Bench Division (LORD GODDARD, C.J., ORMEROD and GORMAN, JJ.) dated Mar. 10, 1955, that an order of prohibition be directed to the Industrial Disputes Tribunal, prohibiting it from dealing with a matter referred to it as an issue on May 13, 1954, by the Minister of Labour and National Service on the application of the trade union under art. 2 of the Industrial Disputes Order, 1951. The respondent local authority had applied for the order of prohibition on the ground that the matter referred to was not an issue within the meaning of art. 2 of the order and no issue within the meaning of that article had arisen.

Gerald Gardiner, Q.C., and *Rodger Winn* for the trade union.
R. I. Threlfall for the local authority.
S. B. R. Cooke for the Minister of Labour and National Service.

Cur. adv. vult.

July 7. The following judgments were read.

DENNING, L.J.: We are here concerned with a trade dispute which has arisen over a man employed by Portland Urban District Council, whom I will call the local authority. The local authority have their waterworks at Upwey, ten miles from Portland. The man in charge is a Mr. Carter, who is given a house on the spot. When he was first appointed in 1949, he was described as the " station engineer ". In 1953 he was given a month's notice but was soon afterwards reappointed under the description of " maintenance fitter ". His work was just the same as before. It was only a change of name. The reason is because the local authority hope in this way to put him in a different trade category.

There are two trade categories into which Mr. Carter may fall. The one is the " miscellaneous " class, which consists of men employed by local authorities whose duties are of a special nature, neither wholly clerical nor wholly manual. The other is the " waterworks " class, which consists of men employed in waterworks undertakings. There is a Whitley Council for each of these trade categories, which has power to recommend what should be done for the men but no power to enforce its recommendations. A Whitley Council consists of representatives of employers and workers in equal numbers: and it makes recommendations only when a majority of each side are in agreement on what should be done. The Whitley Council for the " miscellaneous " class has approved a scheme of conditions of service for miscellaneous men, which is contained in a red book. The Whitley Council for the " waterworks " class has approved a scheme for waterworks men in a white book. Under these schemes the miscellaneous men are a little better off than the waterworks men. If Mr. Carter is graded as a miscellaneous man, he might in due course get £520 per annum, whereas he would only get £482 19s. as a waterworks man.

There has already been one long contest whether Mr. Carter should be graded as a miscellaneous man or as a waterworks man. This contest took over two and a half years from Jan. 6, 1951, to Sept. 7, 1953, and ended with Mr. Carter being graded as a miscellaneous man. All this took place whilst Mr. Carter was described as a " station engineer " and I ought perhaps to give in outline the steps in that contest. On Jan. 6, 1951, Mr. Carter applied to the local authority to be graded as a miscellaneous man, and not as a waterworks man. On Feb. 24, 1951, the local authority refused. On Apr. 6, 1951, Mr. Carter's trade union, the National and Local Government Officers' Association (whom I will call the trade union) took up the matter and appealed to the local authority to grade him as a miscellaneous man; but on Apr. 23, 1951, the local authority refused their request also. On Jan. 30, 1952, the trade union suggested that the matter should be referred to the Whitley Council for the miscellaneous men, according to the procedure laid down in the red book, but the local authority refused this suggestion, saying that the appeals procedure laid down therein was inappropriate. The trade union were not deterred, however, and did refer the matter themselves to the Whitley Council. That council (consisting, as it does, of equal representatives of employers and workers) heard both the trade union and the local authority, and unanimously recommended to the local authority that Mr. Carter should be graded as a miscellaneous man. The local authority refused, however, to accept the recommendation of the Whitley Council. The trade union thereupon reported the matter to the Minister of Labour and National Service under the Industrial Disputes Order, 1951. The union reported it on the ground that an " issue " had arisen whether the local authority should observe the recognised terms and conditions in regard to Mr. Carter. The Minister on Aug. 4, 1953, referred the issue to the Industrial Disputes Tribunal. The issue was stated to be

> " whether the Portland Urban District Council . . . should observe the terms and conditions of employment which are established in England and Wales and which were settled by the National Joint Council "

for the miscellaneous class in respect of Mr. C. H. Carter, station waterworks engineer. On Sept. 7, 1953, the tribunal decided that Mr. Carter came within the miscellaneous class. Their finding was contained in award No. 426 in these words:

> " The tribunal find that the recognised terms and conditions of employment applicable to Mr. C. H. Carter's position are the terms and conditions of employment established by the National Joint Council for Local Authorities' Administrative, Professional, Technical and Clerical Services. The tribunal award that the Portland Urban District Council shall apply to Mr. Carter the provisions of the Scheme of Conditions of Service for the Miscellaneous Classes of Officers as established by the aforesaid National Joint Council. This award shall have effect as from the beginning of the first full pay period following the date hereof."

On that award being made, art. 10 of the Industrial Disputes Order, 1951, came into operation, with the result that it was an implied term of the contract between the local authority and Mr. Carter that they should apply the terms of the red book to him until varied by agreement between him and them. I say " between him and them " because I think that the word " parties " in art. 10 means the parties to the contract of employment and not parties to the dispute or issue.

The local authority duly implemented that award, but not for long. They got out of it by the simple expedient of determining the contract of employment and, with it, the term implied by the award of the tribunal. On Oct. 23, 1953, they gave Mr. Carter one month's notice in writing terminating his employment as station engineer. They then promptly advertised for a maintenance fitter in very similar language to that in which they had previously advertised for a station engineer. I expect they knew that Mr. Carter would be an applicant for this new post, because he needed the employment and the house which went with it. He did in fact apply for the position and was given it. He was appointed maintenance fitter on Nov. 26, 1953: and he continued straight on as before. He occupied the same house and did the same work, but he was described as maintenance fitter instead of station engineer. Incidentally he filled in the printed forms which still had the description of him as station engineer. The only difference was that the conditions of appointment stated that he

> " shall be subject to the conditions of service laid down by the South Midlands District Council of the National Joint Industrial Council for the Waterworks Undertakings Industry."

In other words, the local authority sought to stipulate in the contract that he should be graded as a waterworks man and not as a miscellaneous man.

The trade union regarded this as a palpable device by the local authority to get out of the award which had been made by the tribunal. On Feb. 12, 1954, the local branch of the union unanimously passed a resolution asking the union to take appropriate action. On Feb. 13, 1954, the union reported the matter to the Minister under the Industrial Disputes Order, 1951. They reported an " issue " under art. 2 whether the local authority should observe the terms of the red book. The union said that:

> " The issue arises out of the terms and conditions of employment of Mr. C. H. Carter, who holds a post now designated by the employing authority as ' maintenance fitter ', Friar Waddon Waterworks. It is contended that this post is identical in character to a post previously existing in this authority and titled ' station engineer ', Friar Waddon Waterworks, and is therefore one to which the Scheme of Conditions of Service for the Miscellaneous Classes of Officers of the National Joint Council, should be applied."

The Minister sent a copy of that report to the local authority who took objection to it, saying that " it is not true that there is an issue between the council and Mr. C. H. Carter ". On Apr. 29, 1954, the Minister replied saying that it appeared to him that the matter reported by the trade union was an " issue " within the meaning of art. 2 of the Industrial Disputes Order, 1951, and that the Minister proposed to proceed with the reference of the issue to the Industrial Disputes Tribunal. The tribunal sat on June 24, 1954, to hear the case, but the local authority took objection to the jurisdiction of the tribunal and the hearing was adjourned until the courts had determined the question. The Divisional Court prohibited the tribunal from dealing with the matter. An appeal is now brought to this court.

The first point is whether there was any controversy existing on Feb. 13, 1954, when the trade union reported the matter to the Minister. I think there clearly was. The action taken by the local authority was so provocative that no one could suppose that the trade union would acquiesce in it or remain silent under it. Mr. Carter himself may have been content, so that there was no issue between Mr. Carter and the local authority; but there was clearly an issue between the trade union and the local authority which needed only to be formulated. It was suggested that the union should have written a letter to the local authority, before they reported the matter to the Minister. I think not. I do not see any need for a letter before report any more than a letter before action. If there was no difference between the parties, the local authority could immediately say so: whereas if there was a difference, there could be no objection to its being reported.

The second point is whether the matter was within art. 2 of the order, that is, whether there was

> " an issue as to whether an employer in that district should observe the recognised terms and conditions . . . "

The difficulty about this question is that it has sometimes been assumed that a matter must be either a " dispute " or an " issue ", but cannot be both. I do not agree with this assumption. I find myself in agreement with what ROMER, L.J., said in *R.* v. *Industrial Disputes Tribunal, Ex p. Technaloy* (1) ([1954] 2 All E.R. at p. 83), that there may be a very considerable overlap. Some matters may give rise to an " issue " only, as, for instance, when all employers in a particular trade observe the recognised terms and conditions, but a trade union wishes an employer in an allied trade to observe those terms also. In such a case there is no " dispute " within art. 12 (1), because there is no dispute between an employer and the workmen in his employ: but there is clearly an " issue ". Other matters may give rise to a " dispute " only, as for instance when the workmen are dissatisfied with their pay or conditions, but there are no recognised terms or conditions with which they can be compared.

Apart from those cases, there are many matters which can properly be described either as a " dispute " or as an " issue ". The *Technaloy* case (1) is, I think, a good instance. It raised an " issue " whether the employers should pay their men the recognised rates. That is how the Divisional Court looked at that case. It also raised a " dispute " between an employer and some of his workmen connected with the terms of their employment. That is how this court looked at it. So also with the present case. It could, I think, be described as a " dispute ", because it is, as I understand it, a dispute between the local authority and some of their staff connected with the terms of employment of Mr. Carter. It can also be described as " an issue " because the trade union claim that the local authority should observe the recognised terms and conditions in regard to Mr. Carter.

In these cases, when a matter can properly be described either as a " dispute " or as an " issue ", then it seems to me that the choice lies with the persons who report it to the Minister. If an organisation of employers or a trade union report it as an " issue ", then the Minister must deal with it as such: but if they report it as a " dispute ", he must act on that footing. In either case the matter will, unless settled, come before the tribunal. The jurisdiction of the tribunal should not depend on any nice distinctions between a " dispute " and an " issue ", especially in those cases where the matter can properly be brought under either of those descriptions. The words of LORD GODDARD, C.J., in an unreported case from Derbyshire, *R.* v. *Industrial Disputes Tribunal, Ex p. Derbyshire County Council* (2) (June 11, 1952), are in point:

> " Both issues and disputes can be referred . . . we certainly should not order prohibition because it may be called a dispute instead of an issue or an issue instead of a dispute."

In my opinion the trade union were in this case quite entitled to refer this matter as an " issue " to the Minister, and the Minister acted quite correctly in referring it to the tribunal.

The third point which was strongly pressed on us by counsel for the local authority was that the difference ought to have been referred by the trade union in the first place to the Whitley Council for the miscellaneous class. It ought not, he said, to have been referred straightaway to the Minister. This point finds its origin in para. 25 (2) in the red book (the scheme for the miscellaneous class) which says that

> " A question as to whether or not an employee is an officer to whom the scheme applies, as distinct from a question arising out of the application of the scheme, shall be dealt with under the procedure for the settlement of differences as set out in the constitution of the provincial council."

Perhaps the strongest way of putting this point for the local authority is this: The only thing that can be reported as an " issue " to the Minister is whether an employer should observe the recognised terms and conditions. One of those terms is para. 25 (2) in the red book. So long as the local authority are prepared to let the matter be decided in the way laid down in para. 25 (2) in the red book, it cannot be said that they are not observing the recognised terms and conditions.

The short answer to this point is that the local authority here repudiate the red book altogether. They say that it does not apply to Mr. Carter. They cannot be heard to say that he is bound by it when they say they are not bound by it themselves. Furthermore, para. 25 (2) is not, properly speaking, one of the " terms and conditions of employment " at all. It is only machinery for settling a difference. The existence of such machinery is no bar to a report to the Minister. It is often of the greatest public importance that an issue should be reported to the Minister at once, before resort is had to the trade machinery for settlement. It may be the only way in which a strike can be averted. It is then a matter for the Minister to decide what steps to take to settle the difference. It is for him to say whether there is suitable machinery for settlement of the difference and whether it should go first to the Whitley Council or be sent straight to the Industrial Disputes Tribunal. It would be very unfortunate if a difference could not be reported to the Minister until all trade machinery for settlement had been exhausted. The order does not so require, and I do not think the courts should require it either. I think the trade union were entitled to report this matter to the Minister without first going to the Whitley Council.

In the result I see no reason for issuing an order of prohibition in this case. I think the tribunal has jurisdiction to determine the issue referred to it. I do not agree with the views of the Divisional Court and would allow this appeal.

BIRKETT, L.J.: This is an appeal from a decision of the Divisional Court which decided that an order of prohibition should issue directed to the Industrial Disputes Tribunal prohibiting it from hearing and determining a question described as an " issue " which had been referred to it by the Minister of Labour. The history of the case which resulted in the matter coming before the Divisional Court is somewhat remarkable. I have had the advantage of reading my Lord's judgment which has just been delivered, and as he has stated the facts rather fully it is not necessary to do it again. I will therefore refer briefly to certain of the facts to make my own judgment intelligible. This is really a battle between a local authority, Portland Urban District Council, and a trade union, the National and Local Government Officers' Association, and there are certain features of that battle which are a little disturbing. Mr. Carter, over whose body the battle has been waged, was first employed by the local authority in 1949 as the station engineer of the waterworks belonging to the authority. The contest between the local authority and the trade union began so long ago as 1951, and the question in dispute was the category into which a man described as a station engineer fell. The trade union contended that Mr. Carter was one of what was called the miscellaneous class, and subject to the conditions of service which had been drawn up by the Whitley Council for that class, and embodied in a little book produced before us and referred to as the red book. There was another class into which Mr. Carter might conceivably fall, and that was what was called the waterworks class, and if he did, he would then be subject to the conditions of service drawn up by another Whitley Council for that class and embodied in a little book produced before us and referred to as the white book. The local authority contended that Mr. Carter fell within this class and was governed by the conditions in the white book. If Mr. Carter was to be governed by the red book and not the white book, he would get slightly higher remuneration, but the difference would be comparatively trivial, and scarcely worth, one would have thought, the expense and trouble of prolonged litigation extending now over four years.

The trade union, being unable to get the local authority to agree to their view that Mr. Carter fell within the miscellaneous class, without the agreement of the local authority referred the matter to the Whitley Council, and the council decided in favour of the view put forward by the trade union. The local authority refused to accept this decision and the trade union reported the matter to the Minister of Labour under the Industrial Disputes Order, 1951, as an " issue " and the Minister referred the " issue " to the Industrial Disputes Tribunal, which decided in favour of the view put forward by the trade union. The decision of the tribunal was made in September, 1953, but on Oct. 23, 1953, the local authority terminated Mr. Carter's employment as station engineer and on Nov. 26, 1953, they appointed Mr. Carter as their maintenance fitter. The local authority did not pretend that they had created a new post for Mr. Carter; he did precisely the same work as before; he occupied the same house; the only change was the change of name and the condition of the employment that he should thenceforth be governed by the conditions of service in the white book and not the red book as formerly.

In the Divisional Court this procedure on the part of the local authority met with strong disapproval. I am bound to say that it does not seem to me to be consonant with the standards local authorities ought to set as employers to try to defeat the decision of the tribunal by this rather transparent device. The result was a renewal of the contest which had begun in 1951. For again the trade union reported the matter to the Minister of Labour under the Order of 1951 and they reported it as an " issue " under art. 2 of the order. In their report of February, 1954, to the Minister, the issue raised by the trade union was whether the local authority should observe the recognised terms and conditions of service as laid down in the red book in the case of Mr. Carter, those terms and conditions having been settled by machinery to which the parties are organisations of employers and trade union representatives respectively, i.e., the Whitley Council.

The local authority denied that any issue existed between Mr. Carter and themselves, but the Minister, taking the view that there was an " issue " within the meaning of art. 2 of the order, referred the matter to the tribunal once more. The local authority objected to the tribunal hearing the matter and the case came before the Divisional Court with the result I have already stated.

The Divisional Court has directed the order of prohibition to issue because they said there was no " issue " the Minister could properly refer to the tribunal. Part 1 of the Order of 1951 is headed " Reporting of disputes and issues ", and, after dealing with disputes, deals with the reporting of issues in art. 2. I need not read that article again, but paras. (a), (b) and (c) in art. 2 deal specifically with the reporting of issues concerning recognised terms and conditions of employment. Then in art. 9 of the order " Reference of issues to the tribunal " is dealt with, and art. 10 deals with the way the awards of the tribunal are to be applied to the contract between the employer and the worker.

For the purposes of the order at least, a clear distinction is drawn between disputes and issues. It would appear that an issue is concerned only with recognised terms and conditions of employment as laid down in art. 2.

In *R.* v. *Industrial Disputes Tribunal, Ex p. Technaloy, Ltd.* (1), SOMERVELL, L.J., suggested that the wording of the Industrial Disputes Order, 1951, might well be made clearer than it is, and added ([1954] 2 All E.R. at p. 79):

> " It would be unfortunate if it remained a happy hunting ground for prerogative orders."

In *R.* v. *Industrial Disputes Tribunal, Ex p. Derbyshire County Council* (2) the Divisional Court had before it on June 11, 1952, a motion to prohibit the Industrial Disputes Tribunal from dealing with a " dispute " which the Minister had referred to it under the order. LORD GODDARD, C.J., reviewed the previous cases which had come before the Divisional Court and concluded his judgment with these words:

> "I am inclined to think, but it does not make any difference for the purpose of this case, that so far as the description of what is referred is that the county council should implement the recommendations of the Joint Negotiating Committee for Chief Officers of Local Authorities, strictly speaking I think that is what the order calls an issue; but the second point, that 'the council should fix salary scales of not less than £2,600 rising to £2,900' for the four men is clearly a dispute; but I do not think it makes any difference because both issues and disputes can be referred. The matter has been referred in this way and therefore the Industrial Disputes Tribunal can deal with the matter, and we certainly should not order prohibition because it may be called a dispute instead of an issue or an issue instead of a dispute."

But in the *Technaloy* case (1) the Divisional Court allowed an order of prohibition to issue on the ground that the matter referred by the Minister of Labour was not a "dispute" but was an "issue" and should have been referred to the Minister as an "issue" and not as a "dispute". In this court the decision of the Divisional Court was reversed on the ground that the controversy in that case was a "dispute" and not an "issue", and ROMER, L.J., made some important observations for himself, whilst not dissenting from the decision of the court, and those observations have a great bearing on the way the order should be interpreted. He said ([1954] 2 All E.R. at p. 82):

> "It is, in my opinion, a matter of some difficulty to fix with exactitude the precise line of demarcation between what is a 'dispute' under the Industrial Disputes Order, 1951, and what is an 'issue'. I am fully in agreement with my brethren in thinking that the conception of an 'issue' in the order is primarily related to the question whether or not a general code of terms and conditions of employment which exist in any particular district should be enforced as a whole on some employer in the district who is not already bound by them. For myself, however, I feel some difficulty in accepting the view that an 'issue' is rigidly confined to the question of enforcing a code in its entirety and that any difference between employers and employees which is in any degree narrower in its scope than that cannot constitute an 'issue', but must be dealt with on the footing that it is a 'dispute'."

Then (ibid., at p. 83) he said:

> "I am, accordingly, of opinion on the whole that the failure or refusal of an employer to observe some part only of a generally accepted code may constitute an 'issue' and be referred to the tribunal as such, but it may nevertheless also be a 'dispute' within the definition in the order and be reported and dealt with on that footing. It seems to me, indeed, that too rigid a distinction between the two kinds of difference envisaged by the order, involving as it does the view that 'disputes' and 'issues' are mutually exclusive, might well lead to trouble in the working of the order—as it has, in fact, led to trouble in the present case. In my judgment, there may, in some cases, although not, perhaps, in many, be an overlap between the two."

In that case counsel for the trade union said in the course of the argument:

> "Even if the difference between the employer and workmen is an issue, it also has all the qualifications of a dispute, and there is nothing in the order to suggest that 'dispute' and 'issue' are mutually exclusive terms";

and counsel for the Minister of Labour and National Service, said:

> "If it is a question of the meaning of the terms and conditions it is a

> ‘ dispute ’; but if it is a question whether the employer shall observe the terms and conditions it is an ‘ issue ’. Where the workmen are contented there cannot be a ‘ dispute ’ but only an ‘ issue ’. When it is a question whether the employers are observing the national agreement the question whether it is a ‘ dispute ’ or an ‘ issue ’ depends upon how the matter is put forward. In effect, the parties themselves decide under which definition they will bring forward the report. The employer cannot report an issue and therefore the case can be reported as both a dispute and an issue.”

Counsel for the employers said:

> “ What the report by the union is seeking to say is that this company is not carrying out an agreement which has been nationally agreed, and that is the very topic which art. 2 is intended to cover. If the workmen were saying ‘ you are not carrying out the terms of the agreement,’ and the employer was replying ‘ I am carrying them out,’ that would be a dispute; but where a union asks for a decision whether a particular employer should carry out an agreement and is doing so, the Minister has no power to refer a dispute, because there is no dispute, but only an issue.”

These quotations are enough, I should hope, to show the divergence of view on the interpretation of the order.

In my own judgment, in the *Technaloy* case (1) (if I may refer to it again) I confined myself to a decision on the point at issue which was whether the facts of the case brought the matter within art. 2 of the order as an “ issue ” or whether it came within the provisions of the order dealing with disputes. I said ([1954] 2 All E.R. at p. 80):

> “ The real point to be decided is whether the facts in the case show the controversy to be an ‘ issue ’ or a ‘ dispute ’ within the meaning of the order. The agreement of Nov. 29, 1951, was concerned with two matters only—the 11s. increase and the question of holidays. In asking the employers to fulfil the terms of this agreement the union was asking for the increase in wages and for the additional holidays, and in refusing to fulfil the terms of this agreement, the employers were saying: ‘ We will not pay the increase, nor will we make any alteration in the holidays we grant ’. I am of opinion that art. 2 of the order and art. 9 (2) of the order do not apply to the facts of the present case, so as to make this an ‘issue’ within the meaning of the order.”

It is clear from this quotation that I was then deciding that the view of the Divisional Court was wrong, because they had said this was an “ issue ” and not a “ dispute ”, whereas my view of what the order meant by an “ issue ” was what I described in the passage quoted.

The difficulty in construing the order arises mainly, I think, because the order itself draws such a clear distinction between a “ dispute ” and an “ issue ”. At the time of the *Technaloy* case (1) and today I was impressed by the distinction drawn, and endeavoured to discover the reasons for the distinction. It still seems to me that, on the facts of the *Technaloy* case (1), it was right to decide that the matter in controversy was a “ dispute ” and not an “ issue ” for the reasons given.

In the present case the local authority contend that no “ issue ” had arisen, and that there was no controversy between Mr. Carter and the local authority on Feb. 13, 1954, the date of the report to the Minister. The Divisional Court said on these matters:

> “ It would appear from the facts that there was no controversy between the council and Mr. Carter or the association at this relevant date and, even if there were, the controversy was not whether the council was observing the recognised terms and conditions of employment, but whether the occupation of Mr. Carter under his new contract of employment brought him

> within the terms of the scheme. This is not, in the opinion of the court, an issue within the meaning of the article, but a controversy to be decided by the machinery provided by the scheme itself."

In my judgment, the question whether there was any controversy between Mr. Carter and the local authority is irrelevant, and to state the controversy which had arisen as one which did not raise the question whether the local authority were observing the recognised terms and conditions of employment, but whether Mr. Carter, in the new name the local authority had given to him of maintenance fitter, came within the scheme at all is to take much too narrow a view of the controversy altogether. From the history of the case it seems to me to be clear that the trade union were raising the question as stated in their report to the Minister, which has been quoted in the judgment delivered by my Lord. To submit that the proper procedure is to apply the provisions of para. 25 (2) of the scheme when the local authority has expressly repudiated any application of the terms of the red book to Mr. Carter is a little cynical, but in my view the Minister was fully entitled to refer the matter to the tribunal as an " issue ".

That really disposes of this appeal and strictly no question arises concerning the definitions of " dispute " and " issue ", for, on the view I take, there was here an " issue " and the Divisional Court has not suggested that there was a " dispute ", but merely that para. 25 (2) of the red book must be first applied. But in view of the argument it is clear, I think, that, whilst there can be " issues " which can only be " issues " within the meaning of this order, and " disputes " which can only be " disputes " within the meaning of the order, there can be controversies which partake of the nature of a " dispute " and an " issue " at the same time, and in any such case it would seem that it might be reported as a " dispute " or as an " issue ". I would allow the appeal.

ROMER, L.J.: One of the primary contentions of the local authority on this appeal was based on the provisions and alleged effect of the " Scheme of Conditions of Service for the Miscellaneous Classes of Officers ", to which I will refer hereafter as the scheme. Paragraph 25 of the scheme deals with appeals and in sub-para. (2) thereof provides as follows:

> " A question as to whether or not an employee is an officer to whom the scheme applies, as distinct from a question arising out of the application of the scheme, shall be dealt with under the procedure for the settlement of differences as set out in the constitution of the provincial council, and any decision in favour of the employee . . . shall have effect from a date not earlier than that on which application was first made to the employing authority."

The local authority say that, by reason of this provision, the question whether the scheme applies to Mr. Carter in his present employment cannot (at all events at present) be referred by the Minister as an " issue " under the Industrial Disputes Order, 1951. The matter is put in two ways. First it is said that no issue can arise unless and until the question has been submitted for settlement to the provincial council, and an award obtained from them which is adverse to the employers and which the employers refuse to implement. Secondly, it is said that no issue can be reported unless it be shown that employers are declining to observe recognised terms and conditions, and that that cannot be shown of the local authority because they are willing to proceed under para. 25 (2) of the scheme.

In my opinion, one answer to the first of these contentions is that the National and Local Government Officers' Association have no right, so far as I can see, to bring the machinery of para. 25 (2) into operation—although they managed to do so in 1952. The opening words of the sub-paragraph

> " a question as to whether or not an employee is an officer to whom the scheme applies "

mean, as it appears to me, a question as between an employee and his employer and not a question as between the employer and his employee's trade union. But, further than this, and assuming that the union can in fact resort to para. 25 (2), I can find no support for the view that no issue can arise until they have done so. The trade union are under no contractual or legislative obligation to obtain an award from the provincial council, and, if they report an issue to the Minister without obtaining one, there is nothing in the Industrial Disputes Order, 1951, which precludes the Minister from referring it at once to the tribunal, for art. 5 of the order does not apply to issues, but only to disputes.

Then, as to the second question, it is not easy to see how the local authority can, at one and the same time, say that the scheme does not apply to Mr. Carter's present employment and yet contend that it contains a relevant term or condition of employment with which they are complying or are willing to comply. If the scheme as a whole constitutes the terms and conditions of Mr. Carter's employment, the local authority are plainly not complying with them; if, on the other hand, it does not, then the willingness of the local authority to comply with one of the terms and conditions is an irrelevant consideration. But apart altogether from this I do not regard para. 25 (2) as forming a part of the "recognised terms and conditions" within the purview of that phrase as used in art. 2 of the Order of 1951. The scheme admittedly formulates a complete code of terms and conditions, but that is not to say that a term or condition of employment emerges from every paragraph of the scheme. No such term or condition emerges from para. 25 (2), which does no more than provide administrative machinery for the purpose of settling questions whether or not an employee is in fact an officer to whom the scheme applies. From this it follows that the purported adoption by the local authority of para. 25 (2) does not enable them to say that they are conforming to even one of the recognised terms and conditions of employment and they cannot therefore displace the application of art. 2 of the order on that ground.

The next point on which the local authority relied is that the difference of opinion which has arisen with regard to the terms of Mr. Carter's employment constitutes a "dispute" under the Industrial Disputes Order, 1951, if it falls within the order at all; and that, as it is a "dispute", it cannot be reported to the Minister as an "issue", and be referred by him to the tribunal as such. As to this, it seems to me to be at least a possible view that the question which is in controversy does not constitute a "dispute" at all; for that word is defined by art. 12 (1) of the order as meaning (so far as relevant) "any dispute between an employer and workmen in the employment of that employer" connected with terms of employment or with conditions of labour, and no such dispute exists between Mr. Carter and the local authority. On the assumption, however, that a dispute does exist as to the terms which regulate Mr. Carter's employment, this does not in itself, in my opinion, prevent the co-existence of an issue. I expressed my views on this aspect of the Order of 1951 in the *Technaloy* case (1) ([1954] 2 All E.R. at p. 82) and I will not repeat them now. Suffice it to say that, in my judgment, "disputes" and "issues" under the order are not mutually exclusive and there is, in some degree at least, an overlap between the two. In the present case it is the aim of the trade union to procure the application to Mr. Carter's present employment of the terms and conditions set forth in the scheme. The local authority, as Mr. Carter's employers, contend that these terms and conditions are not applicable to his employment. It appears to me that this conflict of views does give rise to an issue and can be dealt with as such under the order; and none the less because it may also constitute a dispute, and certainly would constitute one if Mr. Carter were a party to the controversy himself. I find myself no more able now than I was in the *Technaloy* case (1) to define the difference between a dispute and an issue with any satisfactory degree of precision; but where, as here, one finds "recognised terms and conditions" which an employee's trade union contend should be applied to his employment, and that contention is rejected by the man's employers, it seems to me that a controversy arises which the union can report as an "issue" under art. 2 of the order and which the Minister can refer to the tribunal under art. 9. I would only mention in conclusion on this point a suggestion which was put forward in argument by counsel for the trade union to the effect that the Minister himself is the sole arbiter, by virtue of art. 3 (2) of the order, to determine whether a controversy constitutes an "issue" or a "dispute" and that his decision is binding on the parties. Such a power was repudiated by counsel on behalf of the Minister and in my opinion rightly so. In my judgment, the certificate of the Minister which is referred to in the paragraph is not a certificate whether what has been reported to him is a "dispute" on the one hand or an "issue" on the other, but merely an authoritative statement that he has received a reported dispute or a reported issue as the case may be.

I agree with my Lord that it is not a condition precedent to the reporting of an issue that a trade union should first communicate to the employers their intention so to do and there is nothing that I can usefully add to what he has said either on that point or on the local authority's submission that no controversy existed at the date of the report. On the appeal as a whole I agree with my Lords that the local authority have not made out a case for an order of prohibition and that the appeal should therefore be allowed.

Appeal allowed. Leave to appeal to the House of Lords refused.

Solicitors: *Timothy Hales* (for the trade union); *Sharpe, Pritchard & Co.* (for the local authority); *Solicitor, Ministry of Labour and National Service.*

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

R. *v.* CLARK.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Devlin and Donovan, JJ.), July 4, 1955.]

Criminal Law—Evidence—Character of accused—Confession—Allegation that police witness concocted confession—Whether cross-examination of accused as to character should be allowed—Criminal Evidence Act, 1898 (61 & 62 *Vict. c.* 36), *s.* 1 (*f*).

The appellant when giving evidence at his trial denied that he had made certain verbal statements about which the prosecution had called evidence and said that a written statement signed by him after caution was not his statement at all but had been dictated by a chief inspector of police to a detective-constable who wrote it down, and who were witnesses for the prosecution. The verbal statements amounted to confessions and the written statement was a complete confession of the offences with which he was charged. The prosecution had then been allowed to cross-examine the appellant as to his previous convictions. It was contended for the appellant that this cross-examination was wrongly allowed.

Held: (i) the appellant's allegation, being in effect that his written confession had been concocted by the police, was more than an emphatic denial of the alleged confession and involved an attack on the conduct of the prosecution's police witnesses, viz., their conduct as distinct from and outside their evidence in the case; in such circumstances the court at the trial were entitled also to know the character of the person who made the imputations and the cross-examination of the appellant as to his character was properly admitted.

Dicta of DARLING, J., in *R.* v. *Wright* (1910) (5 Cr. App. Rep. at p. 133) and of LORD HEWART, C.J., in *R.* v. *Jones* (1923) (17 Cr. App. Rep. at p. 119

applying the principle stated by CHANNELL, J., in *R.* v. *Preston,* [1909] 1 K.B. at p. 575) followed. A

(ii) the court in deciding whether the cross-examination of the appellant was rightly admitted could look at the whole of the evidence given for the appellant.

Appeal dismissed.

[As to cross-examination of defendant as to character, see 10 HALSBURY'S LAWS (3rd Edn.) 449, para. 828. B

For the Criminal Evidence Act, 1898, see 9 HALSBURY'S STATUTES (2nd Edn.) 613.]

Cases referred to:

(1) *R.* v. *Hudson,* [1912] 2 K.B. 464; 81 L.J.K.B. 861; 107 L.T. 31; 76 J.P. 421; 14 Digest 524, *5887.*

(2) *R.* v. *Biggin,* [1920] 1 K.B. 213; 89 L.J.K.B. 99; 83 J.P. 293; 14 Digest 449, *4751.* C

(3) *R.* v. *Wright,* (1910), 5 Cr. App. Rep. 131; 14 Digest 449, *4749.*

(4) *R.* v. *Preston,* [1909] 1 K.B. 568; 78 L.J.K.B. 335; 100 L.T. 303; 73 J.P. 173; 14 Digest 449, *4748.*

(5) *R.* v. *Jones,* (1923), 87 J.P. 147; 17 Cr. App. Rep. 117; 14 Digest 449, *4750.* D

(6) *R.* v. *Rouse,* [1904] 1 K.B. 184; 73 L.J.K.B. 60; 89 L.T. 677; 68 J.P. 14; 14 Digest 447, *4733.*

Appeal against conviction.

The appellant was convicted on Mar. 16, 1955, at Surrey Quarter Sessions together with three other men of breaking and entering and larceny. On arrest he made verbal statements to the police which amounted to a complete confession. E Later he made a statement after caution, which was taken down in writing and which he signed, which was a complete confession. At his trial at quarter sessions he denied having made the verbal statements and said that the written statement, which he admitted signing, was dictated by a chief inspector of police and taken down by a detective, who were witnesses for the prosecution ", and was not the appellant's statement at all; furthermore he said it was untrue. F The prosecution were then allowed to cross-examine the appellant as to his previous convictions. The appellant contended that this cross-examination should not have been allowed.

R. M. G. Simpson for the appellant.

B. S. Horner for the Crown.

G

LORD GODDARD, C.J., delivered the judgment of the court: The sole question raised by this appeal is whether the deputy chairman was right in permitting cross-examination of the appellant with regard to previous convictions, it being said that there were no grounds which would entitle the prosecution to ask questions of that sort.

This class of case is perhaps not as common as it used to be, but we have H constantly had this point as to the right of counsel to ask those questions in these cases and I agree with counsel for the appellant, to whom the court is indebted for a very thorough and careful argument, that it is a case of importance.

The case arises because of an attack made by the appellant on the police with regard to a statement he had made and signed. Any judge who has had any experience on circuit or at the Central Criminal Court, as we all have, knows I that it is one of the commonest things for prisoners who have made the fullest and most complete statements admitting their offences and signed them, to repudiate the statements when the prisoners come to trial and to say that the statements were obtained by some improper means or another. In this case the appellant does not say that the written statement was obtained from him by any threat or by any inducement. What he says is that when he was at the police station the detective started to write down the heading of the statement, which is a caution, and then the chief inspector, in whose room he had previously

A been, came into the room and proceeded to dictate to the detective what he was to write down so that it was not the appellant's statement at all but was the statement of the chief inspector; and the appellant says it was all untrue. This meant that the chief inspector, for the purpose of getting a conviction against him, not only manufactured a statement, but manufactured a statement which had not a word of truth—a sufficiently serious accusation against a high-
B ranking police officer of considerable standing.

Another matter which has arisen in the case and which apparently the learned deputy chairman emphasised in the course of giving his ruling on the matter was a verbal statement which had been made by the appellant. When he was first arrested he made various statements which if the jury accepted them, and they did, would have been quite enough to ensure his conviction. They amount as
C near as possible to a complete confession, but the statement he made afterwards amplified what he had said before and told the whole story in the form of a confession. Counsel for the appellant does not pretend that the written statement is anything but a full confession or that he could have hoped for an acquittal from the jury once that statement was put before them. The first, although not the principal, point which counsel took was that the deputy chairman
D emphasised in the course of his ruling on the matter and paid more attention to what the appellant said about the verbal statement and whether that amounted to an attack on the police than to the written statement. Counsel invited us to say that if the deputy chairman was wrong in having allowed the cross-examination on that account we could not consider what the appellant said in relation to the written statement because the deputy chairman was not considering it.
E I am afraid we cannot take that view. The only question which the court has to decide is whether the cross-examination as to previous convictions was legally admissible or not, and if it was, it is nothing to the point to say that the deputy chairman admitted it on some other ground. We have to see whether on the whole of the case the prosecution were entitled to cross-examine as to character. If the appellant's allegations concerning the written statement
F supplied the material or the ground for allowing the cross-examination we need not trouble ourselves about the denial of the oral statement because there was only one cross-examination as to the appellant's character.

The Criminal Evidence Act, 1898, s. 1 (f) entitles the prosecution to cross-examine a prisoner as to character on several grounds one of which is if:

> ". . . the nature or conduct of the defence is such as to involve imputations
> G on the character of the prosecutor or the witnesses for the prosecution."

There is no doubt that there were, especially in the early days of the Court of Criminal Appeal, a good many decisions on this point and at first it may look as though the line was a very fine one. It has been said in more than one case that the line is a fine one and, as one goes through those cases, one sees that, as very often happens when a new statute has to be considered—and it must be remem-
H bered that the Court of Criminal Appeal only began to act in 1908—at first the court was going very slowly and carefully into what had hitherto been somewhat unexplored country. Until the Criminal Evidence Act, 1898, except in a few cases such as rape (which was an exception introduced in the Criminal Law Amendment Act, 1885) no prisoner could give evidence at all. It was not, there-
I fore, until the Court of Criminal Appeal began to sit in 1908, ten years after the Act of 1898 was passed, that any considered judgments were given regarding the grounds on which such cross-examination could be permitted. The first duty of the court is to read the statute, to consider exactly what it states and to apply it. As was said in *R.* v. *Hudson* (1) ([1912] 2 K.B. at p. 471) the words of the statute are not qualified: it does not say anything about "unnecessarily" or "unreasonably" introducing imputations. It simply states:

> "or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor."

From an early stage in the history of this class of law it has been held that if a prisoner on a charge of rape or indecent assault cross-examined the prosecutrix to show that she had consented, that did not enable the prosecution to cross-examine the prisoner with regard to his record. A good many reasons have been given for that, but I think probably the safe ground on which that cross-examination is disallowed is that it is always necessary in a charge of rape to establish three things; first, that there has been carnal knowledge of the prosecutrix; secondly, that the prisoner was the man who had carnal knowledge of her; and thirdly, that it was done against her will. It is not necessary for the prisoner to prove consent, although he may be able to do so, or to destroy her evidence by cross-examination, but it is for the prosecution to prove that there was lack of consent; I think, therefore, that the courts have considered that the prisoner is entitled if he can to destroy her evidence by cross-examination or by giving evidence that one of the incidents of the crime is not present, even though that may involve some imputation on the character of the woman. For instance, if an apparently respectable married woman is asked whether or not she consented to intercourse, that would seem to involve some imputation on her. There is no doubt, however, that the rule is now well established that the mere fact that, in an effort to break down one of the essential elements of the crime, the prisoner's counsel, or the prisoner himself in evidence, has alleged that the woman was a consenting party is not enough to render the prisoner liable to be cross-examined as to his character. That also, I think, may be the explanation of *R.* v. *Biggin* (2) ([1920] 1 K.B. 213) in which a conviction for manslaughter was quashed, a case on which counsel for the appellant strongly relied. In that case a charge of murder was reduced to manslaughter and the conviction was quashed because the prisoner had been cross-examined as to his character. He undoubtedly did not deny that he had killed the man whose death was the subject of the charge, but he said that the man had made indecent overtures to him, that a fight ensued and that in the course of the fight as a matter of self-defence he killed the man. He was then cross-examined as to his convictions. The court felt some difficulty about the case, but they admitted the evidence because the facts had to come out. The prisoner was relying on provocation and self-defence. Somebody had to explain why the attack took place and until that was explained, and why people should have been in the same room and why there was a fight, it was impossible for any defence to be developed at all.

In this case the prisoner's defence was:

> " I am not one of the men who broke into the place; if I was with the people I had nothing to do with it."

He told the police in his statement that he kept watch, but his case was that he was not involved in the matter at all. His defence was not that an untrue confession was got out of him. It is true that the confession was used against him to prove he was the guilty man but he sought to get out of his confession by saying:

> " I never made that confession at all. It is true I signed it. The policeman wrote it down, but I never said it. It was the chief inspector who came in and told the detective-constable to write down what he told him and he did so."

If that were true—and it must be taken that the jury rejected it—it was about as serious a charge to make against two police officers as could well be imagined. It was not: " They induced me by a promise of favour if I made a confession " or " I would get off light ", but:

> " They concocted a confession which was not my confession at all and, therefore, you the jury ought to pay no attention to it because this is a plot on the part of two police officers."

If that is true those two police officers were committing a criminal offence;

A how it can be said that that is not casting an imputation on them I find it difficult to understand, for they could have been indicted at the next quarter sessions for conspiracy to defeat the ends of justice and also for perjury.

I think this matter, so far as this court is concerned, can really be said to be concluded by two cases, both of them fairly early in the history of the court, which so far as I know have never been reversed. One is the case of *R.* v. B *Wright* (3) (1910) (5 Cr. App. Rep. 131) when the court consisted of DARLING, PHILLIMORE and BUCKNILL, JJ. In that case the prisoner, who had made a complete confession, said that the confession had been got out of him by bribery, by being given tobacco and being allowed to smoke. DARLING, J., giving the judgment of the court, said (ibid., at p. 133):

> "If the appellant puts it that he was improperly induced to make and C sign the statement that was produced, it is difficult to imagine anything more like an imputation on a witness for the prosecution. It is imputed to the witness that, having a man in his custody, he bribed him and so by that means got him to make the confession. It is contended by Mr. Churchill that this case comes within *R.* v. *Preston* (4) ([1909] 1 K.B. 568) in which CHANNELL, J., delivered judgment. But on what ground did CHANNELL, J., really put the D decision ? He says (ibid., at p. 575): '. . . The present case obviously is very near the line,' and (ibid., at p. 576) he says: 'The statement in the present case was a mere unconsidered remark made by the prisoner without giving any serious attention to it . . .' The imputation in the case now before us was that the police inspector was not a fit person to remain in the force; had he done what was imputed to him there is no doubt he could have been E dismissed from the force; it is the gravest possible imputation, and cannot be excused by the contention that it was the only way open to the appellant of meeting the case against him."

I observe that DARLING, J., said that it was difficult to imagine anything more like an imputation on the witness for the prosecution. This case is even worse F because in *R.* v. *Wright* (3) it was merely suggested that to get the confession out of the man the police officers bribed him with tobacco, while in this case it is said that they concocted the confession, and that the confession was never that of the prisoner but was written by the police officer.

The other case to which I would refer is *R.* v. *Jones* (5) (1923) (17 Cr. App. Rep. 117). There, the matter was very much the same as it is here and in the G course of the argument SHEARMAN, J., said (ibid., at p. 118):

> ". . . the appellant said that the police deliberately held him up on remand after remand, and as they could not get evidence they concocted it"

—that is what is said here, that as the police had no evidence they concocted it—and LORD HEWART, C.J., said (ibid., at p. 118):

> "It is one thing to deny a statement; it is another thing to say that H the statement has been deliberately and elaborately manufactured."

In giving judgment, the learned chief justice cited the case of *R.* v. *Preston* (4) rather more fully than it had been cited before. I will read the passage quoting CHANNELL, J., than whom no greater authority on these matters ever lived (ibid., at p. 119):

> I "'If the defence is so conducted, or the nature of the defence is such, as to involve the proposition that the jury ought not to believe the prosecutor or one of the witnesses for the prosecution upon the ground that his conduct —not his evidence in the case, but his conduct outside the evidence given by him—makes him an unreliable witness, then the jury ought also to know the character of the prisoner who either gives that evidence or makes that charge, and it then becomes admissible to cross-examine the prisoner about his antecedents and character with the view of showing that he has such a bad character that the jury ought not to rely upon his evidence.

> That is the general nature of the enactment and the general principle underlying it '. A clear line is drawn between words which are an emphatic denial of the evidence and words which attack the conduct or character of the witness. Applying that ratio decidendi to the present case, it appears to this court that it comes within the line of saying what is forbidden. It was one thing for appellant to deny that he had made the confession; but it is another thing to say that the whole thing was a deliberate and elaborate concoction on the part of the inspector; that seems to be an attack on the character of the witness."

A B

Those two cases seem to be entirely in point. This was an attack by the appellant not on the evidence of the police inspector, but on his conduct outside that evidence. It is one thing to say: "That is not my statement"; it is another thing to say, as very often is said by prisoners: "Well, yes, but he misunderstood me; he has got down something I did not say; I missed it when it was being read over, but what I said was something else" and they may very often give a specious and plausible paraphrase of something which would make the sentence different; or sometimes the prisoner says: "The officer left out something". In all such cases there is really no difficulty and it should be remembered that it is always in the discretion of the judge to rule out a cross-examination and to tell counsel for the prosecution that he is not going to allow a cross-examination as to previous convictions. I do not want to make any joke about the matter or to put it otherwise than perfectly seriously, but one knows well that police officers are regarded as fair game for cross-examination and to make charges against, and I do not believe that any judge would allow a roving cross-examination into the prisoner's past merely because he said: "The police constable is a liar", or "The police constable is not telling the truth"; for all he is doing is pleading not guilty with emphasis, or, as DARLING, J., said in *R.* v. *Rouse* (6) ([1904] 1 K.B. at p. 187), employing "merely an emphatic mode of denial". It is quite another thing to make the suggestion against police officers that they have been conspiring together to defeat the ends of justice.

C D E

Counsel for the appellant in the course of his argument, put this point very forcibly: if we uphold cross-examination in this case it simply means that a prisoner can never deny a statement. I would say that the answer to that is this; that if a prisoner, having signed a statement to a police officer and having put his signature as is always done in two places, one at the end of the caution and one at the end of the statement, alleges that the police have concocted the statement, he does so at the risk of having his character laid bare, if he has a character which it is his wish to conceal, because clearly, if misconduct is to be attributed to police officers the jury is entitled to know the character of the man making the imputation; and it is not to be thought that the man who is making the imputation, if he has a string of convictions, stands in the same position as an inspector of police or any other officer who must be a man of good character.

F G H

For these reasons the court is of opinion that the cross-examination was properly admitted in this case and for that reason the appeal is dismissed.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Wontner & Sons* (for the prosecution).

[*Reported by* A. P. PRINGLE, ESQ., *Barrister-at-Law.*]

Re LEVIEN (*deceased*).
LLOYDS BANK, LTD. *v.* WORSHIPFUL COMPANY OF MUSICIANS AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), July 13, 1955.]

Charity—Music—Gift to promote the training of singers—Gift for the benefit of organists and for the advancement of organ music—Whether good charitable gifts.

By his will a testator bequeathed a sum of money out of his residuary trust fund to the Worshipful Company of Musicians for the purpose of establishing and conducting a fund to be called " the Sir Charles Santley Memorial Fund " on trust to invest the same and to employ the annual income arising from the investments or some part thereof in awarding every year presentations to distinguished persons in the following professions: " (a) singers; (b) composers of vocal music; (c) writers upon the subject of singing; (d) researchers into matters relating to the human voice (including in such class, laryngologists and similar specialists upon the physiological aspect of singing) ". The testator expressed his wishes (although he expressly did not impose any trust on the company in that behalf) as to the manner in which the fund should be administered mentioning that the presentations should not be money prizes or medals, but a piece of plate or a jewel, and that in awarding the presentations the administrative body should bear in mind " as part of their standard of excellence Santley's views and doctrine upon singing and voice production as exemplified " in two monographs by the testator. The testator further directed that the residue of his residuary trust fund should be paid to the said company for the purpose of establishing and conducting a trust fund to be called " the W. T. Best Memorial Fund " and provided that the income of the trust fund should from time to time at the discretion of the company or a committee be applied for " the maintenance support education assistance or otherwise for the benefit of any one or more person or persons who may be musicians or students of music whether in a professional or amateur capacity and whose work or study may be devoted wholly or partly to the art of the organ in its higher aspects whether as executant composer transcriber or writer and whom the company committee or other governing body . . . may from time to time select as being in their opinion of especial merit and deserving of such maintenance support education assistance or benefit or alternatively such income shall . . . be applied for the advancement or study of the music of the organ in such other manner as the company committee or other governing body . . . shall for the time being think fit and proper ". The testator further provided that at the discretion of the company or committee or other governing body the whole or such part or parts of the capital of the Sir Charles Santley Memorial Fund and the W. T. Best Memorial Fund as the company might think fit might be applied for all or any of the purposes prescribed for the application of the income of either fund.

Held: the purpose of the trusts of the Sir Charles Santley Memorial Fund was to effect the training of singers and to benefit the public by producing better singers, and the purpose of the trusts of the W. T. Best Memorial Fund was to produce better organists and organ music which was for the public benefit; in neither case were the trusts for the benefit of individuals without the element of benefit to the public requisite for a valid charitable trust, and accordingly the trusts of the funds were charitable trusts.

Royal Choral Society v. *Inland Revenue Comrs.* ([1943] 2 All E.R. 101) applied.

[As to the promotion of education in particular subjects being charitable purposes, see 4 Halsbury's Laws (3rd Edn.) 218, para. 497; and for cases on the subject, see 8 Digest (Repl.) 328-330, *108-118.*]

Cases referred to:

(1) *Royal Choral Society* v. *Inland Revenue Comrs.*, [1943] 2 All E.R. 101; 112 L.J.K.B. 648; 169 L.T. 100; 25 Tax Cas. 263; 2nd Digest Supp.

(2) *Income Tax Special Purposes Comrs.* v. *Pemsel*, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 3 Tax Cas. 53; 8 Digest (Repl.) 312, *1.*

(3) *Re Allsop*, (1884), 1 T.L.R. 4; 8 Digest (Repl.) 346, *271.*

(4) *Re Ogden*, (1909), 25 T.L.R. 382; 8 Digest (Repl.) 396, *887.*

(5) *Re Shakespeare Memorial Trust*, [1923] 2 Ch. 389; 92 L.J.Ch. 551; 130 L.T. 56; 8 Digest (Repl.) 330, *122.*

Adjourned Summons.

The plaintiff, Lloyds Bank, Ltd., as the executor and trustee of the will of the testator, John Joseph Mewburn Levien, applied to the court by originating summons for determination of the question, among others, whether on a proper construction of the will the trusts thereby declared of " the Sir Charles Santley Memorial Fund " and of " the W. T. Best Memorial Fund " were charitable.

J. A. Armstrong for the plaintiff, the trustee of the will.

N. S. S. Warren for the first defendant, the Worshipful Company of Musicians.

T. J. R. Barnes for the second defendant, one of the next of kin.

B. J. H. Clauson for the Attorney-General.

DANCKWERTS, J.: This case concerns the will of the testator, which was dated Jan. 17, 1945. The testator died on July 2, 1953. He was very much interested in singing, of which he was a professor, and he had been a liveryman of the Worshipful Company of Musicians since 1912 (a company of which I myself became a liveryman in 1913), but the Worshipful Company of Musicians is only interested in the matter in the position of trustee, and the question at issue is whether the trusts which they are directed to carry out are of a charitable nature and therefore valid.

The trusts are contained in cl. 9 of the will which directs the bank to stand possessed of the net residue of his said estate therein referred to as " the residuary trust fund " on trusts which are declared in the following terms:

> " (1) Upon trust in the first place to set aside out of the residuary trust fund the sum of £2,000 and to pay and transfer the same to the Worshipful Company of Musicians (hereinafter called ' the company ') for the purpose but subject to the conditions hereinafter mentioned of establishing and conducting a trust fund to be called ' the Sir Charles Santley Memorial Fund ' according to the following provisions and conditions namely: Upon trust to invest the same in or upon any of the investments from time to time authorised by law for the investment of trustee money with power from time to time to vary such investments for others of the same nature and to employ the annual income arising from the same investments or some part thereof in awarding every year presentations to distinguished members of either sex of any of the following professions viz.:—(a) singers; (b) composers of vocal music; (c) writers upon the subject of singing; (d) researchers into matters relating to the human voice (including in such class, laryngologists and similar specialists upon the physiological aspect of singing); and in payment of all costs and expenses incidental thereto. And it is my desire though I expressly do not impose any trust upon the company in that behalf but leave the matter to their unfettered discretion that they will administer the Sir Charles Santley Memorial Fund in accordance with the following principles, viz.: (a) The fund shall be administered by a standing committee of three chosen from the pastmasters and assistants of

the company. (b) The number of the presentations to be awarded in any one year and the respective recipients shall be decided by such committee subject to confirmation by the master, wardens, and court. (c) The presentations shall not be money prizes or medals, but a piece of plate, a jewel or such other token as the committee shall subject to confirmation as aforesaid decide. (d) In awarding the presentations the committee shall always bear in mind as part of their standard of excellence Santley's views and doctrine upon singing and voice production as exemplified in my two monographs 'Sir Charles Santley' and 'Some Notes for Singers'. (2) Upon trust in the second place to hold the residue of the capital and income of the residuary trust fund after first setting aside and applying the Sir Charles Santley Memorial Fund as prescribed by sub-s. (1) of this clause and to pay and transfer the same to the company for the purpose but subject to the conditions hereinafter mentioned of establishing and conducting a trust fund to be called 'the W. T. Best Memorial Fund' according to the following provisions and conditions namely: (a) Whereas the gift is made by me in memory of W. T. Best late organist of St. George's Hall, Liverpool and the Handel Festival the capital and income of the trust fund if accepted by the company shall be kept separate from the other funds of the company and be called 'the W. T. Best Memorial Fund'. (b) The income of the trust fund shall from time to time at the discretion of the company or a standing committee of three chosen from the pastmasters and assistants of the company (and subject if the company shall so decide to confirmation by the master wardens and court or other governing body) be applied during such periods whether continuous or discontinuous as they shall for the time being think fit and proper for the maintenance support education assistance or otherwise for the benefit of any one or more person or persons who may be musicians or students of music whether in a professional or amateur capacity and whose work or study may be devoted wholly or partly to the art of the organ in its higher aspects whether as executant composer transcriber or writer and whom the company committee or other governing body as aforesaid may from time to time select as being in their opinion of especial merit and deserving of such maintenance support education assistance or benefit or alternatively such income shall from time to time at such discretion as aforesaid be applied for the advancement or study of the music of the organ in such other manner as the company committee or other governing body as aforesaid shall for the time being think fit and proper provided always and I hereby declare that the company shall have full power from time to time or at any time in their discretion or that of their committee or other governing body as aforesaid to expend and apply for all or any of the purposes prescribed in sub-s. (1) and sub-s. (2) of this clause the whole or such part or parts of the capital of the Sir Charles Santley Memorial Fund and the W. T. Best Memorial Fund as the company may think fit and determine and that in all other respects the company shall have an absolute and unfettered discretion as to the mode and manner of their application of either of the trust funds and the income thereof respectively."

The case which gives me the greatest assistance with regard to the questions which I have to decide is *Royal Choral Society* v. *Inland Revenue Comrs.* (1) ([1943] 2 All E.R. 101). That was a case of a society which was formed for the advancement of choral singing in London, and the question was whether it was "established for charitable purposes only" and whether its income was "exclusively applied for such purposes" in regard to income tax law. I find some observations of LORD GREENE, M.R., which seem to me to be very relevant to the matter which I have to decide. After discussing the question of whether the matter was a matter of law or a matter of fact, LORD GREENE continued as follows ([1943] 2 All E.R. at p. 104):

> " That, of course, does not conclude the matter; because it has to be shown that the purpose of this body of persons is charitable and only charitable. We are accordingly thrown back upon an examination of the purposes for which it was established and for which it carries on its work. It is the purpose of the members of the society, ten in number, that is relevant. The maintenance of the choir may be regarded in two aspects: first as an educative process for the members of the choir; and, secondly, as an instrument by which the performance of this type of music is presented to the public. I should have said that there is no flavour of commercial profit or anything of that kind, about this society. So far as the choir is concerned the object, as I have said, paraphrasing the language of the rule, is the encouragement and advancement of choral singing; or, taking the language of the rule, ' the promotion of the practice and performance of choral works '. Bearing in mind the nature of the works in question and the medium through which they are performed, it seems to me that the objects, so far as the public are concerned, are educational; and in so far as possibly they may not be regarded as educational, they would fall within the fourth case referred to in LORD MACNAGHTEN'S analysis in *Income Tax Special Purposes Comrs.* v. *Pemsel* (2) ([1891] A.C. at p. 583). Dealing with the educational aspect from the point of view of the public who hear music, the Solicitor-General argued that nothing could be educational which did not involve teaching, viz., teaching, as I understood him, in the sense of a master teaching a class. He said that in the domain of art the only thing that could be educational in a charitable sense would be the education of the executants: the teaching of the painter, the training of the musician, and so forth. I protest against that narrow conception of education when one is dealing with aesthetic education. Very few people can become executants, or at any rate executants who can give pleasure either to themselves or to others; but a very large number of people can become instructed listeners with a trained and cultivated taste. In my opinion, a body of persons established for the purpose of raising the artistic taste of the country and established by an appropriate document which confines them to that purpose, is established for educational purposes, because the education of artistic taste is one of the most important things in the development of a civilised human being.
>
> " In the case of artistic taste, one of the best ways of training it is by presenting works of high class and gradually training people to like them in preference to works of an inferior class. The people who undergo this process go no doubt with the idea of being amused or entertained; but it is not the state of mind of the people who go to the performance which matters for the present purposes, it is the purpose of the people who provide it which is important. If the people who are providing the performance are really genuinely confining their objects to the promotion of aesthetic education by presenting works of a particular kind, or up to a particular standard, it seems to me that that is just as much education (and, in fact, having regard to the subject-matter the best available method of education) as lecturing or teaching in a class, or anything of that kind. The Solicitor-General referred to a number of cases in which he said it was established that education in the charitable context is limited to teaching in that narrow sense. In my opinion, those cases do not establish any such proposition. I should be very sorry to think that they did. The matters that were being dealt with in those cases have nothing to do with aesthetic education or the cultivation and improvement of public taste in music or the other arts. I cannot help thinking that the Board of Education, which

> has taken the Council for the Encouragement of Music and the Arts under its wing, would be very surprised to learn that that enterprise, in which public funds are now being used, was not an educative one."

Then LORD GREENE, M.R., deals with the evidence of Sir George Dyson, and he criticises the passage in TUDOR ON CHARITIES as being misleading ([1943] 2 All E.R. at p. 106):

> "The passage says (TUDOR ON CHARITIES (5th Edn.) at p. 39): 'The fine arts, however, are probably not regarded as objects of charity; and a gift to encourage artistic pursuits was held not charitable. But it is otherwise if the element of instruction is introduced: a gift for an art school is good'. I do not know what that passage means when it says: 'The fine arts are probably not regarded as objects of charity'. Does it mean that education of artistic taste is not education in the charitable sense? If it does, I dissent from that most vehemently. There is not a particle of authority in support of such a view. If it means that the only way you can bring the fine arts into the charmed circle of charity is by setting up a class to teach executants, whether to teach actors to act, or painters to paint, or musicians to perform, again I dissent most vehemently from any such proposition. Accordingly, in my opinion, that paragraph is inadequate and, indeed, misleading."

Then he refers to two authorities; the first is *Re Allsop* (3) (1884) (1 T.L.R. 4), and he discusses that, and he then refers to *Re Ogden* (4) (1909) (25 T.L.R. 382) and continues ([1943] 2 All E.R. at p. 107):

> "There the testator desired that his executors, with the assistance of certain gentlemen and an art master, and any persons they might call in to assist them, should expend his residue (25 T.L.R. at p. 382): '. . . in any manner they may think desirable to encourage artistic pursuits or assist needy students in art'."

I have referred to that because that case seems to me to contain the principle on which it was argued in the present case that the trusts were not charitable. The Master of the Rolls continued ([1943] 2 All E.R. at p. 107):

> "Again, the report of the case is very meagre. LORD COZENS-HARDY, M.R., said that no less than three times in the previous year had it fallen to his lot to express his view on what the law was in that kind of case. He went on (25 T.L.R. at p. 383): 'In the present case the Vice-Chancellor had thought that the trustees were bound to spend the money to encourage in some way or other education in art'. With the greatest respect to the Vice-Chancellor, he did not see how it was possible to get that meaning out of the words. I do not myself derive any assistance from that case: but it is worth pointing out that a gift merely 'to encourage artistic pursuits' might be expended in a way that nobody would consider charitable; for instance in merely providing for one or two individuals paints and paint-brushes, or a grand piano on which the beneficiaries could play in their drawing-room. I apprehend nobody would say that that was a charitable object; but the money could have been spent for some such purpose as that."

Then he refers to *Re Shakespeare Memorial Trust* (5) ([1923] 2 Ch. 389) which was a case before P. O. LAWRENCE, J., and which he said was in line with the conclusion which he had reached.

It is argued in this case that one could find, consistently with the trusts laid down by the testator, that the trustees could apply the money for the purpose of benefiting individual singers or individual organists, merely for benefiting them in their way of life, I suppose, and therefore not for a purpose which is wholly charitable. It is argued quite correctly that if one finds that application may be made for purposes which are not charitable, then that invalidates the whole

trust because one at once gets the difficulty of uncertainty and the whole trust A
is invalid and fails. One has, however, to read the trust as a whole. In the case of the Sir Charles Santley Memorial Fund, reading the trust as a whole and ignoring as not being lawfully binding the part of the trust which is plainly of a precatory nature and expresses the testator's hope, one finds that the object of the whole trust is to improve the training of singers, including research by experts like laryngologists and others in the methods of singing, and therefore B
to produce better singers. The object is really to effect the training of singers of serious music for aesthetic purposes, and it seems to me to fall exactly within the words used by LORD GREENE, M.R., in *Royal Choral Society* v. *Inland Revenue Comrs.* (1). Taking the trust as a whole, it is not intended to be a trust for the benefit of individual singers, but to be a trust to benefit the public by producing better singers and voice production. C

It is even clearer that the object of the other trust, the W. T. Best Memorial Fund, is educational (to produce the better education of performers on the organ) because one finds in the concluding words of cl. 2, before the proviso, a reference to application

> " for the advancement or study of the music of the organ in such other manner as the company committee or other governing body as aforesaid D
> shall for the time being think fit and proper."

That indicates that what the testator has in mind is not a gift for the benefit of individual organists, but to produce better organists and better organ music, and that seems to me to be for the benefit of the public and to fall within the educational trusts, or within the fourth class referred to in LORD MACNAGHTEN'S E
analysis in *Income Tax Special Purposes Comrs.* v. *Pemsel* (2).

Accordingly, it seems to me, that, on a proper reading of the trusts in the present case, the trusts are entirely confined to charitable purposes and are perfectly valid.

Declaration accordingly.

Solicitors: *Palmer, Bull & Mant* (for the plaintiff); *Waterhouse & Co.* (for the first defendant); *Wegg-Prosser & Co.* (for the second defendant); *Treasury Solicitor.*

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

Re BARBOUR'S LIFE ASSURANCE POLICIES. WESTMINSTER BANK, LTD. *v.* INLAND REVENUE COMMISSIONERS.

[CHANCERY DIVISION (Harman, J.), June 21, 22, 23, July 14, 1955.]

Estate Duty—Passing—Property deemed to pass—Moneys received under policy of assurance—Settlement inter vivos of policies on life of settlor—Income to be accumulated for specified period—Life interest in trust fund—Proceeds of policies falling in on settlor's death—Whether life interest in possession if no income during life of settlor.

By a settlement dated Mar. 5, 1929, a settlor, who at all times was domiciled in Northern Ireland, assigned two fully paid policies of assurance on his life and gave the sum of £12,000 to his trustee on the trusts therein contained. The sums assured by the first policy were two four per cent. Victory Bonds and the policy provided that if either of the bonds was drawn during the currency of the policy a certain sum in cash should be paid to the assured or his assigns forthwith. The second policy was a single premium policy assuring payment of a sum of money on the death of the settlor. Clause 2 of the settlement provided that the trustee should pay all duties leviable on the death of the settlor out of the proceeds of the policies, and should invest the residue thereof and should forthwith invest the £12,000 " which moneys and the property for the time being representing the same and the accumulations of the income thereof hereinafter directed to be made are hereinafter called ' the trust fund ' ". By cl. 3 the trustee was directed to accumulate the income of the trust fund until June 30, 1942, and thereafter to pay the income to the settlor's son John for life with remainder to his sons, and on failure of those trusts to pay the said income to the settlor's nephew James for life. The settlement contained no power to surrender the policies.

The settlor's son John died on July 3, 1937, without issue and from and after June 30, 1942, the income of the trust fund was paid to James. During the life of the settlor one of the Victory Bonds was drawn, a sum was paid to the trustee in accordance with the policy and was invested and the income was paid to James. The settlor died on Oct. 3, 1951, James surviving him. At the settlor's death both assurance policies were locally situate in England, and accordingly were property in respect of which a claim to English estate duty might arise. On a summons to determine whether on the settlor's death, estate duty became payable under s. 2 (1) (d) of the Finance Act, 1894, in respect of James's life interest in the policy moneys, the Crown contended that since the proceeds of the policies, which were defined by cl. 2 as forming part of the trust fund, did not fall in until the settlor's death, James's life interest did not fall into possession until the settlor's death.

Held: on the construction of the settlement the life interest of James was a true life interest in possession prior to the death of the settlor because cl. 2 included in its definition of the trust fund not only the proceeds of the policies which fell in on the settlor's death but also, e.g., the sums payable on the drawing of the Victory Bond in the settlor's lifetime; and accordingly on the death of the settlor estate duty did not become payable in respect of James' life interest.

Per CURIAM: a life interest can be an interest in possession notwithstanding that the subject-matter does not or cannot be made to produce income for the tenant for life (see p. 45, letter D, post).

Lord Advocate v. *Hamilton's Trustees* (1942 S.C. 426) considered; *Re Harrison* ([1918] 2 Ch. 374) and *A.-G.* v. *Dobree* ([1900] 1 Q.B. 442) distinguished.

[**Editorial Note.** Although the present case turned on the construction of the settlement there is indication in the judgment of HARMAN, J., that the decision in *D'Avigdor-Goldsmid* v. *Inland Revenue Comrs.* ([1953] 1 All E.R. 403), viz., that where the proceeds of a policy of life assurance have been for over five years before the death of the life assured the absolute property of another person no right to estate duty arises on its maturing at the death of the life assured, applies where the beneficial interests in the proceeds of the policy are interests under a settlement of the policy. The Crown did not argue that a right to estate duty arose if the interest of the life tenant (James) was an interest in possession.

As to estate duty on policy moneys and interests arising on death, see 13 HALSBURY'S LAWS (2nd Edn.) 241, 242, paras. 232, 233.]

Cases referred to:

(1) *D'Avigdor-Goldsmid* v. *Inland Revenue Comrs.*, [1953] 1 All E.R. 403; [1953] A.C. 407; 3rd Digest Supp.

(2) *Adamson* v. *A.-G.*, [1933] A.C. 257; 102 L.J.K.B. 129; sub nom. *A.-G.* v. *Adamson*, 148 L.T. 365; Digest Supp.

(3) *Rowlls* v. *Bebb*, [1900] 2 Ch. 107; 69 L.J.Ch. 562; 82 L.T. 633; 43 Digest 618, *589*.

(4) *Re Harrison*, [1918] 2 Ch. 374; 88 L.J.Ch. 133; 120 L.T. 187; 21 Digest 15, *71*.

(5) *A.-G.* v. *Dobree*, [1900] 1 Q.B. 442; 69 L.J.Q.B. 223; 81 L.T. 607; 64 J.P. 24; 21 Digest 17, *97*.

(6) *Westminster Bank, Ltd.* v. *A.-G.*, [1939] 2 All E.R. 72; [1939] Ch. 610; 108 L.J.Ch. 294; 160 L.T. 432; Digest Supp.

(7) *Inland Revenue* v. *Scott's Trustees*, 1918 S.C. 720; 55 S.L.R. 654; [1918] S.L.T. 97; 21 Digest 15, *73i*.

(8) *Lord Advocate* v. *Hamilton's Trustees*, 1942 S.C. 426; 2nd Digest Supp.

Adjourned Summons.

Westminster Bank, Ltd., the trustee of a settlement of two several policies of assurance on the life of the settlor dated Mar. 5, 1929, and made between the settlor Sir John Milne Barbour of the one part and the bank of the other part, sought by originating summons the determination of the question whether, having regard to the provisions of the said settlement and in the events that had happened, estate duty became payable under s. 2 (1) (d) of the Finance Act, 1894, or otherwise on the death of the said settlor in respect of the life interest of James Barbour in the money or property assured by the above-mentioned policies.

The facts appear in the judgment.

Geoffrey Cross, Q.C., and *J. A. Wolfe* for the taxpayer.

J. Pennycuick, Q.C., and *E. B. Stamp* for the Crown.

Cur. adv. vult.

July 14. **HARMAN, J.**, read the following judgment: This originating summons issued under R.S.C., Ord. 54A, r. 1A, and in pursuance of s. 3 of the Administration of Justice (Miscellaneous Provisions) Act, 1933, raises the question whether estate duty is payable under s. 2 (1) (d) of the Finance Act, 1894, on the death of a settlor in respect of the interest of a beneficiary under the settlement in two policies of assurance on the settlor's life.

The settlor, Sir John Milne Barbour, died on Oct. 3, 1951, domiciled in Northern Ireland, but the two policies in question being under seal and physically situate in England at his death were locally situate in England, and estate duty, if payable on them, is payable in England and not only in Northern Ireland as is the case with the rest of the settled property. This was a voluntary settlement made on Mar. 5, 1929, between the settlor and the plaintiff bank, whereby he assigned to it, among other property, these two policies on his life, which were at the date of the settlement already fully paid policies. One of them bore date July 16, 1919, and involved the payment of annual premiums up to 1928. The sums assured by this policy were two four per cent. Victory Bonds each for £5,000, and the policy provided that if either of the bonds assured were drawn during the currency of the policy a certain sum in cash should be paid to the assured or his assigns forthwith with a reduction of the sum payable on maturity. The other policy was dated Sept. 12, 1928, and involved the payment of a single premium, the sum assured being £7,000.

By the settlement the settlor assigned to the bank these (and other) policies and handed over a sum of £12,000 cash on the trusts then declared. Clause 2 begins in these terms:

> " The bank shall out of the proceeds of the said respective policies pay all death duties if any leviable at the death of the settlor in respect thereof and all costs and expenses incurred by the bank in connection with the collection and receipt of the proceeds of the said policies and shall invest the residue of the said moneys and shall forthwith invest the said sum of £12,000 (which moneys and the property for the time being representing the same and the accumulations of the income thereof hereinafter directed to be made are hereinafter called ' the trust fund ') in the name of the bank "

in any of the investments therein mentioned. By cl. 3 the plaintiff was directed to accumulate the income of the trust fund until June 30, 1942. Clause 4 was in these terms:

> " From and after the said June 30, 1942, the bank shall pay the income of the trust fund and of the accumulations thereof and of the investments for the time being representing the same (the said policies and the proceeds thereof however not to be treated as income bearing until the amounts payable in respect thereof shall have been received and invested) to the settlor's son John Milne Barbour during his life."

By cll. 5, 6 and 7, the plaintiff was directed to hold the capital and future income of the trust fund and the accumulations after the death of the settlor's son John in trust for his sons. Clause 8 provided that on failure of those trusts the settlor's nephew James Barbour and his issue were to take corresponding interests, and cl. 9 provided that on failure of that trust there should be similar trusts in favour of a nephew John Doherty Barbour and his issue, and there were divers remainders over.

The settlor's son died on July 3, 1937, without issue before the end of the period of accumulation. On and since June 30, 1942, when the accumulation period ended, the income of the trust fund has been paid to the settlor's nephew James. He has at present no issue. John Doherty Barbour is living and has issue two sons one of whom has attained the age of twenty-one. On the death of the settlor on Oct. 3, 1951, Victory Bonds and cash of the value of £19,753 2s. were received by the plaintiff in satisfaction of these two policies, and it is on the life interest of James Barbour in this sum that the Crown claims duty. I was informed in the course of the hearing, though it does not appear in evidence, that one of the Victory Bonds included in the first policy was in fact drawn in the lifetime of the settlor and a sum was paid to the plaintiff in accordance with the terms of the policy and invested and the income paid to James Barbour.

The right of the Crown to duty under s. 2 (1) (d) of the Finance Act, 1894, in respect of life policies has recently been the subject of a decision in the House of Lords in *D'Avigdor-Goldsmid* v. *Inland Revenue Comrs.* (1) ([1953] 1 All E.R. 403). That decision considerably altered views previously held and has finally decided that no claim arises under s. 2 (1) (d) on the maturity of a policy on the life of A where the policy has been the absolute property of B for over five years. A perusal of the correspondence before the issue of the present proceedings led the plaintiff to conclude that the Crown distinguished the present case from that decision on the ground that the policy here was not the absolute property of James but was part of a settled fund in which he had a life interest. Thus the argument appeared to run: duty became exigible because James having survived the settlor became for the first time indefeasibly entitled to a life interest in the policy moneys, his interest having during the life of the settlor been liable to be defeated by his death. This seems to be an argument based on the decision of the House of Lords in *Adamson* v. *A.-G.* (2) ([1933] A.C. 257) in which four members of the House came to the conclusion that an interest in a fund which became indefeasible on the death of the settlor in his children was liable to duty under s. 2 (1) (d) although the same children had like interests in the fund before the death subject to an overriding power of appointment and the necessity of surviving the settlor. LORD WARRINGTON OF CLYFFE said this ([1933] A.C. at p. 277) after deciding that property did not pass by s. 1 of the Act of 1894:

> "It is still necessary to consider the alternative claim of the Crown under s. 2 (1) (d). This section, unlike s. 1, which deals only with property as a whole, brings within the ambit of the charge individual interests provided by the deceased to the extent of the beneficial interest accruing or arising on the death of the deceased. In the present case the interest of each child was unquestionably provided by the deceased, and is therefore to be deemed to be included in the expression 'property passing on the death of the deceased,' but only to the extent of the beneficial interest accruing or arising on the death of the deceased. Before his death each child had a beneficial interest, but one that might be destroyed either by an exercise of the power of appointment or by the death of the child in the lifetime of the deceased; on his death without exercising his power the beneficial interest of each child became absolute and indefeasible. The value of this beneficial interest, of course, exceeded the value if any of that interest to which the child was entitled previously to the death of the deceased, and to the extent of that excess such beneficial interest is, in my opinion, to be deemed to be property passing on the death and would under s. 1 be charged with duty accordingly."

LORD RUSSELL OF KILLOWEN in a dissenting opinion said this (ibid., at p. 283):

> "In my view the beneficial interest in the whole fund passed, on the execution of the settlement, from the settlor as to two-fifths to his son John and as to three-fifths to his three other children then alive, subject in the case of each beneficiary to the possibility of his or her interest being taken away or otherwise affected by the exercise of the special powers reserved to the settlor, or by the occurrence of certain events in his lifetime. His death merely abolished this possibility and made the beneficial interests indefeasible. Or the matter may be put in another way, thus: the particular interest in the fund which was vested in each child immediately after the settlor's death was the same as it was immediately before the death, except that by the death it became indefeasible."

Accordingly, counsel for the plaintiff opening the case was at pains to argue that the fact that the interest in the policy was not an absolute interest as in *Goldsmid's* case (1) but a settled interest, made no difference. I confess that I was impressed by this argument and waited to hear what answer the Crown would make to it, but counsel for the Crown when he addressed me took his stand on a narrower ground. He did not contend that if the interest of James Barbour in these policies was a life interest in possession during the lifetime of the settlor any claim for duty arose, but he argued that on the true construction of the settlement James had no such interest. He rested his main argument on the definition in cl. 2 which I have read under which the trust fund connotes the proceeds of the policies. These he argued did not fall in till the death of the settlor and therefore the interest of James only arose at that date. In

A my judgment this is not the true construction of the document. The interest of James in my judgment was a true life interest in possession and the definition clause does not point only to proceeds falling in on the settlor's death, as is shown indeed by the fact that the sum payable on the drawing of a Victory Bond admittedly became part of the trust fund on its payment in the settlor's lifetime and was invested for the benefit of the life tenant. The Crown conceded, B as I understood the argument, that if the income beneficiary under a settlement which includes a policy has the right to call on the trustees to realise the policy then he has an interest in possession, and that the same result might follow if the trustees having a discretion to surrender the policy before maturity the life tenant had an interest in the surrender moneys, but it was said that if the trustees had a right to surrender but either expressly or on the true construction C of the instrument there would be a duty to accumulate the income of the surrender moneys till the settlor's death then there would be no interest in possession. It was pointed out that here there was no power to surrender the policy, and, indeed, it was provided by cl. 2 that on the maturing of the policy the life tenant should have no right analogous to the kind of claim which succeeded in *Rowlls* v. *Bebb* (3) ([1900] 2 Ch. 107). It was further argued that D if in the present case the insurance society had been put into liquidation, any dividend received would have been directed by the court to have been accumulated till the maturity date. I do not accept this argument, nor in my judgment is it right to suggest that an interest cannot be an interest in possession where the subject-matter does not or cannot be made to produce income for the tenant for life. It is no doubt true that possession connotes the right to receive the E rents and profits, if any there be, but in my judgment it does not follow from the fact that there are or can be no rents or profits that no one is in possession.

This would seem to conclude the matter unless there is authority binding on me to hold to the contrary. In *Re Harrison* (4) ([1918] 2 Ch. 374) it was decided that where the tenant for life of a settled legacy died within a year of the testator and therefore never became entitled to any interest, the legacy F did not pass on his death. That was an interest in possession in the sense that it was not reversionary, but SARGANT, J., decided that it was saved from duty under s. 5 (3) of the Act of 1894 because it failed before it became an interest in possession. The reason, however, was that the interest in fact fell into the residuary estate by reason of the law that interest only runs after one year from the death, so that, in effect, other persons and not the legatee were entitled G to the income and were in possession of it. This seems to me to be not at all analogous to the present case. I was pressed with the authority of *A.-G.* v. *Dobree* (5) ([1900] 1 Q.B. 442) which was not expressly overruled in *Goldsmid's* case (1), as appears from the speech of LORD MORTON OF HENRYTON where he said this ([1953] 1 All E.R. at p. 411):

> " *Dobree's* case (5) differs from the present case, for neither the wife nor H her legal personal representatives could take anything unless she survived her husband, whereas in the present case it was certain, from 1934 onwards, that the appellant or his legal personal representatives would take the whole of the policy moneys, whether or not he survived Sir Osmond. It may be necessary to decide hereafter whether this difference was enough to justify the decision in *Dobree's* case (5). For the moment I would only I observe that both DARLING, J., and CHANNELL, J., appear to have thought that the ' other interest ' provided by the deceased was the sum paid by the assurance company on the death of the deceased and not the contractual right conferred by the policy. With this view I cannot agree."

The decision in *Dobree's* case (5) was, of course, wrong so far as it decided that duty was payable on the principal value and not on the life interest of the wife, but it was argued that for the rest it remained an authority binding on me to hold that the life interest in the policy did accrue or arise on its maturity. It is to be observed that Mr. Haldane's argument in *Dobree's* case (5) did resemble the argument of the taxpayer here, because he said ([1900] 1 Q.B. 447):

> "It is also submitted that the case does not fall within sub-s. (1) (d). No beneficial interest passed from the deceased to the wife or her trustees on his death; it arose or accrued on the making of the settlement,"

and this argument was not accepted, DARLING, J., relying largely on s. 15 of the Act. In that case, however, the settlor kept up the policy during his life and there was no settlement of anything but the moneys to be received under the policy on his death, and all that the court was looking at was these moneys in which no interest in the wife arose or accrued except on the husband's death. Thus, the court did not consider as the subject-matter of the settlement the contract of assurance, but only its fruits, and it is this way of looking at such a transaction which was declared to be wrong in *Goldsmid's* case (1). I cannot see that *Dobree's* case (5) can stand binding in the circumstances. *Westminster Bank, Ltd.* v. *A.-G.* (6) ([1939] 2 All E.R. 72) does not assist because the trustee there admitted that it was accountable under s. 2 (1) (d), taking the view of the law prevalent before *Goldsmid's* case (1), and the relevant question was whether duty was payable under s. 1 or s. 2 (1) (d).

I was also pressed with *Inland Revenue* v. *Scott's Trustees* (7) (1918 S.C. 720). There again it was not disputed that s. 2 (1) (d) would apply to the policy moneys—see LORD CULLEN's opinion (ibid., at p. 722). In that case the trustees had a discretion to surrender the policy which they did not exercise, but it was nevertheless conceded that s. 2 (1) (d) would have applied but for other circumstances. This again seems inconsistent with the decision in *Goldsmid's* case (1). The case was noticed by LORD MORTON in his speech in that case, where he expressed preference for the doubts expressed by LORD SANDS of the correctness of the view. He says this ([1953] 1 All E.R. at p. 413):

> "In *Inland Revenue* v. *Scott's Trustees* (7) the Inner House had to consider the terms of a settlement of policies by a father on somewhat unusual trusts for the benefit of his daughters and their issue. The facts differed widely from the facts of the present case, and need not be set out at length, but I share the doubts expressed by LORD SANDS as follows (1918 S.C. at p. 726): 'These policies belonged, after the creation of the trust, to certain trustees for behoof of certain beneficiaries. Now, no doubt when a man dies who has insured his own life the policy upon his life is part of his estate, and in respect of that part of his estate a beneficial interest accrues to his executors. But I confess I entertain some doubt as to whether, where one already holds as one's own property a policy of insurance on the life of another party, any beneficial interest that was not in the holder before accrues to him at the time of the death of the person whose life is insured. The policy which he had in bonis simply matures'."

On the taxpayer's side there was cited *Lord Advocate* v. *Hamilton's Trustees* (8) (1942 S.C. 426). As to that case, LORD MORTON observes in *Goldsmid's* case (1) ([1953] 1 All E.R. at p. 414):

> "Lastly, I come to *Lord Advocate* v. *Hamilton's Trustees* (8). In that case the deceased, who died in 1936, had in 1912 settled certain policies on his life on trusts for the benefit of his sons and daughter. The sons were to become absolutely entitled on attaining the age of twenty-five and the daughter's share was settled on her for life with remainders over. The trust deed stated that these provisions in favour of the children 'shall vest in them respectively at the date hereof.' The policies became fully paid in 1914 and 1915, and the premiums payable in the meantime were borrowed by the trustees from the deceased. On the deceased's death, duty was claimed under s. 2 (1) (d) on the amount of the policy moneys less the amount borrowed from the deceased by the trustees in order to pay the

premiums, and the claim was rejected by the Inner House, affirming the Lord Ordinary (Lord Keith) on the grounds that (i) 'in the circumstances the property sought to be charged had not been provided by the deceased,' and that (ii) 'there was no beneficial interest accruing or arising on the death of the deceased, in respect that the whole interest in the policies had passed to the beneficiaries twenty-four years before the truster's death, their interest having fully vested.' . . . Lord Keith used language which applies very aptly to the present case. He said (1942 S.C. at p. 434): 'In the present case, it is undoubted that an interest vested in the beneficiaries under the deed of trust at the date thereof, and the death of the truster made no difference to that interest. If the sons had predeceased their father, their shares of the proceeds of the policies would have been paid over to their executors. I have difficulty in seeing how a beneficial interest accrued or arose to them, by survivorship or otherwise, on the death of the deceased. What accrued to them or to the trustees was a present right to demand payment from the insurance company in respect of a previously existing beneficial interest.' I agree with the reasoning which I have just quoted."

So far as the case concerns the interests that the three sons took in the settled policies, it was clearly approved in *Goldsmid's* case (1), but there was also a daughter who took not an absolute but a settled interest and it was not suggested that this made any difference. This, therefore, is in this respect a decision covering the present case, but it was contended that the court was only looking at the absolute interest of the sons and not at the settled interest of the daughter, and that her case was included per incuriam. The report does lend some colour to this suggestion. However that may be, the result of the case was that which the taxpayer here claims to be the right one and at the least it is not a decision against that view.

The cases on this subject have been so lately fully reviewed in the House of Lords that it would not be useful for me to discuss them further. I am of opinion that on the concession* made by the Crown I must decide this case in favour of the taxpayer. I should perhaps add that counsel for the taxpayer desired to reserve the right to argue in a higher court, if necessary, that policies of insurance which are dealt with expressly by s. 2 (1) (c) of the Act of 1894 do not properly come within the mischief of s. 2 (1) (d). That point is admittedly not open to this court and I say no more about it.

Declaration accordingly.

Solicitors: *Parker, Garrett & Co.* (for the taxpayer); *Solicitor of Inland Revenue.*

[*Reported by* Philippa Price, *Barrister-at-Law.*]

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*See p. 44, letter I, and p. 45, letter B, ante.

EDWARDS (INSPECTOR OF TAXES) *v.* BAIRSTOW AND ANOTHER.

[HOUSE OF LORDS (Viscount Simonds, Lord Radcliffe, Lord Tucker and Lord Somervell of Harrow), June 20, 21, 22, July 25, 1955.]

Income Tax—Case Stated—Findings of fact by commissioners—Power of appellate court to review.

The respondents were assessed to income tax under Case 1 of Sch. D to the Income Tax Act, 1918, for the years of assessment 1946-47 and 1947-48 in respect of a transaction engaged in by them in purchasing and later selling certain spinning plant, on which transaction they made a substantial profit. Neither of the respondents had had any transactions in machinery or any other commodity before. On appeal, the Commissioners for the General Purposes of the Income Tax determined that the " transaction " in question was not an adventure in the nature of trade and discharged the assessments. On appeal by the Crown, the High Court and the Court of Appeal held that the determination was purely a question of fact, and that it was not open to either court to interfere with it.

Held: (i) although an appellate court may allow an appeal from the commissioners' determination only if it is erroneous in law, yet, where a Case Stated shows on the face of it no misconception of law, if it should appear to the appellate court that no person, if properly instructed in the law and acting judicially, could have reached that particular determination, the court may proceed on the assumption that a misconception of law has been responsible for the determination.

(ii) the finding that the transaction was not an adventure in the nature of trade must be set aside because the commissioners had acted either without evidence or on a view of the facts that could not reasonably be entertained, and the assessments must be confirmed.

Cooper v. *Stubbs* ([1925] 2 K.B. 753); *Leeming* v. *Jones* ([1930] 1 K.B. 279); *Jones* v. *Leeming* ([1930] A.C. 415); *Inland Revenue Comrs.* v. *Lysaght* ([1928] A.C. 234) considered.

Per VISCOUNT SIMONDS: (a) if and so far as there is any divergence between the English and Scottish approach [to the question to which (i) above relates] it is the English approach which is supported by the previous authority of this House (see p. 55, letter A, post).

(b) what are the characteristics of an adventure in the nature of trade is a question of law, but, assuming that the tribunal is correctly directed on the law, its inference from the facts whether a particular transaction is, or is not, an adventure in the nature of trade, is an inference of fact (see p. 54, letter E, post).

Appeal allowed.

[As to review by an appellate court of a decision by general or special commissioners by way of Case Stated, see 17 HALSBURY'S LAWS (2nd Edn.) 365, 366, paras. 748, 749.]

Cases referred to:

(1) *Leeming* v. *Jones*, [1930] 1 K.B. 279; 99 L.J.K.B. 17; 141 L.T. 472; *affd.* H.L. sub nom. *Jones* v. *Leeming*, [1930] A.C. 415; 99 L.J.K.B. 318; 143 L.T. 50; 15 Tax Cas. 333; Digest Supp.

(2) *Cooper* v. *Stubbs*, [1925] 2 K.B. 753; 94 L.J.K.B. 903; 133 L.T. 582; 28 Digest 22, *113*.

(3) *Inland Revenue* v. *Reinhold*, 1953 S.C. 49; 34 Tax Cas. 389; 3rd Digest Supp.

(4) *Inland Revenue Comrs.* v. *Lysaght*, [1928] A.C. 234; 97 L.J.K.B. 385; 139 L.T. 6; 13 Tax Cas. 511; Digest Supp.

(5) *Inland Revenue* v. *Fraser*, 1942 S.C. 493; 24 Tax Cas. 498; 2nd Digest Supp.

(6) *Currie* v. *Inland Revenue Comrs.*, [1921] 2 K.B. 332; 90 L.J.K.B. 499; 125 L.T. 33; 12 Tax Cas. 245; Digest Supp.

(7) *Inland Revenue* v. *Livingston*, 1927 S.C. 251; 11 Tax Cas. 538; Digest Supp.

(8) *Inland Revenue* v. *Toll Property Co., Ltd.*, (1952), 34 Tax Cas. 13; 3rd Digest Supp.

Appeal.

Appeal by the Crown from an order of the Court of Appeal dated May 10, 1954, affirming an order of WYNN-PARRY, J., dated Feb. 17, 1954, affirming on a Case Stated a decision of the Commissioners for the General Purposes of the Income Tax for the Division of West Morley in the county of York, that assessments to income tax in the sum of £10,326 for the year of assessment 1946-47 and in the sum of £5,000 for the year of assessment 1947-48 should be discharged. The facts appear in the opinion of VISCOUNT SIMONDS.

The Attorney-General (*Sir Reginald Manningham-Buller, Q.C.*), *Cyril King, Q.C.*, and *Sir Reginald Hills* for the Crown.

John Senter, Q.C., and *R. A. Watson* for the respondents.

The House took time for consideration.

July 25. The following opinions were read.

VISCOUNT SIMONDS: My Lords, this appeal relates to certain assessments for income tax made on the respondents Harold Bairstow and Fred Harrison for the years of assessment ending respectively Apr. 5, 1947, and Apr. 5, 1948, in respect of the profits made by them from sales of machinery. The assessments had originally been made on the respondent Harold Bairstow only, but it became common ground that the operations out of which the profits arose were the joint venture of both respondents and the case has throughout been argued on the footing of the assessments being made in their joint names. Against these assessments, which were in the sum of £10,326 for the first year and £5,000 for the second year, appeals were taken to the Commissioners for the General Purposes of the Income Tax for the Division of West Morley in the county of York. They discharged the assessments but, the Crown having expressed its dissatisfaction with their decision as being erroneous in point of law, stated a Case for the opinion of the High Court.

My Lords, it would not be right for me, in view of the conclusion which I have reached in this appeal, to try to abbreviate the statement of facts on which the commissioners made their determination, and I therefore set out verbatim para. 3 of the Case which is in these terms:

> "3. The following facts were admitted or proved:—(1) Mr. Harrison became aware in 1946 that a complete spinning plant was for sale at Messrs. Whitworths at Luddendenfoot and had reason to believe that the plant could be purchased for a reasonable figure. He communicated this information to Mr. Bairstow as he himself was not in a position to finance any purchase. Mr. Bairstow expressed himself to be interested but both he and Harrison agreed that they had no intention of holding the plant—what they desired was a quick purchase and re-sale. Mr. Bairstow therefore arranged for a valuation to be made by a professional valuer in order that he might be satisfied that the price asked by Whitworths was one on which he could make a quick profit. He also immediately and before purchasing the plant made inquiries as to whether he could arrange to sell the plant even before it had been purchased. Mr. Harrison was in touch with an Indian by name Wattal who was very anxious to purchase some of the plant, namely, the botany spinning section; for this he was prepared to pay

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£17,000 but both Harrison and Bairstow were quite decided that they had no intention of selling the plant piece-meal they wanted to sell it as a complete unit. Then Mr. Bairstow began negotiations with the International Export Co. They said they were prepared to buy the whole of the plant. On Nov. 14 the International Export Co. wrote to Mr. Bairstow saying that they were prepared to buy the plant which was on the fourth floor which was the botany spinning plant for £15,000 this, of course, being £2,000 less than the price offered for the same section of the plant by the Indian Wattal. The reason why the International Export Co. were prepared to pay £15,000 immediately for that particular section of the plant was because although they were willing to purchase the whole of the plant it was their intention to export it and whilst they were confident that an import licence into China would be forthcoming for the asking in respect of the botany spinning section they were not willing to complete the purchase of the remainder of the plant until the import licences for such remainder were in fact forthcoming. On Nov. 20 Mr. Bairstow on behalf of himself and Harrison having negotiated the purchase of the spinning plant together with two small items of warping plant completed the purchase by the payment to Whitworths of £12,000. On Nov. 27, one week later, the International Export Co. paid Mr. Bairstow the sum of £15,000 for the botany spinning plant. Subsequently Messrs. Bairstow and Harrison were informed by the International Export Co. that unfortunately the import licences relating to the remainder of the plant could not be obtained and therefore it was regretted that they could not purchase the remainder of the plant. Thus Mr. Bairstow and Mr. Harrison found themselves with the remainder of the plant on their hands (which they had endeavoured to avoid) and this left them no alternative but to sell that remainder in whatever market they could.

" (2) The rest of the plant was sold in two other principal and two smaller lots by February, 1948, though owing to difficulties the last plant was not removed until March, 1949. The two smaller lots consisted of the two items of warping plant.

" (3) Mr. Bairstow was a director of a company manufacturing leather. Mr. Harrison was an employee of a spinning firm. Neither of them had had any transactions in machinery or any other commodity before.

" (4) The profit shown by the accounts (which form part of this Case and are annexed hereto, marked ' A ') was £18,225 11s. 3d.

" (5) The respondents' sole purpose in the transaction was to sell the plant at a profit.

" (6) With regard to the manner in which the sales were effected:—(a) Some commissions were paid for assistance received in effecting sales. (b) There was no advertising. Customers principally learnt of the existence of the plant for sale when they came to inspect the premises which were being advertised by the original owners as becoming vacant. (c) About four hundred spindles out of the 220,000 which the plant represented were replaced because they were missing or damaged. (d) Insurance risks were covered by the respondents while the plant was in their hands. (e) Some costs for renovation were incurred because of damage by floods during their ownership. (f) When it was seen that the transaction would not be over in a matter of weeks, wages were paid to Mr. Bairstow's secretary who kept books and did other office jobs in connection with these transactions. (g) The respondents incurred expense in travelling and entertainment in meeting both the actual persons who would eventually buy the plant and others who did not in fact become customers. A number of advertisements asking for plant, which appeared in trade papers, were answered by the respondents in an attempt to sell the plant remaining after the first main sale. (h) Owing to the delay in removing the plant, rent was paid to the

EXHIBIT "A" Case Stated

MR. HAROLD BAIRSTOW AND MR. FRED HARRISON.

JOINT VENTURE—A SPINNING PLANT EX WHITWORTH MILL, LUDDENDENFOOT.

PERIOD FROM NOV. 20, 1946, TO MAR. 31, 1949.

	£	s.	d.	£	s.	d.
To Purchase of plant				12,000	0	0
,, Repairs and replacements ..				110	18	10
,, Commissions:						
Cornelius Lane of Bradford ..	4,573	4	4			
Mr. and Mrs. Horace Shaw, Highthorn, Belmont Rise, Baildon	751	2	0			
W. Murgatroyd—address not known, but our clients believe he has gone abroad	250	0	0			
Cash commission to a workman	10	0	0			
				5,584	6	4
,, Insurance..				71	15	6
,, Christmas boxes				32	0	0
,, Flood damage costs:						
Wages	300	5	11			
Renovations	42	16	9			
				343	2	8
,, Wages				117	5	0
,, Stationery				3	0	0
,, Travelling and entertainment ..				366	13	11
,, Rent				130	0	0
,, Reserve for cost of dilapidations, legal and accountancy charges				785	0	0
,, Profit on the transaction ..				18,225	11	3
				£37,769	13	6

Profit divisible:

	£	s.	d.
Harold Bairstow	£9,112	15	7
Fred Harrison	£9,112	15	7

		£	s.	d.	£	s.	d.
By Sale of plant:							
1946—Nov. 27	International Export Co. ..	15,439	13	6			
1947—Jan. 29	H. E. Crabtree & Co.	80	0	0			
June 26	Bailey, Verity and Raynor ..	12,000	0	0			
Oct. 22	Stalybridge Vigoyne Spinning Co.	250	0	0			
1948—Feb. 20	Joseph Cooper Junr.	10,000	0	0			
					37,769	13	6
					£37,769	13	6

> landlords for the last six months during which the plant was housed, and it is thought that a further amount will have to be paid to put the premises in order."

Nor can I omit a reference to some, at least, of the contentions which were urged before the commissioners on the one side or the other. The respondents contended that this was a transaction the profits of which could not be liable to tax under Case 1 of Sch. D, because, as they said, in *Jones* v. *Leeming* (1) ([1930] A.C. 415) (to which I shall refer later) four conditions had been approved by the court, one of which must be present to establish liability, (a) the existence of an organisation, or (b) activities which led to the maturing of the assets to be sold, or (c) the existence of special skill, opportunities, in connection with the article dealt with, or (d) the fact that the nature of the asset itself should lend itself to commercial transactions. And they contended that none of these conditions was present in the transaction in question. They distinguished certain cases on which the Crown relied, and urged that the profit was a capital one and that there was no concern in the nature of trade that could be taxed.

On behalf of the Crown, it was contended that the buying and selling of the plant constituted a trade or adventure in the nature of a trade and that the profits and gains arising therefrom were assessable accordingly.

The commissioners expressed their original determination in these terms:

> "We, the commissioners, having considered the facts and evidence submitted to us, are of opinion that this was an isolated case and not taxable, and discharge the assessments."

This, my Lords, was clearly an unsatisfactory determination, for it appeared to suggest that the fact that the transaction was an isolated one (whatever that may mean) was by itself conclusive, and, when the matter came before UPJOHN, J., on the Case Stated, that learned judge took a course which he was entitled to take, and remitted the matter to the general commissioners with the intimation that they were to consider the question whether, the transaction being an isolated transaction, there was, nevertheless, "an adventure in the nature of trade" which was assessable to tax under Case 1 of Sch. D, and he further directed they should be assisted in their finding by legal argument.

I pause in the narrative to remind your Lordships that tax under Sch. D is charged in respect of (inter alia) profits arising "from any trade, profession, employment, or vocation" and that by definition "trade" includes "every trade, manufacture, adventure or concern in the nature of trade". It is these words which are echoed in the order of UPJOHN, J.

The commissioners accordingly met again and, having heard legal argument and further considered the matter, signed a Supplemental Case in which they stated their further decision as follows:

> "We find that the transaction, the subject-matter of this Case, was not an adventure in the nature of trade."

The case thus supplemented came once more before the High Court, this time before WYNN-PARRY, J. That learned judge took the view that he was bound by authority to hold that the question before the court was purely a question of fact, and that the finding of the commissioners could not be upset unless it was so perverse that, as a matter of law, it could not stand, and, holding that it was not possible for him to take that view of their decision, dismissed the Crown's appeal with costs.

From the decision of WYNN-PARRY, J., the Crown appealed to the Court of Appeal, which unanimously dismissed the appeal for the reasons given by the learned judge. In the course of his judgment, SIR RAYMOND EVERSHED, M.R., made this observation which has given rise to much discussion before your Lordships:

> "Although the Scottish courts (as, I think, is clear from a citation from a

> A judgment of the latest of them in the judgment of UPJOHN, J.) may have taken a road which diverges from that followed by the English courts, the two jurisdictions, as it seems to me, can only now be got together again by the House of Lords . . ."

And it is clear that the revenue authorities were anxious to bring this case to your Lordships' House largely because it was apprehended that the courts of England B and Scotland had to some degree diverged in their treatment of this subject. That there is some ground for this apprehension will be clear from a comparison of (for example) the observations of ATKIN, L.J., and WARRINGTON, L.J., in *Cooper* v. *Stubbs* (2) ([1925] 2 K.B. 753), with those of LORD RUSSELL in *Inland Revenue* v. *Reinhold* (3) (1953 S.C. at p. 56):

> C "In the Scottish courts, however, it is clear that such a question [i.e., whether a transaction is an 'adventure in the nature of trade'] is regarded as a question of law, or at least of mixed fact and law."

It is not to be doubted that, particularly in a matter of taxation, any possible conflict, even if it be only an apparent conflict, should be resolved, and that is the task which now falls to your Lordships.

D Before, however, examining the authorities in any detail, I would make it clear that, in my opinion, whatever test is adopted, that is whether the finding that the transaction was not an adventure in the nature of trade is to be regarded as a pure finding of fact, or as the determination of a question of law, or of mixed law and fact, the same result is reached in this case. The determination cannot stand: this appeal must be allowed and the assessments must be confirmed. E For it is universally conceded that, though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarised by saying that the court should take that course if it appears that the commissioners have acted without any evidence, or on a view of the facts which could not reasonably be entertained. It is for this reason that I thought it right to set out the whole of the facts as they were found by the F commissioners in this case. For, having set them out and having read and re-read them with every desire to support the determination if it can reasonably be supported, I find myself quite unable to do so. The primary facts as they are sometimes called do not, in my opinion, justify the inference or conclusion which the commissioners have drawn; not only do they not justify it but they lead irresistibly to the opposite inference or conclusion. It is, therefore, a case in G which, whether it be said of the commissioners that their finding is perverse or that they have misdirected themselves in law by a misunderstanding of the statutory language or otherwise, their determination cannot stand. I venture to put the matter thus strongly because I do not find in the careful and indeed exhaustive statement of facts any item which points to the transaction not being an adventure in the nature of trade. Everything pointed the other way. When H I asked learned counsel on what, in his submission, the commissioners could have reasonably founded their decision, he could do no more than refer to the contentions which I have already mentioned. But these, on examination, seemed to help him not at all. For, if it is a characteristic of an adventure in the nature of trade that there should be an "organisation", I find that characteristic present here in the association of the two respondents and their subsequent I operations. I find "activities which led to the maturing of the asset to be sold" and the search for opportunities for its sale, and, conspicuously, I find that the nature of the asset lent itself to commercial transactions. And by that I mean what I think ROWLATT, J., meant in *Leeming* v. *Jones* (1) that a complete spinning plant is an asset which, unlike stocks or shares, by itself produces no income and, unlike a picture, does not serve to adorn the drawing room of its owner. It is a commercial asset and nothing else.

Your Lordships have examined a large number of cases in some of which the commissioners have found an adventure or concern in the nature of trade and in others have not. In each category will be found cases in which the court has upheld, and others in which the court has reversed, the commissioners' decision. I do not think it necessary to review them. It is inevitable that the boundary line should not be precisely drawn, but I think that there has been no case cited to us in which the question, however framed, whether the determination of the commissioners was maintainable, could be answered more clearly and decisively than in the present case.

I must turn now to the question of the apparent divergence between the English and Scottish courts, and venture to approach it by a brief consideration of the nature of a problem which has many aspects, e.g., the finding of a jury, the award of an arbitrator or the determination of a tribunal which is by statute made the judge of fact. And the present case affords an exact illustration of the considerations which I would place before your Lordships.

When the commissioners, having found the so-called primary facts which are stated in para. 3 of their Case, proceed to their finding in the Supplemental Case that

> " the transaction, the subject-matter of this Case, was not an adventure in the nature of trade ",

this is a finding which is, in truth, no more than an inference from the facts previously found. It could aptly be preceded by the word " therefore ". Is it then an inference of fact ? My Lords, it appears to me that the authority is overwhelming for saying that it is. Such cases as *Cooper* v. *Stubbs* (2), *Leeming* v. *Jones* (1), and *Inland Revenue Comrs.* v. *Lysaght* (4) ([1928] A.C. 234) (a case of residence), amongst many others are decisive. Yet it must be clear that to say that such an inference is one of fact postulates that the character of that which is inferred is a matter of fact. To say that a transaction is, or is not, an adventure in the nature of trade is to say that it has, or has not, the characteristics which distinguish such an adventure. But it is a question of law, not of fact, what are those characteristics, or, in other words, what the statutory language means. It follows that the inference can only be regarded as an inference of fact if it is assumed that the tribunal which makes it is rightly directed in law what the characteristics are and that, I think, is the assumption that is made. It is a question of law what is murder; a jury finding as a fact that murder has been committed has been directed on the law and acts under that direction. The commissioners making an inference of fact that a transaction is, or is not, an adventure in the nature of trade are assumed to be similarly directed, and their finding thus becomes an inference of fact.

If this is, as I hope it is, a just analysis of the position, the somewhat different approach to the question in some but by no means all of the Scottish cases is easily explicable. For as the Lord President (LORD NORMAND) put it in *Inland Revenue* v. *Fraser* (5) (1942 S.C. at p. 501):

> " . . . the commissioners here have either misunderstood the statutory language (which I think is the probable explanation of their error) or, having understood it, have made a perverse finding without evidence to support it."

He might equally well have said that the assumption that they were rightly directed in law was displaced by a finding which was, on that assumption, inexplicable. The misdirection may appear on the face of the determination. It did so here, I think, in the Case as originally stated. For, in effect, that determination was that the transaction was not an adventure in the nature of trade because it was an isolated transaction, which was clearly wrong in law. But sometimes, as in the Case as it now comes before the court, where all the admitted or found facts point one way and the inference is the other way, it can only be a matter of conjecture why that inference has been made. In such a case, it is easy either to say that the commissioners have made a wrong inference of fact because they

A have misdirected themselves in law or to take a short cut and say that they have made a wrong inference of law, and I venture to doubt whether there is more than this in the divergence between the two jurisdictions which has so much agitated the revenue authorities.

But, my Lords, having said so much, I think it right to add that, in my opinion, if and so far as there is any divergence between the English and Scottish B approach, it is the former which is supported by the previous authority of this House to which reference has been made. It is true that the decision of the commissioners is only impeachable if it is erroneous in law, and it may appear paradoxical to say that it may be erroneous in law where no question of law appears on the face of the Case Stated. But it cannot be, and has not been, questioned, that an inference, though regarded as a mere inference of fact, C yet can be challenged as a matter of law on the grounds that I have already mentioned, and this is, I think, the safest way to leave it. We were warned by learned counsel for the respondents that to allow this appeal would open the floodgates to appeals against the decisions of the general commissioners up and down the country. That would cause me no alarm, if decisions such as that we have spent some time in reviewing were common up and down the country. D But nothing, I think, will fall from your Lordships to suggest that there is not a large area in which the opinion of the commissioners is decisive. I would, myself, say nothing to detract from what was said by LORD STERNDALE, M.R., and SCRUTTON, L.J., in *Currie* v. *Inland Revenue Comrs.* (6) ([1921] 2 K.B. 332) on the kindred question whether the taxpayer was carrying on a profession, for I do not think that any more precise guidance can be given in the infinitely complex E and ever changing conditions of commercial adventures.

In the result, the appeal will be allowed, but effect will be given to the special arrangement as to costs which was a condition of leave to appeal being given.

LORD RADCLIFFE: My Lords, the Crown has sought to charge the respondents with income tax on the profit arising from the purchase and sales F of certain spinning plant acquired and sold during the period 1946-48. This profit, it is said, came from a " trade, manufacture, adventure or concern in the nature of trade ", and so is taxable under Case 1 of Sch. D to the Income Tax Act, 1918. The Commissioners for the General Purposes of the Income Tax for the Division of West Morley in the county of York, to whom the respondents appealed against the assessments, determined that the " transaction " which G was their subject-matter was not an adventure in the nature of trade, and discharged the assessments. In the High Court, the Crown's appeal was dismissed by the learned judge (WYNN-PARRY, J.), on the ground that the determination was " purely a question of fact " and that, accordingly, it was not open to the court to interfere with it. The matter was treated in exactly the same way in the Court of Appeal.

H I should not, myself, have thought that the principles which govern a case of this sort offered much scope for controversy at this date, whether they are sought for in English or in Scottish legal decisions. The only difficulty that I see arises from the fact that, in some cases, judges have not been at pains to distinguish in their judgments what are the conditions which make the particular question before them no more than a question of fact. My Lords, I think that I it is a question of law what meaning is to be given to the words of the Income Tax Act " trade, manufacture, adventure or concern in the nature of trade " and for that matter what constitutes " profits or gains " arising from it. Here we have a statutory phrase involving a charge of tax, and it is for the courts to interpret its meaning, having regard to the context in which it occurs, and to the principles which they bring to bear on the meaning of income. But, that being said, the law does not supply a precise definition of the word " trade "; much less does it prescribe a detailed or exhaustive set of rules for application to any particular set of circumstances. In effect, it lays down the limits within which it would be permissible to say that a " trade ", as interpreted by s. 237 of the Act, does, or does not, exist.

The field so marked out is a wide one, and there are many combinations of circumstances in which it could not be said to be wrong to arrive at a conclusion one way or the other. If the facts of any particular case are fairly capable of being so described, it seems to me that it necessarily follows that the determination of the commissioners, special or general, to the effect that a trade does or does not exist is not " erroneous in point of law "; and, if a determination cannot be shown to be erroneous in point of law, the statute does not admit of its being upset by the court on appeal. I except the occasions when the commissioners, although dealing with a set of facts which would warrant a decision either way, show by some reason they give or statement they make in the body of the Case that they have misunderstood the law in some relevant particular.

All these cases in which the facts warrant a determination either way can be described as questions of degree and, therefore, as questions of fact. In this, I am only saying what was said by Lord Sterndale, M.R., in *Currie* v. *Inland Revenue Comrs.* (6) ([1921] 2 K.B. at p. 336) and repeated by Atkin, L.J., in *Cooper* v. *Stubbs* (2) ([1925] 2 K.B. at p. 773). And, in Scotland, Lord Sands says the same thing in *Inland Revenue* v. *Livingston* (7) (1927 S.C. at p. 258). I agree with them. But, of course, in proper circumstances a case can be described as one of fact, or as purely one of fact (if the testimonial adds anything), without going through the procedure of explaining that that is so because it is one of degree and, the facts fairly admitting of the determination come to, there is no error which justifies the court's intervention. I see nothing more than this in anything that was said in this House in *Jones* v. *Leeming* (1). The only thing that I would deprecate is too much abbreviation in stating the question, as by asserting that it is simply a question of fact whether or not a trade exists. It is not simply a question of fact. The true clue to the understanding of the position lies, I think, in recalling that the court can allow an appeal from the commissioners' determination only if it is shown to be erroneous in point of law.

Nor do I think that there can be any real divergence of opinion as to what constitutes error of law for this purpose. Naturally, judges have not always expressed it in exactly the same terms. I will take one or two instances. As I have said, where there is an actual statement in the Case which shows a misconception of the law, no one feels any difficulty. But, equally, no one supposes that the court's right, or, as I would say, duty, to intervene stops at this. For example, in *Cooper* v. *Stubbs* (2), Rowlatt, J., was prepared to overrule the commissioners' determination that no trade existed because, as he said (133 L.T. at p. 585):

> " If one were trying a question of this sort with a jury, one would have to say upon these facts, ' Well, now a trade is proved ', and I think that what the commissioners have done is merely to give the wrong name to a state of facts which in law amount to something else."

In the Court of Appeal, the majority did not agree with him, holding, in effect, that it would not have been right to give such a direction to the jury on the facts as found. We are not re-hearing *Cooper* v. *Stubbs* (2), though one can say, at any rate, " sed victa Catoni ". But I see no reason to think that the majority were following any different principle. Warrington, L.J., said ([1925] 2 K.B. at p. 768) that intervention was proper only

> " . . . in a very clear case, where either the commissioners have come to their conclusion without evidence which should support it, that is to say, have come to a conclusion which on the evidence no reasonable person could arrive at, or have misdirected themselves in point of law."

A And ATKIN, L.J., recognised (ibid., at p. 772) that

> " . . . there may be a state of facts which can only lead to one conclusion of law . . ."

Now if I turn to the Scottish decisions, I find that the judges are stating, though sometimes in somewhat different words, the same principle. LORD NORMAND'S B (Lord President) judgment in the Court of Session (First Division) in *Inland Revenue* v. *Fraser* (5) (1942 S.C. at p. 497) has said almost everything that needs to be said on this branch of the subject.

> " In cases where it is competent for a tribunal to make findings in fact which are excluded from review, the appeal court has always jurisdiction C to intervene if it appears either that the tribunal has misunderstood the statutory language—because a proper construction of the statutory language is a matter of law—or that the tribunal has made a finding for which there is no evidence or which is inconsistent with the evidence and contradictory of it."

And that, in its turn, appears to me to propound the same principle as that D adopted by LORD COOPER (Lord President) in *Inland Revenue* v. *Toll Property Co., Ltd.* (8) where he says (1952) (34 Tax Cas. at p. 18):

> " Keeping in view the nature of the transaction, the purpose with which the company was floated and the objects which were prescribed in the memorandum of association, and the whole of the other circumstances which I have briefly summarised, it seems to me that the majority of the E commissioners were not entitled to reach the conclusion which they did, that they must have misdirected themselves in law, and that the true and only reasonable conclusion on the facts found is the conclusion reached by the dissenting commissioner."

My Lords, I must apologise for taking so much time to repeat what I believe F to be settled law. But it seemed to be desirable to say this much, having regard to what appears in the judgments in the courts below as to a possible divergence of principle between the English and Scottish courts. I think that the true position of the court in all these cases can be shortly stated. If a party to a hearing before commissioners expresses dissatisfaction with their determination as being erroneous in point of law, it is for them to state a Case, and in the body G of it to set out the facts that they have found as well as their determination. I do not think that inferences drawn from other facts are incapable of being themselves findings of fact, although there is value in the distinction between primary facts and inferences drawn from them. When the Case comes before the court, it is its duty to examine the determination having regard to its knowledge of the relevant law. If the Case contains anything ex facie which is bad law H and which bears on the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law, and that this has been I responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination, or as one in which the evidence is inconsistent with, and contradictory of, the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when, in cases such as these, many of the facts are likely to be neutral in themselves and only to take their colour from the combination of circumstances in which they are found to occur.

If I apply what I regard as the accepted test to the facts found in the present case, I am bound to say, with all respect to the judgments under appeal, that I can see only one true and reasonable conclusion. The profit from the set of operations that comprised the purchase and sales of the spinning plant was the profit of an adventure in the nature of trade. What other word is apt to describe the operations ? Here are two gentlemen who put their money, or the money of one of them, into buying a lot of machinery. They have no intention of using it as machinery, so they do not buy it to hold as an income-producing asset. They do not buy it to consume or for the pleasure of enjoyment. On the contrary, they have no intention of holding their purchase at all. They are planning to sell the machinery even before they have bought it. And, in due course, they do sell it, in five separate lots, as events turned out. And, as they hoped and expected, they make a net profit on the deal, after charging all expenses such as repairs and replacements, commissions, wages, travelling and entertainment and incidentals, which do, in fact, represent the cost of organising the venture and carrying it through.

This seems to me to be, inescapably, a commercial deal in second-hand plant. What detail does it lack that prevents it from being an adventure in the nature of trade, or what element is present in it that makes it capable of being aptly described as anything else ? Well, to judge by the respondents' contentions as recited in the Case, there were some circumstances lacking in this deal of which the presence has been regarded as of importance in other cases. I do not think that this line of argument is ever very conclusive; but, in any event, it breaks down completely on the facts that are found. It is said that there was no organisation for the purposes of the transaction. But, in fact, there was organisation, as much of it as the transaction required. It is true that the plant was not advertised for sale, though advertisements asking for plant were answered by the respondents. But why should they incur the cost of advertising if they judged that they could achieve the sale of the plant without it ? ~~It is~~ said that no work had been done on the maturing of the asset to be sold. But such replacement and renovation as were needed were, in fact, carried out, and I can see no reason why a dealer should do more work in making his plant saleable than the purposes of sale require. It is said that neither of the respondents had any special skill from his normal activities which placed him in an advantageous position for the purposes of this transaction. It may be so, though one of them was the employee of a spinning firm. In any case, the members of a commercial community do not need much instruction in the principles and possibility of dealing, and I think that, given the opportunity, the existence or non-existence of special skill is of no significance whatever. It is said, finally, that the purchase and sale of plant lent itself to capital, rather than commercial, transactions. I am not sure that I understand what this is intended to mean. If it means that, at the relevant period, there was no market for second-hand plant in which deals could take place, there is no finding to that effect, and all the facts that are recited seem to be against the contention. If it means anything else, it is merely an attempt to describe the conclusion which the respondents would wish to see arrived at on the whole case.

There remains the fact which was avowedly the original ground of the commissioners' decision—" this was an isolated case ". But, as we know, that circumstance does not prevent a transaction which bears the badges of trade from being in truth an adventure in the nature of trade. The true question in such cases is whether the operations constitute an adventure of that kind, not whether they by themselves, or they in conjunction with other operations, constitute the operator a person who carries on a trade. Dealing is, I think, essentially

A a trading adventure, and the respondents' operations were nothing but a deal or deals in plant and machinery.

There is only one thing more that I wish to add. The appeal was presented to us as involving a question of great importance, since it offered an opportunity of reconciling what were thought to be divergences between the views of the English and Scottish courts as to their jurisdiction in dealing with Cases Stated
B which involve the existence or non-existence of a " trade " under Case 1 of Sch. D. As I have tried to show, I do not think that there has been any such divergence of principle. But I do not feel equally confident that there has not been some divergence in the understanding and application of the governing principles. I find it difficult to think that, had there not been, the Crown would have been appellant in the present case. I think it possible that the English courts have
C been led to be rather over-ready to treat these questions as " pure questions of fact " by some observations of WARRINGTON and ATKIN, L.JJ., in *Cooper* v. *Stubbs* (2). If so, I would say, with very great respect, that I think it a pity that such a tendency should persist. As I see it, the reason why the courts do not interfere with commissioners' findings or determinations when they really do involve nothing but questions of fact is not any supposed advantage in the
D commissioners of greater experience in matters of business, or any other matters. The reason is simply that, by the system that has been set up, the commissioners are the first tribunal to try an appeal and, in the interests of the efficient administration of justice, their decisions can only be upset on appeal if they have been positively wrong in law. The court is not a second opinion, where there is reasonable ground for the first. But there is no reason to make a mystery about the subjects that
E commissioners deal with, or to invite the courts to impose any exceptional restraints on themselves because they are dealing with cases that arise out of facts found by commissioners. Their duty is no more than to examine those facts with a decent respect for the tribunal appealed from and, if they think that the only reasonable conclusion on the facts found is inconsistent with the determination come to, to say so without more ado.

F I agree that the appeal should be allowed.

LORD TUCKER: My Lords, I agree, for the reasons which have been stated, that this appeal should be allowed.

LORD SOMERVELL OF HARROW: My Lords, I have had the advantage of reading the opinion of my noble and learned friend, LORD RADCLIFFE, in which
G I concur.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Iliffe, Sweet & Co.*, agents for *Laycock, Dyson & Laycock*, Huddersfield (for the respondents).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

THE EMPIRE JAMAICA. A
WESTERN STEAMSHIP CO., LTD. *v.* N. V. KONINKLIJKE ROTTERDAMSCHE LLOYD.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Parker, L.JJ.), July 11, 12, 1955.]

Shipping—Limitation of liability—"Actual fault or privity of shipowner"— B *Insufficient complement of certificated officers—Breach of merchant shipping ordinance—Merchant Shipping Act,* 1894 (57 *&* 58 *Vict. c.* 60), *s.* 503.

Costs—Appeal to Court of Appeal—Shipping—Action for limitation of liability in case of collision.

The plaintiffs were the owners of the Empire Jamaica registered at Hong Kong from which port she sailed. C In 1951 that ship collided with a ship owned by the defendants. At the time of the collision, S. was officer of the watch on board the Empire Jamaica. S. had been made chief boatswain in 1947 on the recommendation of the master and had in fact acted as second mate; he had had altogether some nine years' watch-keeping experience at the time of the collision.

By Hong Kong ordinance the Empire Jamaica should have been provided D with a master and a first and second mate duly certificated but S. did not hold a certificate. There was at the time a scarcity of certificated officers at Hong Kong. After the collision application was made, and granted, for exemption from the requirement to provide a certificated second mate. There was evidence of the Director of Marine at Hong Kong that, according to the practice at the relevant time, the Empire Jamaica was E properly manned despite the fact that S. was uncertificated.

The plaintiffs admitted liability for the collision and were granted a declaration under s. 503 (1) of the Merchant Shipping Act, 1894, limiting their liability. On appeal,

Held: (i) the plaintiffs had shown that they reasonably believed that S. was competent to act as second mate; accordingly in view of the particular F circumstances prevailing at Hong Kong at the time, they had discharged the onus of proving that the collision occurred without their actual fault or privity, and were entitled to the declaration sought.

(ii) although it was the common practice in limitation actions that the plaintiffs should pay the costs, yet in the Court of Appeal the ordinary rule should apply, namely, that the unsuccessful party to the appeal should G pay the costs of the appeal; accordingly, the defendants would pay the costs of the present appeal.

Decision of WILLMER, J. ([1955] 1 All E.R. 452) affirmed. Observations of WILLMER, J. (ibid., at p. 454, letter E) criticised.

[As to actions to limit liability, see 1 HALSBURY'S LAWS (3rd Edn.) 63, para. 126. H

As to the limitation of liability without actual fault or privity, see 30 HALSBURY'S LAWS (2nd Edn.) 942, para. 1304, note (d); and for cases on the subject, see 41 DIGEST 919, 920, *8099-8103*.

As to costs in actions for limitation of liability, see 30 HALSBURY'S LAWS (2nd Edn.) 946, para. 1309, note (a); and for cases on the subject, see 41 DIGEST 926, 927, *8159-8165*. I

For the Merchant Shipping Act, 1894, s. 92, s. 503 (1), see 23 HALSBURY'S STATUTES (2nd Edn.) 454, 656.]

Cases referred to:

(1) *Standard Oil Co. of New York* v. *Clan Line Steamers, Ltd.*, [1924] A.C. 100; 93 L.J.P.C. 49; 130 L.T. 481; 41 Digest 920, *8103*.

(2) *The Bristol City*, [1921] P. 444; 91 L.J.P. 6; 126 L.T. 80; 41 Digest 919, *8101*.

(3) *Asiatic Petroleum Co., Ltd.* v. *Lennard's Carrying Co., Ltd.*, [1914] 1 K.B. 419; 83 L.J.K.B. 861; 109 L.T. 433; *affd.* H.L. sub nom., *Lennard's Carrying Co., Ltd.* v. *Asiatic Petroleum Co., Ltd.*, [1915] A.C. 705; 84 L.J.K.B. 1281; 113 L.T. 195; 41 Digest 418, *2616*.

(4) *The Mobile*, (1856), Sw. 69; 166 E.R. 1024; *on appeal*, Sw. 127; 166 E.R. 1055; 41 Digest 738, *5865*.

Appeal.

The defendants, N. V. Koninklijke Rotterdamsche Lloyd, appealed against an order of WILLMER, J., dated Jan. 27, 1955, reported [1955] 1 All E.R. 452.

By their action the plaintiffs, the Western Steamship Co., Ltd., claimed a declaration that they were not answerable in damages in respect of loss of or damage to vessels, goods, merchandise, property or other things beyond the aggregate amount of £8 per ton for each ton of the tonnage of their ship Empire Jamaica which collided on Sept. 1, 1951, with the Dutch motorship Garoet. WILLMER, J., held that, although the plaintiffs' ship had put to sea with the privity of the plaintiffs in breach of the requirement to carry two certificated mates, there was no causal connection between the fact that the officer who performed the duty of a second mate did not possess a certificate, and the fact that his negligent navigation caused the collision and made the declaration prayed for.

R. F. Hayward, Q.C., and *D. H. Hene* for the defendants.
K. S. Carpmael, Q.C., and *J. B. Hewson* for the plaintiffs.

SIR RAYMOND EVERSHED, M.R.: At about twenty minutes past one in the morning of Sept. 1, 1951, in the Java Sea, on a night which was dark but clear, a collision occurred between the plaintiffs' vessel, the Empire Jamaica, and the defendants' vessel, the Garoet, as a result of which considerable damage was done to both vessels. The plaintiffs have admitted that the collision was solely due to the negligent navigation of their vessel Empire Jamaica. I think that fact must be stated, in view of the argument: for I agree with counsel for the defendants that it is not open in these proceedings for the plaintiffs to suggest that some part of the blame might have been due to the faulty navigation of the Garoet. At the time of the collision, the officer on the watch in the Empire Jamaica was one Sinon; and the inference which is inevitable from the materials and the admission made is that Mr. Sinon committed a blunder in seamanship of what I think might reasonably be called a somewhat serious and startling character. In 1951 there was in force in the port of Hong Kong, at which the Empire Jamaica was registered and from which she had sailed, s. 4 of the Merchant Shipping (Amendment) Ordinance, 1949 (No. 2 of 1949), which repealed and substituted s. 4 of the Merchant Shipping Ordinance, 1899 (No. 10 of 1899). The provisions of s. 4 (3) were derived from s. 92 (1) of the Merchant Shipping Act, 1894*, and they follow that section closely. By s. 4 (3) it was provided as follows:

> "Every British ship, and every foreign ship holding a passenger certificate under s. 10 shall, when leaving any port of the colony [of Hong Kong], be provided with officers who possess certificates of competency of a grade appropriate to their stations in the ship or of a higher grade, according to the following scale:—(a) in any case, with a duly certificated master; (b) if the ship is of one hundred tons or upwards, with at least one officer besides the master holding a certificate not lower than that of only mate, or of second mate in the case of a sailing ship of not more than two hundred tons; (c) if the ship carries more than one mate, with at least the first and second mates duly certificated . . ."

The Empire Jamaica was a vessel of 3,538 tons gross. It follows therefore from paras. (a) and (c) above that not only must she have had a duly certificated master, but also, if there were more than one mate, a first and second mate duly certificated. In fact the complement of the ship was made up, as far as relevant, as follows. Her master was a Mr. Beer, who was beyond question duly certificated as such. She had in addition other officers, but only one other certificated mate. There was a third mate who was not certificated and also there was the man I have mentioned, Mr. Sinon, who was signed on in the ship's articles with the rank or office of chief boatswain, but who in fact acted, as was intended, for practical purposes, as second mate. He was not certificated.

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* Amended by the Merchant Shipping Act, 1906, s. 56.

If the facts were merely as I have stated them, the inference might reasonably be drawn that the absence from Mr. Sinon of the necessary qualification which a certificate would have given was responsible for the collision. In these proceedings, however, the plaintiffs have claimed under s. 503 (1) of the Merchant Shipping Act, 1894, to limit their liability to an amount as provided by the section, which, having regard to the tonnage, amounts in total to some £23,000. The relevant terms of that sub-section are:

> " The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity; that is to say [and then are set out certain occurrences including damage or loss to goods, merchandise and to other vessels] be liable to damages beyond the following amounts . . .",

and then comes the relevant figure, which, since there was no loss of life, is £8 for each ton of their ship's tonnage. The present case, therefore, raises the question whether, on the facts as they were ultimately proved in the proceedings, the plaintiffs have established that the occurrence—the damage which was suffered—took place without the owners' actual fault or privity. As has been pointed out, the substance, putting it very briefly, of that limitation is to remove from the owners, in the circumstances stated, the full liability for the damage which otherwise, by the common law, would flow from the fact that there had been, as there was in the present case, negligence by the owners' servant. The owners themselves must have been actually at fault or privy to the negligence, if they are to be liable for the full consequence of it. In *Standard Oil Co. of New York* v. *Clan Line Steamers, Ltd.* (1), in which the effect of this section was considered by the House of Lords, Viscount Haldane said ([1924] A.C. at p. 113):

> " It is now well settled that those who plead the section as a defence must discharge the burden of proving that they come within its terms. That is to say, they must show that they were themselves in no way in fault or privy to what occurred."

In that case it was held that the owners had failed to limit their liability because they had not (as they should have done) taken care to see that the ship was properly seaworthy by instructing the master about the necessary risk which attached to the vessel's design. We were also referred to *The Bristol City* (2) ([1921] P. 444) where a similar question arose in this court because the ship was, amongst other things, not supplied with proper grounding tackle. Atkin, L.J., referred (ibid., at p. 452) to the section and to certain language of Hamilton, L.J., in *Asiatic Petroleum Co., Ltd.* v. *Lennard's Carrying Co., Ltd.* (3) ([1914] 1 K.B. at p. 436) and then summed the matter up in this way ([1921] P. at p. 453):

> " In my view, the onus is upon the plaintiffs to establish that they did not know this vessel was not properly equipped, and I think it is impossible to say that they have discharged that onus."

In the present case, the defendants have, by an adaptation of that language, said that the plaintiffs have failed to establish that they did not know and ought not to have known that this vessel, Empire Jamaica, was not properly manned; and, by the phrase "not properly manned", they refer exclusively to the circumstance that Mr. Sinon who was in charge of the navigation of the ship at the relevant time had not got the requisite certificate and that the ship had gone to sea in breach of the requirements of the Ordinance of 1899, as amended. As I have said earlier, if there were no more facts proved in the case than those that I have already stated, it would, I think, be difficult for the plaintiffs to say that they had discharged the onus, but there were other facts proved. Before I refer to the evidence, I should state in connection with the relevant regulations that there was also a provision in operation under the Emergency (Merchant Shipping Ordinance, 1899) (Amendment) Regulations, 1951,* that the governor of the colony of Hong Kong in council might, if he thought fit and on such conditions (if any) as he thought fit to impose, exempt a ship from any of the specified requirements in the ordinance which I have read. That right is expressed to be qualified by this, that the governor must be

> "satisfied that that requirement has been substantially complied with in the case of that ship, or that compliance with the requirement is unnecessary in the circumstances of the case, and that the action taken or provision made as respects the subject-matter of the requirement in the case of the ship is as effective as, or more effective than actual compliance with the requirement."

In point of fact, as also appears from the record, an exemption of this ship under that paragraph was later granted by the governor in respect of the ordinance that I have mentioned, the terms of which I need not pursue; but it is also a point made by the defendants that the plaintiffs, the owners of this vessel, had not, in the circumstances which I will mention in a moment, then availed themselves, as they should have done, of the capacity to obtain, in appropriate circumstances, the dispensation.

The circumstances to which I have just alluded are these, and I now come to the evidence. I think that it is plain that at this time there was a very substantial and serious shortage of certificated officers in the merchant marine, at any rate in this part of the world; and it is no doubt true that a shipowner in the ordinary course would have to do the best he could. The defendants say that not only were the plaintiffs, by their managing director, well aware of the ordinance and of the difficulty of obtaining certificated officers, but they forbore from making the application they might and should have done under the paragraph. I think that those circumstances have a relevance to the question of fact that we have to consider. As WILLMER, J., observed, however, it is no less plain that the mere fact that the collision took place because of the negligence of Mr. Sinon and the mere fact that Mr. Sinon was not certificated does not provide the answer to the present case. Equally I think it follows that the mere fact that there had been a breach of these provisions and the fact that the plaintiffs had not tried to avail themselves of the dispensing provision is not an answer to the problem; nor are these circumstances in combination an answer to the problem. If the plaintiffs are to establish exemption from liability, save to the extent provided by s. 503 (1), they have to prove that the damage or occurrence took place without their actual fault or privity; but, in my judgment, they can establish that fact if they prove to the satisfaction of the court that, in all the circumstances of the case, they had good reason to believe that the man they did engage in the capacity nominally of chief boatswain, but actually and in practice as second mate, was fully competent to perform the functions which would fall on him to perform. The question is whether they have succeeded in so doing; and it is a question of fact.

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* These regulations, by reg. 3, amended s. 4 of the Ordinance of 1899 by the addition of the above provision as sub-s. (19A).

Some criticism has been made by the defendants of the form of WILLMER, J.'s judgment; and I think, if I may say so with all respect to him, that perhaps some of those criticisms are well founded. As I read the judgment, I am inclined to think that the learned judge may, in some parts of his judgment, have rather directed his attention to this question: whether Mr. Sinon, with or without his certificate, was in fact incompetent for the task which he was performing. I venture to doubt whether that is the right test. The question is not whether he was competent in fact, but whether the plaintiffs, the shipowners, had reasonable grounds for believing when he was engaged that he was. I think, again, that WILLMER, J., may have used language, at any rate, which would indicate that there was no challenge of the competence of Mr. Sinon; and in that respect, if the language leads to that conclusion, again I would venture to doubt whether it was justified. As counsel for the defendants pointed out, Mr. Sinon was not a man that they had engaged. They could not set up (or, at any rate, in the present case had no means of setting up) some affirmative case for proving him incompetent; they put the question of his competence and the plaintiffs' belief in his competence in issue; and counsel for the defendants cross-examined the only witness who gave oral evidence, the captain, Mr. Beer, plainly in a way indicating that he strongly challenged the view that the master had expressed of Mr. Sinon's competence. I do not wish to pursue this matter too far, but our attention was also directed to the passage in the judgment where the learned judge said ([1955] 1 All E.R. at p. 454):

> " I think that counsel might have pressed his argument further, because, even if the ordinance is strictly complied with, there can never be any guarantee that the officer in charge on the bridge at any given time will be a certificated officer."

With all respect, I rather doubt again whether that is a relevant consideration for our purpose. But when those matters are set aside, we come back to the question which I have tried to formulate: in all the circumstances of the present case, were the owners justified in the view which they undoubtedly put forward, and which they set out to prove, namely, that Mr. Sinon was as good as a certificated officer for the purposes for which he was engaged ? I have no doubt that WILLMER, J., on that matter, having seen the master, Mr. Beer, concluded that the plaintiffs had, as a matter of fact, established that case to his satisfaction. I will say at once that, though I have not found the case entirely easy, I have come to the conclusion that there is no sufficient ground on which we could disturb the conclusion of the learned judge on that matter of fact.

I have mentioned the circumstances of the ordinance and the shortage at the relevant time of certificated officers. I do not think that it is an irrelevant consideration, and particularly do I take that view because one of the witnesses, albeit a witness by affidavit only, was a Mr. Jolly, who was at the relevant time, and I think still is, the Director of Marine at Hong Kong. In that capacity, he has to see that ships leaving the port comply with the regulations as regards their complement and the necessary clearance is only given by him, or those for whom he is responsible, if he or they are so satisfied. In his affidavit, Mr. Jolly said:

> " 4. At the material time there was a shortage of British certificated officers in Hong Kong and it was the general practice to grant an exemption in accordance with s. 4 (19A)* of the Hong Kong Merchant Shipping Ordinance (No. 10 of 1899) in respect of ships registered in Hong Kong. 5. It was also the practice in Hong Kong to sign on uncertificated men, described in the articles as boatswain or chief boatswain or as a mate, but owners were not required by my department to do other than comply with s. 4 (3) (b) of the ordinance and were not required to comply with sub-s. (3) (c)."

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* This sub-section was added by the Emergency (Merchant Shipping Ordinance, 1899) (Amendment) Regulations, 1951.

A It will be remembered that sub-s. (3) (c) required that, in circumstances such as would be applicable in the present case, at least the first and second mates in a ship having more than one mate should be certificated.

> "6. At the time when the articles were opened in July, 1951 [this is in reference to the articles of agreement of the crew of the Empire Jamaica] B I was under the impression that the Empire Jamaica had already been included in the lists of vessels submitted by me for inclusion in an exemption by the Governor-in-Council under sub-s. (19A) and I was satisfied that the Empire Jamaica was properly manned. 7. At the time such articles were opened I was aware that the Empire Jamaica was to carry only one certificated master, and I was satisfied that this was proper compliance C with the law of Hong Kong. 8. Accordingly I was and still am satisfied that in July, 1951, the Empire Jamaica was properly manned in all respects and I would have so certificated to her owners."

I find the last paragraph difficult to follow, if it is strictly construed; but I think the relevance of those paragraphs is this. From the point of view of the D owners, whatever Mr. Jolly may or may not have thought as to the situation of the Empire Jamaica in relation to the Merchant Shipping Ordinance, 1899, they are entitled, in my judgment, to say: In the strained circumstances as to personnel in those days, it was within our knowledge that strict compliance with these provisions was not insisted on and that we could get a certificate from the officer, a public servant charged with the duty of giving certificates of clearance, if the complement of our ship was such that those responsible thought and had E grounds for supposing that they had the requisite number of officers of skill and competency.

Against that background, I turn to the evidence actually given by the master, Mr. Beer, and by Mr. Sinon himself. I have said that the master was the only oral witness and it will, therefore, be convenient if I refer to Mr. Sinon's affidavit first. He states that he was born in 1902, being a British subject by birth, in F fact born in the Seychelles Islands. He says that he first went to sea in 1917 as a deck boy and has been at sea ever since. He then sets out in tabular form a catalogue of his maritime experience by reference to the vessels in which he sailed; and I notice that from 1921 until 1941 he was a boatswain in two ships, called the Norwegian I and Norwegian II; that from 1941 to 1946 he acted as G boatswain and third mate and eventually as third mate and acting second mate; and then, after an interval acting as a purser for six months in 1946 and 1947, from 1947 until the present date he acted as chief boatswain. He says that, prior to joining the Empire Jamaica in 1946, he had been a watch-keeping officer in the ships mentioned in the list for five years. Then he says:

> H "5. In the year 1947 [and this is corroborated by the master] I was promoted by my owners on the recommendation of Captain Beer from third mate of the Empire Jamaica to chief boatswain, and as such chief boatswain I have kept the twelve to four watches morning and afternoon. 6. I have studied the regulations for preventing collisions at sea and I am experienced in taking bearings, plotting courses, and the other duties of a watch-keeping I officer."

Pausing there for a moment, it was suggested that that paragraph, swearing, so to speak, by the card, amounted to no more than a statement that he had studied the regulations, but that it did not involve the consequence that he knew them or understood them; but I think that is too narrow a view and that by that paragraph plainly Mr. Sinon was saying, and intending to say and swear: "I know the regulations for preventing collisions at sea" and, indeed, as officer of the watch, it would be his duty so to do. He then gave an account of the accident, and the only point that perhaps should be made is that, when he saw that the collision was imminent, he failed in fact to rouse the master, as the regulations in the ship required him to do; and it is a point much stressed that, according to the master, if the master had been roused and had gone to the bridge, he says that he thinks the accident could have been avoided. The reason why I have mentioned that matter will presently appear.

I now go back to the evidence of Mr. Beer, the experienced master of the ship, who had held a British master's certificate since 1916. After stating the difficulty of getting certificated junior officers, he said that Mr. Sinon "was a good man", who "had been with me for many years". Then, in answer to questions put by counsel for the plaintiffs, the following evidence emerged. He said that Mr. Sinon "had been with me and had been under my instruction for a long time; he had a very good understanding of navigation and seamanship". Then he said that his knowledge of the collision regulations "was quite good; we had often discussed them together"; and Mr. Sinon had served with him for about eight years before the collision. Then later he said: "I had absolute confidence in him; he was a good man, and I trusted him"; and then he added: "He is still there"—that is, still with my company on the company's ship—"in that capacity"—that is, of chief boatswain acting as second mate. Then he was subjected to a cross-examination, which not only was, of course, strictly fair, but clearly intended to show that the grounds of Mr. Beer's confidence in Mr. Sinon were not entirely justified; and in that connection a point was made in this way: You, Mr. Beer, say you never made any complaint about Mr. Sinon: what about your report of this very collision itself, in which you pointed out that the accident could have been avoided had he, Mr. Sinon, done as he ought to have done and aroused you, the master? Counsel for the defendants particularly drew our attention to certain passages, and I will read a few questions and answers which occur at the end of the cross-examination.

> "He [Sinon] was a splendid man . . . He is a very good man and I have absolute confidence in him, and he is still on the ship . . . There was a certain amount of excitement at the moment, but he had always reported to me before, and since, and I do not know what let him down this time."

Then come the questions which counsel for the defendants particularly drew to our attention. Mr. Beer was asked:

> "It is an advantage to have certificated officers, is it not? A.—Of course it is. Q.—Was Sinon forty-nine years of age at the time of the collision? A.—Yes. Q.—And, although he had been going to sea for some time, he had not been able to get a certificate? A.—He is not an educated man; he is a seaman. Q.—Do you by that answer mean to tell my Lord that this man could not pass an examination for a mate's or second mate's certificate because he is not sufficiently educated? A.—Yes; that is what I want to say; he is not that type of man; he will never get a certificate. Q.—I suppose you would not deny that the purpose of ships' staffs having certificates is to show that they have some qualifications for their jobs. That is right, is it not? A.—Yes."

Then finally these questions were put by the learned judge. He asked:

> "I suppose you know as much about this man's record as anybody? A.—Yes. Q.—You had had him with you since 1943? A.—Yes. Q.—Had you ever had any previous casualties? A.—Yes, once in 1947 I ran over a wreck; I was on watch myself at the time. Q.—I mean any casualty in which Mr. Sinon was personally concerned. A.—No. He was not concerned in that incident at all. Q.—Have you had any other casualty? A.—No, not a marine casualty. Q.—I am talking about navigational casualties. A.—No, I have had no other navigational casualty. Q.—And,

> so far as you know, in the eight years that Mr. Sinon served with you he was not concerned in any other navigational casualty? A.—That is so. Definitely not."

Obviously the learned judge, as those questions show, was directing his mind to the witness and to his demeanour and credibility; and, in those circumstances, I think that we cannot say that the learned judge wrongly concluded as a fact that, in the opinion of the experienced master, Mr. Sinon was a perfectly competent man; in other words, that the master thought that Mr. Sinon, though not certificated, was every bit as good as a certificated man would have been.

That leaves only one other matter, and it is this. No doubt, as was observed in one of the other cases that has been read*, owners cannot always shelter behind the opinion of others who act on their behalf. It remains, therefore, to see in the present case what the owners themselves have to say on this matter. The evidence on their behalf was given by the managing director of the plaintiff company, Mr. Leung Yew, of Hong Kong. He was the managing director, and appears to have assumed the responsibility which naturally and ordinarily attaches to that office. He swore two affidavits, and, in the second, he said, amongst other things:

> "The opening of articles is not a matter which requires my personal attention. It is in fact a matter only concerning the captain and crew members and the mercantile marine office. Without hesitation I can say that it is not the usual practice in Hong Kong for managers or managing directors of shipping companies to attend at the opening of articles."

Let it be said that that was not challenged, by affidavit or otherwise. Then he went on to say:

> "I had always understood from the marine department of Hong Kong that if a ship carried more than one mate and the first mate was certificated it was not necessary for the other mates to be certificated. I know that the marine department sometimes suggested the signing on of a chief boatswain and no second officer. I was well aware that the signing on of a first mate, chief boatswain and a third mate, possibly even a fourth mate, was a practice which satisfied the officials in the mercantile marine office at Hong Kong."

Pausing there, although in strictness those practices were not in accordance with the ordinance, unless a dispensation had been given as regards a particular ship, still his evidence is in entire accord with what Mr. Jolly, the principal officer of the marine department, had said; and the managing director there shows that he had made himself aware, and was aware, of the practical requirements of the authority concerned. He went on:

> "If a clearance was granted by the marine department to a ship leaving Hong Kong I took it that the department must have been satisfied as to the manning of that ship";

and then, as regards the articles of agreement of the Empire Jamaica, which were signed on July 3, 1951, he said: "In the circumstances, I was satisfied that she was properly manned". Again, in the circumstances, and in the light of Mr. Jolly's affidavit, I think Mr. Yew can properly rely on those facts. Finally, he says this, leaving out certain matters which can be passed over:

> "The master of the vessel, Captain Beer, spoke and still speaks highly of him and gave a very good report of him to me. The master suggested he be employed by my company. I agreed to this. I never have had any complaint concerning him or any unfavourable report."

Then he refers to the fact that I have already mentioned that, at the master's suggestion, Mr. Sinon was promoted in 1947 to the position of chief boatswain in the Empire Jamaica.

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* *The Mobile* (4) (1856), Sw. at p. 71.

I think that that evidence shows that the plaintiffs, through their managing director, had made themselves aware of the relevant facts and that, in the light of the conditions as they were at Hong Kong, they had done what was necessary to satisfy the mercantile marine department; and, moreover, and most important, Mr. Yew had made himself aware, through the master, of the master's view and of the experience of Mr. Sinon as a competent officer. In those circumstances, I think that the managing director of the company did what he reasonably ought to have done. If, therefore, the view expressed by Mr. Beer, the master, of the competency of Mr. Sinon was justified or, more strictly, if he reasonably thought that Mr. Sinon was fit for the post for which he was engaged, then I think the same equally can be said of the managing director, Mr. Leung Yew. The result of that analysis is, in my judgment, that in the present case there was evidence which justified the learned judge's conclusion on the question of fact, and, as I have already said, we should not disturb it. Accordingly, the appeal should be dismissed.

JENKINS, L.J.: I agree. The onus is on the plaintiffs to show that they did not know, and could not reasonably have been expected to know, at the time when the Empire Jamaica sailed on the voyage during which the collision occurred, that Mr. Sinon was not capable of performing the duties of second mate. In seeking to discharge this onus, they are faced with the admitted fact that Mr. Sinon was not certificated, as he should have been, under the provisions of the Merchant Shipping Ordinance, 1899 (No. 10 of 1899) as amended by the Merchant Shipping (Amendment) Ordinance, 1949 (No. 2 of 1949). If Mr. Sinon had held a certificate, that would have been evidence, and I think cogent evidence, of competence. Does the converse apply; that is to say, did the absence of a certificate afford a ground on which the plaintiffs should be regarded as fixed with knowledge that Mr. Sinon was not competent to perform the duties of second mate? If Mr. Sinon had been a stranger to the plaintiffs and they had engaged him, uncertificated as he was, as a second mate, I think it might well have been held that the plaintiffs had been so negligent in the performance of their duty to see that the ship was properly manned, that they could not be heard to say that the collision which occurred through the incompetence of this uncertificated stranger occurred without their actual fault or privity. In actual fact Mr. Sinon was a man who had been many years at sea, who had been employed by the plaintiffs in this same ship, the Empire Jamaica, since, according to the master, August, 1946, and a man, further, who was experienced in watch-keeping duties and had in fact been performing the watch-keeping duties of a second mate since 1947, shortly after he joined the Empire Jamaica. The master had every confidence in him and regarded him as a perfectly reliable man, and reported on him as such to the plaintiffs' managing director.

In these circumstances, can it reasonably be held that the fact that Mr. Sinon possessed no certificate amounted in effect to notice to the plaintiffs that, notwithstanding their past wholly satisfactory experience of him, he was in fact incompetent? In my judgment, it cannot reasonably be so held. There was actual experience of Mr. Sinon's character and capabilities which showed him to be in fact a competent man, so far as anybody could tell. As SIR RAYMOND EVERSHED, M.R., has mentioned, at the time there was a great shortage of certificated officers in Hong Kong, and, according to the evidence, there seems to be no doubt that the ordinance was not strictly enforced. It is clear from the evidence of Mr. Jolly, the Director of Marine, that he thought, for his part, that the ship was properly manned; and I think it is to be deduced from his evidence that, if there had been an application on the part of the plaintiffs for the exemption of the Empire Jamaica from the strict requirements of the ordinance under the dispensing power contained in s. 4 (19A), there would have been no doubt but that such application would have been granted. Clearly, if the plaintiffs' only fault was failure to apply for exemption under that sub-section that was not

A a fault which could have had any causal connection with the collision. Such exemption could have had no influence on events at the critical moment, Mr. Sinon would still have been on watch, and he would have made the same mistakes, whatever they were, which led to the collision.

In my view, therefore, although the plaintiffs did commit a technical breach of the ordinance, in that they only had one certificated mate when they ought to B have had two, it cannot be held that this collision took place through their actual fault or privity; and, accordingly, although I do not agree entirely with all his reasons, I am of opinion that the learned judge came to a right conclusion and that this appeal should be dismissed.

PARKER, L.J.: I agree. The sole question to be determined in this C appeal is whether the plaintiffs have discharged the onus which is undoubtedly on them of showing that, though liable for the negligence of Mr. Sinon, no fault or privity on their part caused or contributed to the collision. As the defendants have stressed, the difficulty of discharging that onus is not made easier by the fact that, as the learned judge found (and this is not disputed), the owners were privy to a breach of the requirements of the Hong Kong ordinance. Section D 4 (3) provided that, in the case of a ship of the size and type of the Empire Jamaica, the master and the first and second mates should all be officers who possessed certificates of competency. In fact the Empire Jamaica sailed, to the knowledge of the owners, with only two officers possessing such certificates, namely, the master and the first mate. Mr. Sinon, who was acting as second mate, did not in fact possess such a certificate. Accordingly, it must be taken that the E plaintiffs had knowledge that the watches from 12 midnight to 4 a.m. and from 12 noon to 4 p.m., being the second mate's watches, would be kept by Mr. Sinon, an uncertificated man. Again, the defendants stress the undoubted fact that on the basis of the concession of liability made in the proceedings, Mr. Sinon acted in complete disregard of the collision regulations and in a way which it is difficult to believe that he would have acted had he been able to obtain, and had F obtained, a certificate.

The fact that the owners were privy to a breach of the ordinance does not, of course, conclude the matter against them. Indeed, in a sense, that is merely part of the background of the case, by reason of which they are prevented from adducing the certificate as cogent evidence of the man's competency. The real question, to my mind, is whether the plaintiffs have proved that they were not G privy to sending a ship to sea improperly manned. So far as the facts of this case are concerned, the issue can be further narrowed to this: Have they shown that, as owners, they were entitled to believe, and did believe, that Mr. Sinon was competent to act as second mate ? It was, I think, at one time suggested that to limit their liability the owners must go further and show that Mr. Sinon was in fact competent to act as second mate, but that, I think, is putting the onus H too high. As I have said, I think the issue must be whether they were entitled to believe that he was competent, since only if they were not so entitled could they be said to be at fault. In the present case, the plaintiffs sought to discharge the onus by calling the master, a man of long experience, whose evidence the judge clearly accepted. He had served with Mr. Sinon for eight years, during the whole of which time Mr. Sinon had had watch-keeping experience, first as I acting third mate and, from June, 1947, as acting second mate. The master said that Mr. Sinon had a very good understanding of navigation and seamanship, and it was on his recommendation that Mr. Sinon was promoted to acting second mate. It is perfectly true (and counsel for the defendants stressed this) that the master said that Mr. Sinon's education was such that he would never get a certificate, but at the same time he said, I think, on more than one occasion that he always had complete confidence in Mr. Sinon in the capacity in which he was acting, namely, as second mate; and, when one looks at Mr. Leung Yew's affidavit, it is perfectly clear that he knew of the recommendation of the master and had acted on it. Much reliance was also put on the fact that, in an answer A to a question put to him in cross-examination: " Could the collision have been avoided if you had been on the bridge ? ", the master said: " It certainly could have been ". At the same time, it must be remembered that it is difficult to see how the master could, in the circumstances, have given the answer No. In the light of the concession of negligence, he would be in fact admitting that, if he had been on the bridge, he would have been just as negligent. Accepting, as B he did, the evidence of the master, the learned judge was, in my judgment, perfectly entitled to come to the conclusion that the plaintiffs had discharged the onus on them, and I see no ground for interfering with his conclusion. I would dismiss the appeal.

Mr. Hayward: My Lord, with regard to costs, it is the common practice in C limitation actions that the plaintiff pays the costs. It is stated in ROSCOE'S ADMIRALTY PRACTICE (5th Edn.), at p. 249, in these terms:

> " The costs in actions of limitation of liability are in the discretion of the court, but it is an invariable rule of practice for the court to exercise its discretion by condemning the plaintiffs in the costs of the proceedings other than costs incurred by reason of the defendants having raised unreasonably D issues on which they have failed, or costs occasioned by a dispute between rival claimants to the fund in court."

In the present case I respectfully submit that the defendants have not raised unreasonable issues.

SIR RAYMOND EVERSHED, M.R.: I agree with that, but what about E the position on appeal ? Is there any practice about this ?

Mr. Hayward: No, my Lord, it is in your Lordships' discretion.

SIR RAYMOND EVERSHED, M.R.: On the whole, we think the ordinary rule ought to apply in this court; that is, the appeal be dismissed with costs.

Appeal dismissed. Leave to appeal to the House of Lords granted. F

Solicitors: *Waltons & Co.* (for the defendants); *Hill, Dickinson & Co.* (for the plaintiffs).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

A

Re RUMBALL (*deceased*). SHERLOCK AND ANOTHER *v.* ALLAN AND OTHERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Parker, L.JJ.), July 6, 7, 11, 1955.]

B *Charity—Religion—Gift to "the Bishop for the time being of the Windward Islands"—"To be used by him as he thinks fit in his diocese."*

By his will the testator bequeathed his residuary estate to "the Bishop for the time being of the Diocese of the Windward Islands to be used by him as he thinks fit in his diocese". On a summons to determine whether the bequest was a gift to the bishop on valid charitable trusts, it was contended C on behalf of the persons interested in the event of an intestacy that, although a gift to the bishop for the time being simpliciter would have operated as a gift to the bishop on a charitable trust for ecclesiastical purposes, the testator, by adding the words "to be used by him as he thinks fit in his diocese", had defined the trusts on which the property was to be held in terms capable of including objects which were not charitable, and that, therefore, the gift D was bad.

Held: the bequest was a gift to the bishop on valid charitable trusts, because, being a gift to a holder of an office of a charitable character virtute officii, it was a gift on trusts exclusively appropriate to the nature of the office by which he was described, and the added words, "to be used by him E as he thinks fit in his diocese", merely gave the bishop an absolute discretion as to the application of the fund within the limits of trusts exclusively appropriate to the nature of his office and confined to the use of the fund in his diocese.

Dicta of JENKINS, L.J., in *Re Spensley's Will Trusts* ([1954] 1 All E.R. at pp. 183, 184) applied.

F *Dunne* v. *Byrne* ([1912] A.C. 407) distinguished.

Appeal dismissed.

[**Editorial Note.** It may be convenient to set out the principle quoted by JENKINS, L.J., at p. 79, letter G, post, formulated into one whole as he indicates. "Where there is a gift to a person who holds an office the duties of which are in G their nature wholly charitable and the gift is made to him in his official name and by virtue of his office, then, if the purposes are not expressed in the gift itself, the gift is assumed to be for the charitable purposes inherent in the office; but, where the purposes of a gift are plainly expressed in terms not confining them to purposes which are in the legal sense charitable, they cannot be confined to charitable purposes merely by reference to the character of the trustee." H This statement sets out the principle to be deduced from *Re Flinn* ([1948] 1 All E.R. 541) and contrasts with it that to be deduced from *Dunne* v. *Byrne* ([1912] A.C. 407) and other cases.

As to a gift to the holder of a religious office and as to gifts for ecclesiastical purposes, see 4 HALSBURY'S LAWS (3rd Edn.) 224, 225, para. 504; and for cases I on the subject, see 8 DIGEST (Repl.) 391-393, *847-860*.]

Cases referred to:

(1) *Re Garrard*, [1907] 1 Ch. 382; 76 L.J.Ch. 240; 96 L.T. 357; 8 Digest (Repl.) 391, *847*.

(2) *Re Flinn*, [1948] 1 All E.R. 541; [1948] Ch. 241; [1948] L.J.R. 923; 8 Digest (Repl.) 392, *857*.

(3) *Dunne* v. *Byrne*, [1912] A.C. 407; 81 L.J.P.C. 202; 106 L.T. 394; 8 Digest (Repl.) 392, *858*.

(4) *Farley* v. *Westminster Bank, Ltd., Re Ashton's Estate,* [1939] 3 All E.R. 491; [1939] A.C. 430; 108 L.J.Ch. 307; 161 L.T. 103; *affg.*, [1938] 1 All E.R. 707; [1938] 1 Ch. 482; 107 L.J.Ch. 282; 158 L.T. 441; 8 Digest (Repl.) 389, *831.*

(5) *Re Simson,* [1946] 2 All E.R. 220; [1946] Ch. 299; [1947] L.J.R. 183; 175 L.T. 314; 8 Digest (Repl.) 392, *853.*

(6) *Re Beddy,* (1953), unreported.

(7) *Bowman* v. *Secular Society, Ltd.,* [1917] A.C. 406; 86 L.J.Ch. 568; 117 L.T. 161; 8 Digest (Repl.) 359, *378.*

(8) *Re Spensley's Will Trusts,* [1954] 1 All E.R. 178; [1954] Ch. 233; 3rd Digest Supp.

(9) *Re Macgregor,* (1932), 32 S.R.N.S.W. 483; 49 N.S.W.W.N. 179; 8 Digest (Repl.) 393, *261.*

(10) *Re Van Wart,* (1911), "The Times", Feb. 17; 8 Digest (Repl.) 391, *848.*

(11) *Thornber* v. *Wilson,* (1855), 3 Drew. 245; 24 L.J.Ch. 667; 25 L.T.O.S. 309; 19 J.P. 675; 61 E.R. 897; *subsequent proceedings,* (1858), 4 Drew. 350; 28 L.J.Ch. 145; 32 L.T.O.S. 115; 22 J.P. 769; 62 E.R. 135; 8 Digest (Repl.) 428, *1179, 1180.*

(12) *Re Delany,* [1902] 2 Ch. 642; 71 L.J.Ch. 811; 87 L.T. 46; 8 Digest (Repl.) 325, *89.*

(13) *Re Davidson,* [1909] 1 Ch. 567; 78 L.J.Ch. 437; 99 L.T. 222; 8 Digest (Repl.) 396, *883.*

Appeal.

This was an appeal by the seventh defendant, Mrs. Emmeline Sarah Wilson, from an order of DANCKWERTS, J., dated Mar. 25, 1955.

The plaintiffs, Hugh Sherlock and Barclays Bank, Ltd., as executors and trustees of the will, dated Sept. 23, 1949, and codicil, dated Feb. 14, 1953, of the testator, Arthur Milton Rumball deceased, applied to the court by originating summons to determine, among other things, (i) whether, on the true construction of the will and codicil of the testator, and in the events which had happened, the bequest of the residue of the estate of the testator to the bishop for the time being of the diocese of the Windward Islands to be used by him as he thinks fit in his diocese was a gift to the sixth defendant, the Right Reverend Ronald Norman Shapley, the Lord Bishop of the Windward Islands, on valid charitable trusts; and (ii) whether, on the true construction of the will, a legacy of £51,300 given by cl. 3 of the will to the first, second, third, fourth and fifth defendants, cousins of the testator, was chargeable with estate duty payable in respect of the testator's residuary estate.

By cl. 7 of his will the testator directed that his residuary estate should be held:

> "Upon trust to divide the same into two equal parts and to pay one of such parts to the Guardians of the Shrine of Our Lady of Walsingham at Walsingham for the purposes of their Order and to pay the other part to the Bishop for the time being of the Diocese of the Windward Islands to be used by him as he thinks fit in his diocese Provided always that the bequest of one half of the residue of my estate to the Guardians of the Shrine of Our Lady of Walsingham is conditional on my having been elected a Guardian of the said Shrine at the time of my death and if I have not been so elected then I bequeath the sum of £100 to the said guardians . . . in the place of the one half of the residue of my estate and in that event subject to this payment of £100 I bequeath the whole of the residue to the Bishop for the time being of the Diocese of the Windward Islands to be used by him as aforesaid."

The testator died on Oct. 3, 1953, and, in the events which happened, the Guardians of the Shrine of Our Lady at Walsingham became entitled, under the terms of the will, only to a legacy of £100.

DANCKWERTS, J., held (i) that the bequest of the residue to the bishop for the time being of the diocese of the Windward Islands to be used by him as he thought fit in his diocese was a gift to the sixth defendant, the present bishop, on valid charitable trusts; and (ii) that the legacy of £51,300 given by cl. 3 of the will was chargeable with such proportion of the estate duty payable on the death of the testator as the amount of the legacy bore to the net value of the estate for estate duty purposes. The learned judge appointed the seventh defendant, who was an aunt of the testator, to represent, for the purposes of the application, the persons beneficially entitled to any property as to which the testator died intestate other than persons who were parties to the action.

The seventh defendant appealed to the Court of Appeal from that part of the order of DANCKWERTS, J., dealing with the bequest of residue, and the first five defendants appealed from that part of the order dealing with the payment of estate duty. The report deals only with the seventh defendant's appeal, which was supported by the first five defendants, the first four of whom were among the persons who would be beneficially entitled to any property as to which the testator died intestate.

N. S. S. Warren for the seventh defendant, Mrs. Emmeline Sarah Wilson, the representative of the persons interested in the event of an intestacy.

Charles Russell, Q.C., and *F. G. King* for the first, second, third, fourth and fifth defendants, pecuniary legatees.

J. V. Nesbitt for the sixth defendant, the Bishop of the Windward Islands.

D. S. Chetwood for the plaintiffs, the trustees.

Denys B. Buckley for the Attorney-General.

SIR RAYMOND EVERSHED, M.R.: The disposition of the testator's residuary estate was expressed by him as follows:

> "Upon trust to divide the same into two equal parts and to pay one of such parts to the Guardians of the Shrine of Our Lady of Walsingham at Walsingham for the purposes of their Order and to pay the other part to the Bishop for the time being of the Diocese of the Windward Islands to be used by him as he thinks fit in his diocese."

It was the first question raised on the summons before DANCKWERTS, J., whether the latter part of the words which I have read, the gift in favour of the Bishop of the Windward Islands, was apt to create a valid charitable trust. If it was not so apt, it is clear that so much of the residue (and, having regard to a later provision in the will, it was substantially the whole) was undisposed of and would pass accordingly to the testator's next of kin, of which Mrs. Wilson, the seventh defendant, was one, but among whom are also to be numbered four of the first five defendants, the appellants on the first matter before us in this court. DANCKWERTS, J., held that the words which I have read were apt to create a valid charitable trust; and his declaration, which is now appealed from, was accompanied by an order appointing Mrs. Wilson as a representative of the numerous class of which the testator's next of kin consists.

Questions of this kind are notoriously difficult, and, no doubt, the distinctions illustrated by the cases appear at times very fine. Thus, a gift to the vicar and churchwardens of a particular parish "to be applied by them in such manner as they shall in their sole discretion think fit", and a gift "to His Eminence the Archbishop of Westminster Cathedral London for the time being . . . to be used by him for such purposes as he shall in his absolute discretion think fit" have been held to be good charitable gifts: see *Re Garrard* (1) ([1907] 1 Ch. 382) and *Re*

Flinn (2) ([1948] 1 All E.R. 541). A gift to the Archbishop of Brisbane for such purposes as he should " judge most conducive to the good of religion in [his] diocese ", however, has been held by the Privy Council to be bad: see *Dunne* v. *Byrne* (3) ([1912] A.C. 407). Again, a gift to a vicar " for parish work " has been held bad by the House of Lords in *Farley* v. *Westminster Bank, Ltd.* (4) ([1939] 3 All E.R. 491); but a gift to a vicar to be used by him as he should think fit " for his work in the parish " was held in 1946 by ROMER, J., to be good: see *Re Simson* (5) ([1946] 2 All E.R. 220); and in *Re Beddy* (6), in 1953 (unreported), where the words of the gift bore a resemblance, at least, to those in the present case—for they were a gift " to the Roman Catholic prelate who shall be Archbishop of Westminster at the time of my death, to use for such purposes in the diocese as he may choose "—HARMAN, J., expressing himself as not willing to add to the fineness of the distinctions already made, held the gift to be bad.

In this notoriously difficult field some degree of fineness of distinction is, I think, inevitable. Where the question is that of the application of principles never finally stated and perhaps undefinable, which the courts have evolved from the examples given in the preamble to the statute 43 Eliz. 1 c. 4, to an infinite variety of forms of gift, it is inevitable that some cases will be found very near the line on one side or the other. It may, therefore, be unprofitable to lament the facts of legal experience in this class of case. Nevertheless, I think it possible to derive from an analysis of the cases the essential characteristics of those principles, so far as they are relevant, with sufficient clarity to enable the court to determine on which side of the line the present case lies; and, although I have, for my part, been conscious of changes of view during the argument, I have in the end, and particularly after hearing the argument of Mr. Buckley, counsel for the Attorney-General, to which I would like to acknowledge my indebtedness, come to the conclusion that DANCKWERTS, J., was right and that the present disposition does constitute a valid charitable trust.

I begin with this, to use the language of LORD PARKER OF WADDINGTON in *Bowman* v. *Secular Society, Ltd.* (7) ([1917] A.C. at p. 437):

> " . . . the circumstances of the gift or the directions given or objects expressed by the donor may be such as to impose on the donee the character of a trustee."

Therefore, a gift to a person holding a particular office, such as that of vicar of a parish or bishop of a diocese or master of a school, may, and frequently in its context will, be held to impose on the donee the character of a trustee. The matter was recently expressed thus by JENKINS, L.J., in *Re Spensley's Will Trusts* (8), the most recent of the reported cases ([1954] 1 All E.R. at p. 184):

> " It will be seen that inevitably those two principles must be liable to produce fine distinctions in particular cases and it may often be hard to decide on which side of the line a given case falls. Is it a gift to a holder of an office of a charitable character virtute officii with merely superadded words conferring wide powers of disposition ? If so, on the principle followed in *Re Flinn* (2), the gift will prima facie be charitable by virtue of the charitable character of the office. On the other hand, is it a gift to a trustee bearing a charitable character or holding a charitable office on trusts which according to their terms are not, or are not exclusively or necessarily, of a charitable nature ? If so, then the scope of the trusts is not to be limited by reference to the character of the trustee."

In this case it was not contended otherwise than that the gift to the Bishop of the Windward Islands was intended to be a gift to him virtute officii and to impose on him, accordingly, the character of a trustee; and, if the gift had stopped after the words " Windward Islands ", so as not to include the final words in the clause, " to be used by him as he thinks fit in his diocese ", the

A trusts would have been those exclusively appropriate to the office which he held. In this case, therefore, and in the other examples which I have given, the trusts would accordingly, I apprehend, have been charitable trusts. If, therefore, in a gift of this character, there are no words added to the gift to the donee described by reference to his office, the trust would (where an intention not to make a gift to the donee for his own personal benefit is established) be implied by the B law. The difficulties appear almost always to have arisen from general words which follow the gift—words which may be either of limitation or expansion. The argument before us has been illustrated by a numerous list of reported cases, starting with *Re Garrard* (1) and ending with *Re Spensley's Will Trusts* (8), and in the future the present case may well make another link in the chain. I do not propose to travel through the cases again. The examples which I have given C from them sufficiently, I think, illustrate the arguments and my judgment.

The conclusion which counsel for the persons interested in the event of an intestacy, from their analysis of the cases and their explanations of the distinctions, seek to apply to this case is as follows. Once, they say, it is seen that the circumstances or context of the gift are such as to impose the character of a D trustee on the donee and that the trusts on which the donee holds are exclusively those properly belonging to or relating to his office, then it must follow that, if the words which follow the gift are general and unqualified, e.g., are "for such purposes as he shall in his absolute discretion think fit" or similar words, the trusts must still be limited to the scope of the office held, for otherwise the gift would inevitably become repugnant in itself. The general words cannot E be construed literally, since they would, if so construed, allow beneficial enjoyment by the donee, which ex concessis is already negatived; and the only other possible way to construe the words is to limit their significance by reference to the office of the donee. On the other hand, according to the contention of counsel for those interested in the event of an intestacy, when the words following the gift are not general and wholly unqualified, the antinomy, or, as they express it, F the dilemma, is no longer presented. The presence of the limitation or qualification of itself negatives the unlimited discretion which would create the conflict with the donee's character as a trustee. It becomes, then, necessary to see, in such a case as the present, whether the words following the gift, not being entirely general, are, on ordinary principles of construction, such as to comprehend G non-charitable as well as charitable objects.

The argument has great force and cogency, and, if it is correct, it is obviously fatal to the validity in the present case of the gift in favour of the Bishop of the Windward Islands; for clearly the uses to which the bishop might, as a trustee, seek to apply the fund within the confines of his diocese would not be all charitable purposes. On the whole, however, I prefer the explanation put forward by H counsel for the bishop and for the Attorney-General. According to their argument, the true analysis of the cases is to this effect. The question is whether, on the construction of the language used, the words following the gift are intended merely to indicate that, within the scope of the trusts properly appropriate to the nature of the office by which the donee is described, the discretion is entirely the donee's, or whether, by the added words, the donor is himself intending to I state, or, at least, to indicate, the trusts on which the donee is to hold the property. If the latter is the true interpretation, then the further question of construction arises whether the trusts so indicated or stated comprehend non-charitable objects. Where, however, the words following the gift to the donee are absolutely general, the first is the right inference to be drawn, that is, that the words are intended merely to indicate that, within the scope of the trusts already implicit in the gift, the discretion is the donee's; for otherwise the added words would permit the beneficial enjoyment by the donee of the fund disposed of.

The two arguments do not widely diverge, but the difference between them, as will be seen, is vital in certain characteristics, and sufficient, in my judgment, to determine the present case. According to counsel for the bishop and for the Attorney-General, in cases like *Farley* v. *Westminster Bank, Ltd.* (4) and *Dunne* v. *Byrne* (3), the language, from the point of view of the question whether there was a valid charitable trust, was such that the testator had not been content to leave the trusts as those implicit in the office of the donee, but had himself indicated the scope of the trusts—although he did so in the broadest possible sense and in such a way that, within the general bounds of those trusts, the discretion should be that of the donee. For my part, I think that this argument is the sounder. I come to that conclusion for two reasons. In the first place, I think that the argument more truly accords with the principle of the decision in *Farley's* case (4), which was a decision of the House of Lords. In the submission of counsel for those interested in the event of an intestacy, a qualification inserted in, or an addition made to, the words which follow the gift itself would (prima facie, at least) be fatal, although, on the face of those words, they amounted to no more than a limitation. Such, indeed, is the present case, where the words of qualification added to the more general formula are " in his diocese ", and are, therefore, as a matter of construction, merely effective to limit the operation of the trusts to the diocese as distinct from the whole of the world. It seems, therefore, that the rule as worked out by counsel for those interested in the event of an intestacy would be an automatic rule of thumb, so that any qualification of any kind would always be fatal to the validity of a gift of this kind as a charitable discretion. On the other hand, on the view submitted by counsel for the bishop and for the Attorney-General, the real vice of any qualification or particularisation, when added to the general formula, is that, on its true construction, it operates not as a limitation, but as an extension or expansion of what otherwise would be the scope of the trusts.

If *Farley* v. *Westminster Bank, Ltd.* (4) is taken as an example, the words which were there added by way of what I have called qualification were " for parish work ". In this court, to take the language of FARWELL, J. ([1938] 1 All E.R. at p. 716), those words " parish work " were construed as meaning

> " that which is sometimes compendiously called ' good works ' in the particular parish—that is to say, the various activities which the vicar and churchwardens promote and carry on in the parish for the good of the parishioners, not merely for their religious good, but for their good generally in various ways, which, no doubt, although many of them are most benevolent and excellent, are not charitable in the strict sense of the word."

In the House of Lords LORD RUSSELL OF KILLOWEN, after stating the argument that the words " for parish work " were limited to the work which the vicar and churchwardens were strictly appointed to perform (namely, the religious purposes of the parish), said ([1939] 3 All E.R. at p. 494):

> " For myself, I am unable to put so narrow a construction upon the words . . . In my opinion, upon the true construction of this will, the words in brackets [' for parish work '] mean that the gift is not a gift for ecclesiastical or religious purposes in the strict sense, but that it is a gift for the assistance and furtherance of those various activities connected with the parish church which are to be found, I believe, in every parish, but which, unfortunately for the donees here, include many objects which are not in any way charitable in the legal sense of that word."

By making that addition of " for parish work ", therefore, the testator was indicating that the trusts on which the vicar and churchwardens should hold the fund were those expressed by FARWELL, J., and LORD RUSSELL, and the vice of those words which were added was, as I have said, that they had enlarged what would otherwise have been implicit from the nature of the office of the donee, so as to comprehend non-charitable as well as charitable purposes. LORD ATKIN stated that conclusion quite plainly as follows (ibid., at p. 492):

> ". . . I am entirely unable to accept that construction [the construction put forward by the appellants]. I think that the words are quite plainly enlarging words. They are words of definition, it is quite true, but I think that they were used for the very purpose of defining what the testatrix meant as the purpose for which the money was to be applied . . ."

There is, however, a further, and second, reason which seems to me also to support the view of counsel for the bishop and for the Attorney-General. If counsel for those interested in the event of an intestacy are right, the result would appear to me, as I have already indicated, to be to bring into existence what I have ventured to call a rule of thumb method of dealing with this class of case; and prima facie I am disposed to reject, in a matter which in the end rests on the construction of particular documents, anything in the nature of a rule of thumb method, and more particularly when its application would appear to offend against the plain logic and common sense of the matter. That such would be the effect of the rule, I attempted to illustrate during the course of the argument by an example given, which, as counsel for the first five defendants pointed out, was not, as I presented it, appropriate, but which, as amended, is, I think, appropriate and illustrates the point which I am seeking to make. I take the language in *Re Flinn* (2), which was held, as I have said, to be a good gift, namely, to " the Archbishop of Westminster . . . to be used by him for such purposes as he shall in his absolute discretion think fit ". Let it then be supposed that there were added to those words " other than for the repair of the cathedral ". The words which I have added are not such as to imply that the earlier general formula included personal enjoyment by the archbishop or included purposes which were not charitable. The effect, on the face of the words, is merely to limit the general purposes to which the archbishop, in the exercise of his official calling, could apply the fund, and to limit them by the exclusion of one purpose only, namely, the repair of the cathedral. Yet, as I follow the argument of counsel for those interested in the event of an intestacy, the addition of those words " other than the repair of the cathedral " would render the gift inevitably and automatically invalid. It seems to me, on the other hand, that if the test of the analysis by counsel for the bishop and for the Attorney-General is applied, the effect is that which it appears to be—namely, to exclude one, and one only, of the trusts implicit in the office of the archbishop, but not so as to substitute for those trusts some new and different trusts which the testator himself lays down or defines. I must not be taken to be saying that the analysis which has been put before us is necessarily applicable in every case of this broad kind when the charitable or non-charitable character of a gift has to be determined. As I said a moment ago, all these questions in the end turn on the construction and effect of the particular words used. In the class of case in what I may call the *Re Garrard* (1) to *Re Spensley's Will Trusts* (8) category, however, I think that the analysis points the way to the correct conclusion.

In the course of the argument, we were referred to *Re Macgregor* (9) (1932) (32 S.R.N.S.W. 483), a decision of the Supreme Court of New South Wales, where the essential words were " for diocesan purposes ", and the learned judge, LONG INNES, J., held that there was a valid charitable gift, I do not, for my part, think that that decision much assists us in the present case, because the phrase " for diocesan purposes " was held by the judge, on the evidence before him, to mean exclusively ecclesiastical purposes. What seemed from the report more striking was the reference in the argument before LONG INNES, J., and in the judgment to *Re Van Wart* (10) which had been decided by PARKER, J., in 1911. According to the reference in the judgment (32 S.R.N.S.W. at p. 495), it appeared that PARKER, J., had required, in making his order, an undertaking on the part of the then Roman Catholic Archbishop of Westminster that the property would, in his hands, be used by him " for diocesan purposes "; and it seemed that, if that were so, at any rate PARKER, J., also thought that " diocesan purposes ", as such, were exclusively ecclesiastical and, therefore, charitable. In the circumstances, I thought it proper to send for the order from the Public Records Office, and, in case this matter should come again before the courts, it may be useful if I state what in fact was the order, as it appears from the record. After a statement of the evidence which had been read, the order proceeded:

> " And the defendants the Most Reverend Francis Bourne, Roman Catholic Archbishop of Westminster, and the Very Reverend Patrick Cooney, the Provincial of the Order of the Friars Minor of St. Francis, by their counsel stating that they respectively intend and hereby undertake to apply the gifts or bequests of the third parts of the said testatrix's residuary estate bequeathed to each of them respectively by the said will for the purposes therein expressed, and the defendant His Majesty's Attorney-General by his counsel expressing himself satisfied with the said undertakings, this court doth declare that upon the true construction of the said will the plaintiffs ought to pay one-third part of the residuary estate of the said testatrix to each of the defendants the Most Reverend Francis Bourne and the Very Reverend Patrick Cooney on their sole receipts and that the gift of the remaining one-third part of the said residuary estate which became operative by virtue of the said codicil is given to the defendants the Most Reverend Francis Bourne and the Very Reverend Patrick Cooney in equal shares for their own respective use and benefit free from any trust and doth direct the same to be paid to them accordingly."

It will be seen, therefore, that, on the face of the order, it looks as though the view taken by PARKER, J., was that there was, as far as the relevant shares of residue were concerned, no effective trust at all; but that the archbishop and his co-defendant in fact undertook to apply the funds according to the trusts or purposes declared by the testator and that that undertaking satisfied the Attorney-General. The order went accordingly. The case quite obviously does not, therefore, give any assistance in the present case, save to the extremely limited extent that, if the purposes expressed by the will were described, or to the extent to which they were described, as " diocesan purposes ", it might lend some slight support to the view that diocesan purposes were exclusively ecclesiastical; but, beyond that, I think that the case carries us no further.

My last word shall be about *Re Beddy* (6), before HARMAN, J. Having regard to the view which I reach in the present case, the question may be asked whether I am also of opinion that the decision of HARMAN, J., in *Re Beddy* (6) ought not to be supported. In my view, it is unnecessary to express any conclusion on that matter. The words are, I think, materially different. In the present case the words are " to be used by him as he thinks fit in his diocese "; in *Re Beddy* (6) the words were " to use for such purposes in the diocese as he may choose ". These matters always being questions of construction, it might—I say no more—well be that the correct answer in regard to *Re Beddy* (6) was that the words " for such purposes in the diocese as he may choose " are substantially the same as, or, at any rate, not materially different from, the words in *Dunne* v. *Byrne* (3), namely, for such purposes as the archbishop " may judge most conducive to the good of religion in [the] diocese ". If that is so, then, although the distinction is, no doubt, a fine one, it would follow that *Re Beddy* (6) was rightly decided, and that the decision of DANCKWERTS, J., in the present case to the contrary effect involves no inconsistency with the decision of HARMAN, J. However that may be, for the reasons which I have stated, I have come, on the whole, to the same conclusion as that to which DANCKWERTS, J., came, and I think, therefore, that this part of the appeal should be dismissed.

JENKINS, L.J.: The question which we now have to decide is whether, as DANCKWERTS, J., has held, the gift of residue to " the Bishop for the time being of the Diocese of the Windward Islands to be used by him as he thinks fit in his diocese " is a valid charitable gift. It is not, and could not well be, disputed that the gift is to the person for the time being holding the office of bishop of the diocese named virtute officii, and not a gift beneficially to the individual happening to hold that office at the date of the testator's death. Accordingly, it is not open to doubt that the bishop for the time being takes as a trustee and that, if the gift had been to the bishop for the time being of the diocese named simpliciter, without the addition of the words " to be used by him as he thinks fit in his diocese ", it would have operated as a gift to the bishop for the time being on a charitable trust for ecclesiastical purposes. See, for instance, *Thornber* v. *Wilson* (11) (1855) (3 Drew. 245) and *Re Delany* (12) ([1902] 2 Ch. at p. 646). It follows that the gift in question is a valid charitable gift unless the addition of the words " to be used by him as he thinks fit in his diocese " has the effect of converting what would otherwise be a valid charitable trust into a trust capable of including objects which are not charitable and, therefore, void for uncertainty.

Cases concerning gifts of this type have been only too often before the courts. The authorities were discussed in some detail in *Re Flinn* (2), and their effect has been recently summarised by this court in *Re Spensley's Will Trusts* (8). I therefore find it unnecessary to go into them all again. I think that the principles to be applied are sufficiently stated in the following passages from my own judgment in *Re Spensley's Will Trusts* (8). I said ([1954] 1 All E.R. at p. 183):

> " The learned judge . . . founded himself on the principle deducible from the cases summarised and followed in *Re Flinn* (2). I find it unnecessary to review those authorities at length, because counsel for the fourth defendant, in the course of his argument on behalf of residue, stated the principle deducible from them in terms which, if I may say so, appear to me to be wholly adequate, and from which counsel for the Attorney-General did not dissent. The principle deducible from those authorities was thus stated by counsel: ' Where there is a gift to a person who holds an office the duties of which are in their nature wholly charitable and the gift is made to him in his official name and by virtue of his office, then, if the purposes are not expressed in the gift itself, the gift is assumed to be for the charitable purposes inherent in the office '. On the other hand, it is necessary also to bear in mind the principle stated in such cases as *Dunne* v. *Byrne* (3) and *Re Davidson* (13) ([1909] 1 Ch. 567). The principle deducible from those cases is of this nature—and to contrast it with the principle deducible from *Re Flinn* (2) and the cases there followed it can appropriately be introduced with a ' but '—' But where the purposes of a gift are plainly expressed in terms not confining them to purposes which are in the legal sense charitable they cannot be confined to charitable purposes merely by reference to the character of the trustee ' . . . It will be seen that inevitably those two principles must be liable to produce fine distinctions in particular cases and it may often be hard to decide on which side of the line a given case falls. Is it a gift to a holder of an office of a charitable character virtute officii with merely superadded words conferring wide powers of disposition ? If so, on the principle followed in *Re Flinn* (2), the gift will prima facie be

> charitable by virtue of the charitable character of the office. On the other hand, is it a gift to a trustee bearing a charitable character or holding a charitable office on trusts which according to their terms are not, or are not exclusively or necessarily, of a charitable nature ? If so, then the scope of the trusts is not to be limited by reference to the character of the trustee."

The question in the present case, therefore, is whether the words " to be used by him as he thinks fit in his diocese " are merely superadded words conferring wide powers of disposition, or are words imposing trusts which according to their terms are not, or are not exclusively or necessarily, of a charitable nature. In other words, has the testator here left the purposes of the gift to be implied from the charitable character of the bishop's office, and merely added a provision to the effect that the bishop is to have full discretion in the application of the fund for those purposes, or has the testator defined the trusts on which the property is to be held in terms capable of including objects which are not charitable ? In my judgment, it is reasonably plain that this question should be answered in the former sense. The testator has not defined the trusts on which the fund is to be held. He has merely given the bishop for the time being an absolute discretion as to its application by the words " to be used as he thinks fit " and limited that discretion to the use of the fund in the area under the bishop's ecclesiastical charge by the final words " in his diocese ".

Were it not for those final words, the gift in the present case would not be distinguishable in any material respect from the gift upheld in *Re Garrard* (1) and would even more closely resemble the gift upheld in *Re Flinn* (2) ([1948] 1 All E.R. 541), which was in these terms:

> " To His Eminence the Archbishop of Westminster Cathedral London for the time being I bequeath all the rest residue and remainder of my property of every nature and kind . . . to be used by him for such purposes as he shall in his absolute discretion think fit."

We were not invited, even if it were open to us to do so, to hold that *Re Garrard* (1) and *Re Flinn* (2) were wrongly decided. The burden of the argument for the next of kin was to the effect that the presence here of the words " in his diocese" sufficed to distinguish this case from those, and to bring it within the principle of *Dunne* v. *Byrne* (3). So to hold would, to my mind, be carrying refinement of distinction too far. In *Re Garrard* (1), the gift was to the vicar and churchwardens for the time being of a specified parish " to be applied by them in such manner as they shall in their sole discretion think fit ", and JOYCE, J., after observing ([1907] 1 Ch. at p. 384) that a

> " legacy to the vicar and churchwardens for the time being of a parish, without more, is a gift or charitable legacy to them for ecclesiastical purposes in the parish ",

went on to say (ibid.):

> " The words ' to be applied by them in such manner as they shall in their sole discretion think fit ', to my mind merely direct that the particular mode of application within the charitable purposes of the legacy is to be settled by those individuals . . ."

If the charitable purposes to be implied from a gift to the vicar and churchwardens for the time being of a parish, without more, are ecclesiastical purposes in the parish, and the words " to be applied by them in such manner as they shall in their sole discretion think fit " merely indicate that those individuals are to settle the particular mode of application within the charitable purposes of the legacy (that is to say, " ecclesiastical purposes in the parish "), I fail to see how the express addition of the words " in the parish " (which, if not expressed, would have been implied from a gift to the vicar and churchwardens for the time being simpliciter) could reasonably be held to alter the result. So, in the present case, a gift to the bishop for the time being of the diocese of the Windward Islands, without more, would have been a charitable legacy to him for ecclesiastical purposes in his diocese. The words " to be used by him as he thinks fit " merely direct that he is to settle the particular mode of application within the charitable purposes of the legacy (that is to say, ecclesiastical purposes in his diocese); and the addition of the words " in his diocese " is no more than an expression of that which, if not expressed, would have been implied. Accordingly, I regard this case as indistinguishable from *Re Garrard* (1) and *Re Flinn* (2). It follows that in my opinion *Re Beddy* (6) where a gift " to the Roman Catholic prelate who shall be Archbishop of Westminster at the time of my death to use for such purposes in the diocese as he may choose " was held to be distinguishable from *Re Flinn* (2) and void for uncertainty on the principle of *Dunne* v. *Byrne* (3) and *Re Davidson* (13) ([1909] 1 Ch. 567), cannot be supported so far as it is to be regarded as turning merely on the presence of the words " in the diocese ". I express myself in that way because I prefer to reserve my opinion on the question whether the form of words used in *Re Beddy* (6), taken as a whole, may not provide a valid ground for distinguishing it from the present case. For these reasons, I agree that DANCKWERTS, J., came to a right conclusion on this question, and, accordingly, that the appeal fails and should be dismissed.

PARKER, L.J.: I agree with both judgments and there is nothing which I desire to add.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Bridges, Sawtell & Co.* (for the seventh defendant, the appellant, and for the fourth and fifth defendants); *Theodore Goddard & Co.* (for the first, second and third defendants); *Nicholl, Manisty & Co.* (for the sixth defendant); *Edwin Coe & Calder Woods*, agents for *Urry, Woods & Pethick*, Ventnor (for the plaintiffs); *Treasury Solicitor.*

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

A

NOTE.

HARVEY *v.* HARVEY.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Davies, J.), July 25, 1955.] B

Divorce—Appeal—Transcript of shorthand notes of judgment of Divisional Court—Costs—Legal Aid (General) Regulations, 1950 (*S.I.* 1950 *No.* 1359), *reg.* 14 (3).

Legal Aid—Costs—Transcript of shorthand notes of Divisional Court of Probate, Divorce and Admiralty Division—Legal Aid (General) Regulations, 1950 (*S.I.* 1950 *No.* 1359), *reg.* 14 (3). C

[For the Legal Aid (General) Regulations, 1950, reg. 14 (3), see 5 HALSBURY'S STATUTORY INSTRUMENTS 214.]

Application.

This was an application by the wife for leave to appeal against an order of the Divisional Court dated May 12, 1955. D

The Cardiff justices found the husband guilty of desertion and of wilful neglect to maintain and made a maintenance order in favour of the wife. The husband appealed and both parties were granted civil aid certificates.

On May 12, 1955, the Divisional Court (LORD MERRIMAN, P., and DAVIES, J.) allowed the appeal and remitted the case for re-hearing by the justices. At the conclusion of their judgment, there was a discussion as to the need to make a further application to the area committee under the Legal Aid (General) Regulations, 1950, reg. 14 (3), for authority to bespeak a transcript of the shorthand notes of the court's judgment for the justices at the remitted hearing. E

On July 25, 1955, the wife applied to the Divisional Court for leave to appeal to the Court of Appeal against the order of the Divisional Court dated May 12, 1955. The court granted leave to appeal and during his judgment LORD MERRIMAN, P., made the observations reported below. F

A. J. D. McCowan for the wife.

A. C. Munro Kerr for the husband.

LORD MERRIMAN, P.: I am now in a position to make the following announcement with the consent of the Lord Chancellor: The Treasury have agreed that transcripts may be provided at the public expense in all cases in which the Divisional Court directs a re-hearing by magistrates, and in any other case which the court considers fit for a transcript. G

Solicitors: *Rhys Roberts & Co.*, agents for *Leo Abse & Cohen*, Cardiff (for the wife); *Wrentmore & Son*, agents for *H. Morgan Lloyd & Evans*, Cardiff (for the husband).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

Re MANNERS (*deceased*). PUBLIC TRUSTEE *v.* MANNERS AND OTHERS.

[CHANCERY DIVISION (Upjohn, J.), March 2, April 6, 1955.]

Will—Class gift—Time of ascertainment of class—Gift of share of residue to "my grandchildren (the children of my son [E.J.M.])"—Distribution postponed until the youngest is twenty-one years of age—Whether grandchildren born after testator's death included in class.

By his will the testator directed that his residuary estate should be divided into four equal parts and gave "one part to my grandchildren (the children of my son [E.J.M.]) to be administered towards their maintenance and education until the youngest is twenty-one years of age and then distributed equally among them." At the date of the testator's death E.J.M. had two children. Subsequently a third child was born. Neither of the elder children had attained the age of twenty-one years. On the question whether the one-fourth share of residue was held on trust for all the children of E.J.M., whenever born,

Held: the gift to the grandchildren being immediate and vested, the rule of construction was that the class of grandchildren who took under the gift was confined to those in esse at the date of the testator's death unless the testator had clearly indicated a contrary intention; the direction to distribute the share when the youngest was twenty-one years of age was not a sufficient indication that the testator intended a larger class to take, and, therefore, the share was held on trust for the two children of E.J.M. who were living at the date of the testator's death.

Smith v. *Jackson* (1823) (1 L.J.O.S.Ch. 231) followed; *Mainwaring* v. *Beevor* (1849) (8 Hare, 44), *Armitage* v. *Williams* (1859) (7 W.R. 650), and *Re Pilkington* (1892) (29 L.R. Ir. 370) distinguished.

[**Editorial Note.** In the present case the controversy was whether a principle analogous to the rule in *Andrews* v. *Partington* (1791) (3 Bro. C.C. 401) applied. That rule is that where there is an immediate bequest to the children of "A" to be paid at the age of twenty-one years, and at the testator's death children of "A" are living but none has attained that age, all children coming into existence before the eldest attains twenty-one share in the bequest. In the present case the gift was to the children of the son to be administered until the youngest was twenty-one and then to be distributed, and, if the construction had prevailed whereby children born after the testator's death might benefit, the result would have been that the class would not have closed while there was possibility of further children being born owing to the period of distribution being when the youngest should attain twenty-one.

As to the rule of convenience for determining the period of distribution where a class gift is postponed by reason of conditions attached to the donees, see 34 HALSBURY'S LAWS (2nd Edn.) 271, para. 322; and for cases on the subject, see 44 DIGEST 768-775, *6266-6322*.]

Cases referred to:

(1) *Re Couturier*, [1907] 1 Ch. 470; 76 L.J.Ch. 296; 96 L.T. 560; 44 Digest 818, *6697*.

(2) *Gosling* v. *Gosling*, (1859), John. 265; 70 E.R. 423; *subsequent proceedings* sub nom. *Christie* v. *Gosling*, (1866), L.R. 1 H.L. 279; 44 Digest 563, *3812*.

(3) *Smith* v. *Jackson*, (1823), 1 L.J.O.S.Ch. 231; 44 Digest 1059, *9119*.

(4) *Mainwaring* v. *Beevor*, (1849), 8 Hare, 44; 19 L.J.Ch. 396; 68 E.R. 266; 44 Digest 771, *6297*.

(5) *Armitage* v. *Williams*, (1859), 27 Beav. 346; 7 W.R. 650; 54 E.R. 135; 44 Digest 772, *6305*.

(6) *Re Pilkington*, (1892), 29 L.R. Ir. 370; 44 Digest 768, *6266 xi*.

(7) *Andrews* v. *Partington*, (1791), 3 Bro. C.C. 401; 29 E.R. 610; 44 Digest 768, *6266*.

(8) *Oppenheim* v. *Henry*, (1853), 10 Hare, 441; 68 E.R. 999; sub nom. *Openheim* v. *Henry*, 20 L.T.O.S. 291; 44 Digest 766, *6246*.

(9) *Dias* v. *De Livera*, (1879), 5 App. Cas. 123; 44 Digest 759, *6174 i*.

(10) *Re Bleckly*, [1951] 1 All E.R. 1064; [1951] Ch. 740; 2nd Digest Supp.

Adjourned Summons.

The plaintiff, as executor and trustee of the will of the testator, Henry James Manners deceased, applied to the court by originating summons, dated Mar. 25, 1948, for the determination of questions arising under the will.

The testator, by his will dated July 28, 1944, gave and bequeathed to his grandchildren, the children of his son Eric James Manners, the balance of £5,000 after the purchase of an annuity given by the will. After giving a number of pecuniary legacies, he divided the residue into four equal parts and gave and bequeathed one part to his grandchildren (the children of his son Eric James Manners)

> " to be administered towards their maintenance and education until the youngest is twenty-one years of age and then distributed equally among them."

At the time of the testator's death, on Apr. 5, 1947, Eric James Manners had two children, the infant defendants, Roy Axel Manners and Delene Cheryl Manners, then aged four and two and a half years, respectively.

Questions 4 and 5 of the summons were:

> " (4) whether on the true construction of the will . . . the class of children of the defendant Eric James Manners to whom the . . . sum of £5,000 or the balance remaining after the purchase of the . . . annuity is given consists (a) of the defendant Roy Axel Manners and Delene Cheryl Manners or (b) of the said defendants and any other children of Eric James Manners who may hereafter be born. (5) whether on the true construction of the will . . . one-fourth share of [the] residuary estate is held upon trust (a) for the defendants Roy Axel Manners and Delene Cheryl Manners or (b) for the said defendants and such other children of the defendant Eric James Manners as may come into existence before the youngest such child for the time being living attains the age of twenty-one years or (c) for the said defendants and all other children of the defendant Eric James Manners whenever born . . ."

The summons came before the court in October, 1948, and, by an order of Wynn-Parry, J., dated Jan. 24, 1949, declarations were made in reply to questions 1, 2 and 3 (which are not material for the purposes of this report), and it was ordered, among other things, that questions 4 and 5 were to stand over as long as the infant defendants, Roy Axel Manners and Delene Cheryl Manners, were both alive and under the age of twenty-one years and no other grandchild of the testator had been born; and that all further proceedings except as against the infant defendants be stayed.

On Sept. 17, 1950, a third child, Max Manners, was born to the testator's son, Eric James Manners. It having become necessary to determine questions 4 and 5, the summons was restored, and Max Manners was added as a defendant, by amendment.

D. H. McMullen for the plaintiff, the trustee, and for unborn children of the testator's son Eric James Manners.

M. Nesbitt for the defendants Roy Axel Manners and Delene Cheryl Manners, the testator's grandchildren living at the time of his death.

R. W. Vick for the defendant Max Manners, a grandchild born after the testator's death.

Cur. adv. vult.

Apr. 6. **UPJOHN, J.**, read the following judgment: The testator, Henry James Manners, died on Apr. 5, 1947. His will, dated July 28, 1944, gave rise to a number of questions of construction, and an originating summons was issued in 1948 to determine those questions. The summons was heard in 1949, when it appeared that two of the questions, Nos. 4 and 5, raised what were then future questions, and they were ordered to stand over generally. The other questions were determined, and proceedings against all the defendants except the third and fourth defendants, Delene Cheryl Manners and Roy Axel Manners, have been stayed. The third and fourth defendants are the children of the testator's son, Eric James Manners, and they were both born in the testator's lifetime. Since his death, Eric James Manners has had further issue, namely, a son, Max Manners, who was born on Sept. 17, 1950, and who has been added by amendment as a defendant to the originating summons. His birth makes it necessary now to determine questions 4 and 5. None of the children has attained the age of twenty-one years.

By his will the testator made a number of pecuniary bequests, among them one in this form:

> "I give and bequeath £5,000 to purchase an annuity of £250 per annum less tax for Amelia Martha Manners, the balance of this £5,000 after the purchase of this annuity of £250 per annum less tax I give and bequeath to my grandchildren, that is the children of my son Eric James Manners."

Question 4 of the summons asks whether the balance of the sum of £5,000, after providing for the annuity, ought to be held for the defendants Roy Axel Manners and Delene Cheryl Manners, or whether the class includes Max and any other after-born children of Eric James Manners. It is conceded that, as the gift of the balance is an immediate gift, the class is closed at the death of the testator, and that Max and any later-born children of Eric James Manners are excluded, and I shall declare accordingly.

The testator divided his residue into four equal parts, and his directions with regard to one part give rise to a question of difficulty. The relevant terms of the will are as follows:

> ". . . one part to my grandchildren (the children of my son Eric James Manners) to be administered towards their maintenance and education until the youngest is twenty-one years of age and then distributed equally among them . . ."

Question 5 of the summons suggests that there may be three possible ways of considering this gift. The question is in these terms:

> "5. whether on the true construction of the will of the testator one-fourth share of his residuary estate is held upon trust (a) for the defendants

> Roy Axel Manners and Delene Cheryl Manners or (b) for the said defendants and such other children of the defendant Eric James Manners as may come into existence before the youngest such child for the time being living attains the age of twenty-one years or (c) for the said defendants and all other children of the defendant Eric James Manners whenever born . . ."

No one has been found to support alternative (b), and the whole argument has been directed to alternatives (a) and (c). Counsel for the two older children submitted, in the first place, that the testator had provided his own dictionary, as he had used similar words in the gift of the legacy, and he could not have intended a different class to take a share of the residue. I feel unable to accept this submission. In the gift of residue the testator has attached certain directions as to maintenance and distribution not attached to the legacy, and I cannot assume that he necessarily intended the same class to take. Secondly, counsel argued that on the true construction of the will there is a clear immediate absolute gift of corpus which must be construed as a gift then in esse at the testator's death. There is a superadded direction postponing the time of payment, and in accordance with well-settled principles in such a case the court will reject the superadded direction which merely postpones the enjoyment of the gift; see *Re Couturier* (1) ([1907] 1 Ch. 470), where the broad principle laid down by PAGE WOOD, V.-C., in *Gosling* v. *Gosling* (2) (1859) (John. at p. 272) is cited with approval.

Counsel relied very strongly on *Smith* v. *Jackson* (3) (1823) (1 L.J.O.S.Ch. 231). It was a decision of SIR JOHN LEACH, V.-C., and, except for the interposition of life interests in residue to the testator's widow and daughter and the survivor, the terms of the relevant codicil were indistinguishable from the present case. SIR JOHN LEACH, V.-C., said (1 L.J.O.S.Ch. at p. 233):

> " Here the time of payment is, when the *youngest* shall attain the age of twenty-one. The testator must mean *the youngest of the children who are to take*; and the real question is, whether the gift is confined to great-grandchildren living at the death of Mary Jackson, or includes all great-grandchildren at whatever time born . . . No person can doubt, that if the gift in the codicil had stopped at these words ' in trust for all and every the child and children of my said grand-daughters ', there would have been a clear vested interest in the children living at the death of the testator's widow. The codicil, however, does not stop here; it goes on to direct payment, when the youngest shall attain the age of twenty-one. But if there be a present interest given in general words, it is not the less a *vested* interest, because the payment is referred to a future time. This is the general principle; according to it, there would be a vested interest in all the great-grandchildren living at the death of Mary Jackson; and this general principle must prevail, unless there be found in the instrument, that is to receive a construction, something declaring a contrary intention."

SIR JOHN LEACH, V.-C., concluded his judgment in these words (ibid., at p. 234):

> " The principle on which I proceed is—that, unless something be found to control the general principle of construction, the direct words of bequest in the codicil give a vested interest to the great-grandchildren living at the death of the survivor of the widow, Mary Jackson, and the daughter Mary Smith: and that to control this vested interest, a clear expression of particular intention must be found. In this codicil, however, far from finding anything in the other clauses to control the general principle, all the directions are in favour of it. Therefore, the great-grandchildren living at the

A death of the survivor of the widow and daughter, must be held to have taken a vested interest at that time: and, consequently, after-born children are excluded."

That decision is not mentioned in the latest editions* of THEOBOLD ON WILLS or HAWKINS ON WILLS, and is treated as inconsistent with the later B authorities in a footnote in JARMAN ON WILLS (8th Edn.), vol. 3, at p. 1680. I must refer to those authorities, in none of which was *Smith* v. *Jackson* (3) cited. The first is *Mainwaring* v. *Beevor* (4) (1849) (8 Hare, 44). The relevant gift was that as soon as all and every the testator's grandchildren attained the age of twenty-one years, the subject-matter of the gift was to be divided among such grandchildren. Later the testator declared that each of his grandchildren on their C severally attaining the age of twenty-one years should take vested interests under the will. That is sufficient to distinguish that case from this, for the gift to grandchildren was not vested at the testator's death. SIR JAMES WIGRAM, V.-C., came to the conclusion that, as a matter of construction, a child born after the death of the testator was included in the class of those who took, and D held that there could be no artificial closing of the class when the youngest in esse at any time attained the age of twenty-one years so as to exclude after-born grandchildren.

The next case is *Armitage* v. *Williams* (5) (1859) (7 W.R. 650). In that case there was a gift to the children of M. A. Williams and R. Williams, who were brother and sister, on their attaining the age of twenty-one years. At the date of E the death of the testator neither M. A. Williams nor R. Williams was married. SIR JOHN ROMILLY, M.R., held that the class must remain open to include all the children of M. A. Williams and R. Williams born at any time, and that there could be no artificial closing of the class when the first child attained the age of twenty-one years. That case is clearly distinguishable, for the decision was in F accordance with another well-known rule, namely, that where no one in the class is alive at the death of the testator the class remains open, even where the gift is an immediate vested gift.

The last authority is an Irish case, *Re Pilkington* (6) (1892) (29 L.R.Ir. 370). In that case a testator directed that his residue should accumulate until the children of A. by his wife B. should arrive at the age of twenty-one years each, and G then the whole of the proceeds to be divided share and share alike, between them. There was a gift over if none of the children attained twenty-one years of age. PORTER, M.R., held that there was a gift to all the children of A. and B., whether born in the lifetime of the testator or not. That conclusion was reached (rightly or wrongly) largely because the testator referred to the children of A. H and B., and did not include the children by another mother. The Master of the Rolls also held that each child's share should be vested on the child attaining twenty-one years of age. The real controversy in that case was whether the rule in *Andrews* v. *Partington* (7) (1791) (3 Bro. C.C. 401) applied. Having reached the conclusion on the true construction of that will that after-born children took, the Master of the Rolls necessarily came to the conclusion, supported by I *Mainwaring* v. *Beevor* (4) and *Armitage* v. *Williams* (5), that the class was to remain open until all the children had attained the age of twenty-one years, and that there could be no closing of the class when the eldest attained the age of twenty-one. That case is, therefore, plainly distinguishable from the present case.

Counsel for the youngest child relied on the last three cases which I have mentioned in support of his submission that, where there is a gift to be distributed when the youngest child attains twenty-one years of age, it matters not whether the gift is vested or contingent, for the testator is indicating an intention to benefit all the children, whenever born, and that the ordinary rule closing the class at death is displaced. He further submitted that, although this was an immediate gift, yet the possession or enjoyment is postponed until the youngest child attains twenty-one years of age. Therefore, although the share of residue vests in those in esse at the death, the class remains open to let in any after-born children. He referred me to *Oppenheim* v. *Henry* (8) (1853) (10 Hare, 441). In that case the testator made a gift to his grandchildren to be distributed at the expiration of twenty years from his death. PAGE WOOD, V.-C., held that the gift vested in those grandchildren living at the death of the testator and those born afterwards but before the period of distribution.

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* THEOBALD ON WILLS, 11th Edn. (1954), and HAWKINS ON WILLS, 3rd Edn. (1925).

Those cases are not easy to reconcile, but each of them depended essentially on the true construction of the words used by the testator, and do not form a sure guide to other cases. The real problem—and I find it a difficult one—is to ascertain the class of grandchildren who take. It is conceded that the gift is immediate and is vested. That, in my judgment, is the cardinal point in this case. In these circumstances, there is a clear rule of construction that the class is confined to those in esse at the date of the death, which is only to be departed from where the testator has clearly indicated a contrary intention. So strong is the rule that it is equally applicable to a gift to " all " the children of " A ", although, as has often been pointed out, the apparent intentions of the testator may thereby be defeated. Moreover, although the authorities are conflicting, the better opinion seems to be that in a gift of personalty the rule is equally applicable to a gift to all the children of " A " " begotten and to be begotten ". See the authorities discussed in JARMAN ON WILLS (8th Edn.), vol. 3, pp. 1690-1692, and the opinion of WILLIAMS, J., in his book, WILLIAMS on EXECUTORS AND ADMINISTRATORS,* quoted with approval in *Dias* v. *De Livera* (9) (1879) (5 App. Cas. at p. 134).

That being the general rule, the question is whether the direction to distribute the share when the youngest is twenty-one years of age and to apply the income for maintenance in the meantime is a sufficient indication that the testator intended a larger class to take. I do not think that it is. As SIR JOHN LEACH, V.-C., pointed out in *Smith* v. *Jackson* (3) (1 L.J.O.S.Ch. at p. 233), the testator must mean that the gift is distributable when the youngest of the children who are to take attains the age of twenty-one. The direction as to distribution and maintenance throws no light on the question as to what class is to take and who are to be maintained in the meantime. Distribution takes place when the youngest taker, whoever he may be, attains twenty-one years of age. It is quite different from a case where a testator directs his estate to be accumulated for a fixed period, as in *Oppenheim* v. *Henry* (8). In my judgment, the children to take must be ascertained in accordance with the rule which I have mentioned, for there is insufficient context to displace it. Therefore, the gift vests in the two older children; it will be distributable by the testator's direction when the younger of those attains twenty-one years of age, and they alone will be maintained thereout in the meantime. However, on the principle stated earlier in this judgment, the elder on attaining twenty-one years of age can call for his share. That construction may defeat the testator's real intention, but, if it does, that is because, in my judgment, he has failed to use sufficiently explicit language to displace the rule of construction. It is, in my judgment, a mistake to try to whittle away so firmly entrenched a rule and thereby to make it " incoherent and capricious in its effect ", to borrow the words of SIR RAYMOND EVERSHED, M.R., when considering the analogous rule in *Andrews* v. *Partington* (7): see *Re Bleckly*

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* See now WILLIAMS ON EXECUTORS AND ADMINISTRATORS, 13th Edn. (1953), vol. 2, pp. 551 et seq. The reference in *Dias* v. *De Livera* (supra) was to the 8th Edn. (1879), p, 1094.

A (10) ([1951] 1 All E.R. at p. 1070). I propose to answer the summons in the sense of para. 5 (a).

Declaration accordingly.

Solicitors: *W. J. Woodhouse & Co.* (for the plaintiff); *Drysdale, Lamb & Jackson* (for the grandchildren living at the testator's death); *Stuart Hunt &* B *Co.* (for the grandchild born after the testator's death).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

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NOTE.

Company—Winding-up—Costs—Taxation—Jurisdiction of persons authorised by registrar.

F The Companies (Winding-up) (Amendment) Rules, 1955 (S.I. 1955 No. 1077), which came into operation on July 25, 1955, authorise the taxation of costs in the companies court to be conducted by a person acting under the direction of the registrar. They are expressed to apply to allowances or certificates of taxation given by the registrar after taxation by a person under his direction, whether given before or after the coming into operation of the amending rules. G They thus negative the consequences which otherwise might have flowed from the decision in *Re Wool Textile Employers' Mutual Insurance Co., Ltd.* ([1955] 2 All E.R. 827).

STRONGMAN (1945), LTD. *v.* SINCOCK.

[COURT OF APPEAL (Denning, Birkett and Romer, L.JJ.), July 8, 11, 12, 1955.]

Building Control—Licence—Failure to obtain—Building architect's undertaking to obtain—Liability to builders for breach of warranty.

Warranty—Breach—Illegality affecting main contract for lack of building licence—Building architect's neglect to obtain—Right of builders to rely on his undertaking to obtain licences.

An architect in 1948 and 1949 employed builders, who had done much other work for him without any question arising as to building licences, to convert buildings into dwellings, undertaking to obtain the building licences then necessary for the work under the Defence (General) Regulations, 1939, reg. 56A, and if unable to do so to stop the work. In fact he obtained licences for work to a value much less than the value of the work done, but did not instruct the builders to stop work, with the result that he and the builders committed an offence against the regulations in carrying out the work and the builders were debarred in law from suing on the contract because it was an illegal contract. The amount of the excess of the value of the work done over the sum paid by the architect was £3,459. In an action by the builders against the architect for damages for breach of a warranty by the architect that he would obtain the necessary supplementary licences or stop the work, it was admitted by the architect in evidence that it was the universal practice for the licence to be obtained by the architect where there was an architect.

Held: the architect was liable in damages for the £3,459 for breach of a warranty or of a collateral contract, notwithstanding the illegality affecting the main contract, since the builders were unaware of the failure to obtain the supplementary licences and were not guilty of negligence (which otherwise might disable them from maintaining their claim) in not having required production of the supplementary licences in view of their previous experience with the architect and the practice that an architect was normally responsible for obtaining building licences.

Burrows v. *Rhodes* ([1899] 1 Q.B. 816); *Gregory* v. *Ford* ([1951] 1 All E.R. 121) and *Road Transport & General Insurance Co., Ltd.* v. *Irwin* (not reported) applied. *Askey* v. *Golden Wine Co., Ltd.* ([1948] 2 All E.R. 35), and *Dennis & Co., Ltd.* v. *Munn* ([1949] 1 All E.R. 616) distinguished.

Appeal dismissed.

[**Editorial Note.** If the building owner had not been an architect, the decision in the present case would, it seems, have been against the builders. The case turned on the fact that in practice an architect is normally responsible for obtaining building licences, so that the court was satisfied that the builders had not been culpably negligent in not satisfying themselves that the licences had been obtained. If there had been negligence on the part of the plaintiffs in this respect they would not have recovered (see pp. 93, 94, post). The present case is an instance of an action on a collateral contract or warranty and may usefully be compared with *Marles* v. *Philip Trant & Sons, Ltd.* (*No.* 2) ([1953] 1 All E.R. 651), but a similar principle applies where an action is brought for indemnity in relation to a payment made in a transaction which is illegal only by reason of circumstances unknown to the payor; see 8 HALSBURY'S LAWS (3rd Edn.) 233, para. 401, text and note (o).

As to the effect of failing to obtain building licences on contractual obligations between builder and owner, see 3 HALSBURY'S LAWS (3rd Edn.) 448, paras. 849, 851.

As to ignorance of illegality in relation to contract generally, see 8 HALSBURY'S LAWS (3rd Edn.) 128, para. 221; and for cases on the subject, see 12 DIGEST (Repl.) 313, *2403* et seq., 324, 325, *2506-2509*; see also on illegality by statute, 8 HALSBURY'S LAWS (3rd Edn.) 148, and, as regards collateral contracts, ibid., p. 126, para. 216.]

Cases referred to:

(1) *Heilbut, Symons & Co.* v. *Buckleton*, [1913] A.C. 30; 82 L.J.K.B. 245; 107 L.T. 769; 39 Digest 420, *526*.

(2) *Gregory* v. *Ford*, [1951] 1 All E.R. 121; 2nd Digest Supp.

(3) *Road Transport & General Insurance Co., Ltd.* v. *Irwin*, (1955), 105 L.Jo. 225.

(4) *Burrows* v. *Rhodes*, [1899] 1 Q.B. 816; 68 L.J.Q.B. 545; 80 L.T. 591; 63 J.P. 532; 35 Digest 50, *455*.

(5) *Re Mahmoud & Ispahani*, [1921] 2 K.B. 716; 125 L.T. 161; sub nom. *Mahmoud* v. *Ispahani*, 90 L.J.K.B. 821; 39 Digest 655, *2488*.

(6) *Askey* v. *Golden Wine Co., Ltd.*, [1948] 2 All E.R. 35; 2nd Digest Supp.

(7) *Dennis & Co., Ltd.* v. *Munn*, [1949] 1 All E.R. 616; [1949] 2 K.B. 327; [1949] L.J.R. 857; 2nd Digest Supp.

Appeal.

The plaintiff builders on Feb. 23, 1950, brought an action against the defendant architect for £4,005 6s. 11d., the balance of the price claimed in respect of work done and labour and materials supplied to the architect at the architect's request in 1948 and 1949, and alternatively for damages for breach of warranty to obtain building licences in respect of the work. On June 5, 1951, Master BURNAND ordered that the action be tried before an official referee. The parties agreed to refer to the arbitration of a quantity surveyor the question of the value of the work, all questions of law raised being reserved for the decision of the official referee. By his award of Apr. 17, 1953, the arbitrator found that the sum of £3,459 was due to the builders, being the difference between the total value of the work done, £6,359 and £2,900 paid on account. Before the official referee the architect submitted that only two licences for £1,690 and £460 respectively had been obtained for the work under the Defence (General) Regulations, 1939, reg. 56A, and that work done in excess of those amounts was done illegally and the excess amounts were therefore irrecoverable. The builders contended that the architect orally warranted that he would obtain all the licences and authorities necessary for the work, and that he was liable for damages for breach of the warranty. On Mar. 29, 1955, His Honour SIR LIONEL LEACH, Q.C., the Official Referee, gave judgment for the builders for the sum found to be due by the arbitrator. He found that the architect assured the builders that he would obtain all the licences necessary, including supplementary licences for work in excess of that covered by the original licences, that if he failed to do so he would instruct the builders to stop work, and that he made no attempt to get supplementary licences and did not instruct the builders to stop work but allowed them to proceed in the belief that the licensing position was in order. He held that the builders had not been negligent in not insisting on the production of supplementary licences, having done a great deal of other work for the architect without any question as to the sufficiency of the licences, and the architect being a professional man whose admitted duty it was to obtain all necessary supplementary licences. He therefore held the architect liable for damages for breach of warranty. The architect appealed.

Dingle Foot, Q.C., and *T. O. Kellock* for the defendant architect.

B. S. Wingate-Saul for the plaintiff builders.

DENNING, L.J.: The plaintiffs, Strongman (1945), Ltd., are builders in the county of Cornwall. Two practised men, Mr. George and Mr. William Nicholls, are directors of the company. The defendant, Mr. Sincock, is an architect. The builders claim against the architect for building work which they have done for him. The architect admits that the work was done, but he says that the plaintiffs are not entitled to be paid because it was all done illegally.

The architect has no merits at all. In addition to being an architect, he was the owner of some buildings in Cornwall, and he employed the builders to convert these buildings into modern dwellings. One was at Penpol, and the other at Greatwood, Mylor. The work done was of the value of £6,359. Licences were only obtained for £2,150. The architect says the builders cannot recover anything above the licensed figure because the work was unlawful. It comes ill from him to say this, when on his own admission he sold these converted dwellings altogether for a sum of £10,650. He said in evidence "If I paid the plaintiffs for the work they have done, I should have been left with a very handsome profit." Not only does he wish to keep that profit, but he also wishes to avoid payment of some £4,000 to the plaintiffs on the ground that it was an unlawful contract; but if the defence is good in law, effect must be given to it.

Let me say first that the builders cannot sue here on the contract to do the work. The work was done in 1948 and 1949. At that time it was unlawful under the Defence (General) Regulations, 1939, reg. 56A, for the work to be done without a proper licence. Licences were only in force to the amount of £2,150. When work was done to the value of over £6,000 the builders and the architect were all guilty of an offence for which they might have been prosecuted. Under many decisions in this court it has been held that a builder doing work without a licence cannot recover under the contract.

The builders seek to overcome this objection by saying that there was a warranty, or (putting it more accurately) a promise by the architect that he would get supplementary licences, or, if he failed to get them, that he would stop the work. The builders say that on the faith of that promise they did the work, and that, as the promise was broken, they can recover damages in respect of it.

The first question raised before us was whether there was such a promise, or warranty as it was called. On this point the finding of the official referee was this:

> "I am satisfied that when the [builders] agreed to do work for the [architect] he assured them that he would get all licences which were necessary, and that if the work exceeded the amounts of the original licences he would apply for supplementary licences. I am also satisfied that he said that if he failed to get a supplementary licence he would instruct them to stop work. Consequently I regard the plea of warranty as being well founded."

That seems to me to be a finding of fact which is decisive. Applying the test which LORD MOULTON laid down in *Heilbut, Symons & Co.* v. *Buckleton* (1) ([1913] A.C. at p. 47) the assurance given by the architect amounted to a collateral contract by which the architect promised that he would get any necessary supplementary licences or, if he could not get them, that he would stop the work.

The second question is whether the builders can recover in law on this collateral promise. The promise itself was not illegal, but it is said that damages cannot be recovered for the breach of it. It is said that, if damages could be recovered, A it could be an easy way of getting round the law about illegality. This does not alarm me at all. It is a settled principle that a man cannot recover for the consequences of his own unlawful act, but this has always been confined to cases where the doer of the act knows it to be unlawful or is himself in some way morally culpable. It does not apply when he is an entirely innocent party. Take a case where a master sends out his servant to drive a lorry, and the servant B has an accident and injures a third person on the road. It then turns out that the master had not taken out a proper insurance policy to cover them. Both master and servant are guilty of an offence under the Road Traffic Act, 1930, but, nevertheless, the servant, if sued for damages, can claim an indemnity against the master. The master impliedly promises he will not ask the servant to do C anything unlawful. The master having broken that promise, the servant can recover against him, although the servant was himself guilty of the criminal act of driving without being insured. That was decided by BYRNE, J., in *Gregory* v. *Ford* (2) ([1951] 1 All E.R. 121).

Another case occurred recently where a man hired a car for a day, and the lender represented to him that it was insured. He said the insurance cover D was in the right front compartment in the car. The borrower did not trouble to look at it. He relied on what he was told by the lender. There was an accident and it turned out that the policy was not in force. The hirer and the lender were both guilty of a criminal offence under the Act, but the innocent hirer was entitled to recover indemnity from the lender as on a warranty or promise that there was a valid policy in force to cover him. That was decided E by ROXBURGH, J., in the unreported case of *Road Transport & General Insurance Co., Ltd.* v. *Irwin* (3) on Mar. 9, 1955.

Finally, take the instances which were given by KENNEDY, J., in his celebrated judgment in *Burrows* v. *Rhodes* (4) ([1899] 1 Q.B. 816). In that case Cecil Rhodes was being sued by one of the men who had been enlisted for the F Jameson raid. It was held that, although the plaintiff was guilty of a criminal offence under the Foreign Enlistment Act, 1870, nevertheless he could sue Cecil Rhodes and Jameson for fraud in inducing him to go on the raid. In the course of his judgment KENNEDY, J., took the case of a licensee of a public house who is induced to supply liquor to a man not knowing that the man is intoxicated. He is so induced by the false representation of another. The publican is guilty G of an offence, but he can recover over against the person who deceived him. KENNEDY, J., there had in mind, no doubt, an action of fraud, but it is clear from a passage of the report (ibid., at p. 828) that he put the breach of warranty on the same footing as deceit.

On these authorities I think the law is that, although a man may have been H guilty of an offence which is absolutely prohibited so that he is answerable in a criminal court, nevertheless, if he has been led to commit that offence by the representation or by the promise of another, he can recover damages for fraud if there is fraud, or for breach of promise or warranty if he prove that to have been given, provided always that he himself has not been guilty of culpable negligence disabling him from that remedy.

I Counsel for the architect referred us to the observations of this court in *Re Mahmoud & Ispahani* (5) ([1921] 2 K.B. 716). On a consideration of that case, it seems to me that the court only decided that no action lay on the contract for the purchase of goods. They did not decide whether there was an action for fraud or breach of promise or warranty, and I do not think their observations were intended to express any view on the matter.

The third question is whether the builders were guilty of negligence. I can quite well see that, if there was culpable negligence on the part of the person seeking damages, he might not be entitled to recover. In *Askey* v. *Golden Wine Co., Ltd.* (6) ([1948] 2 All E.R. 35) some merchants had been guilty of culpable negligence in not taking proper steps to see whether a liquor was safe for consumption, and they were not allowed to recover. I said (ibid., at p. 39):

> " If they were allowed to be negligent and yet recover damages, it would offer an inducement to them to turn a blind eye to contamination."

So, if in any of these licensing cases the builder were negligent and yet allowed to recover damages, it would be an inducement to him to turn a blind eye to the regulations. That is what I had in mind in *Dennis & Co., Ltd.* v. *Munn* (7) ([1949] 1 All E.R. 616) and the other cases to which counsel for the architect referred us.

When a builder is doing work for a lay owner, if I may so describe him, the primary obligation is on the builder to see that there is a licence. He ought not simply to rely on the word of the lay owner. He ought to inspect the licence himself. If he does not do so, it is his own fault if he finds himself landed in an illegality. But in this case there was not a lay owner. The owner was the architect, and he himself said in evidence: " I agree that where there is an architect, it is the universal practice for the architect and not the builder to get the licence ". No fault, it seems to me, can, in these circumstances, be attributed to the builder.

It was contended before us by counsel for the architect that, on the facts of this case, there must have been negligence and that, in point of law, the official referee ought so to have found. I think not. The official referee said:

> " I do not consider that the [builders] in the present case have done an immoral act, nor were they negligent in not insisting on the production of supplementary licences. They had done a great deal of other work for the [architect] without any question being raised with regard to the sufficiency of the licences."

As I said at the beginning of this case, it comes very ill from the mouth of the architect to raise this point as against the builders. His attitude was well shown by an observation which he made to the solicitor, Mr. Ratcliffe. He said: "If the Nicholls can be bluffed they deserve to lose their money." In other words, he was saying: " If they were fools enough to trust in me, they ought to lose their money." That is a very wrong attitude for a professional man, an architect, to take up. It shows quite clearly that, on his own admission, he has misled them and now seeks to turn it to his own advantage. In my judgment, his objection fails. On the findings of the official referee, the builders were entirely innocent people who were led into this unfortunate illegality by the representation, amounting to a collateral contract, by the architect that he would get the licences. That contract not having been fulfilled, I see no objection in point of law to the plaintiffs recovering the damages, and I think the appeal should be dismissed.

BIRKETT, L.J.: I am entirely of the same opinion. My Lord's judgment has covered all the essential facts of the case and the law applicable thereto. I must express my satisfaction at being able to come to this conclusion. My Lord has spoken at some length of the acknowledgment of counsel for the architect that he came here without merits. It was quite clear as the argument proceeded that he was not merely without merits but had a considerable quantity of demerits.

The first point taken by counsel for the architect was that the learned official referee ought never to have found a warranty in this case as there was no real

A evidence to support it. Whether the word "warranty" is strictly the correct term to apply, or whether it should be more properly called a collateral contract on which the builders relied, I should have thought that there was abundant evidence that the learned official referee was right. The evidence of Mr. Ratcliffe, the solicitor, is evidence of the most powerful kind. He said: "In December of 1949 I had a conversation with the [architect] on the telephone." At that telephone B conversation, according to Mr. Ratcliffe, the architect said: "The Nicholls are in my hands." Mr Ratcliffe said:

> "'What do you mean by that? The Nicholls have told me that you promised to get the licences'. He agreed with me that he had made the arrangement with the Nicholls to obtain the supplementary licences. I pressed C him again and asked whether I could be assured that he had done what he promised he would do, namely, get the supplementary licences. He would give me no straight answer except he said that the licences were all right. He then made this observation 'If the Nicholls can be bluffed they deserve to lose their money', or words to that effect."

D Later, when he was cross-examined, Mr. Ratcliffe said:

> "I said that the Nicholls brothers told me that the [architect] had promised them to get the supplementary licences. I asked the [architect] whether the position was in order. He said it was."

E There was no cross-examination to suggest that no such conversation took place. When the architect gave evidence, he said he had no recollection of any such conversation at all. When the official referee took up that matter with him he was emboldened to say "That is a complete invention." We know the official referee said:

> F "I accept the evidence adduced by the [builders] and reject the testimony of the [architect] where there is a conflict."

So the situation really was that there was evidence of the existence of this promise from the lips of the architect himself, if Mr. Ratcliffe was to be believed. I think there is no real trouble on the first point raised by counsel for the architect that there was in fact no evidence on which the learned official referee could G come to his conclusion.

The subsequent points have been dealt with by my Lord and it would be mere surplusage to go through them again. The judgments of BYRNE, J., in *Gregory* v. *Ford* (2) ([1951] 1 All E.R. at p. 123), of ROXBURGH, J., in *Irwin's* case (3), and of KENNEDY, J., in *Burrows* v. *Rhodes* (4) ([1899] 1 Q.B. at p. 827) H and in particular the two illustrations which he gave (ibid., at p. 831), support the view that my Lord has already expressed.

Counsel for the architect suggested that, if this method of suing on a warranty could be adopted successfully, the whole purpose of the regulation would be defeated. I think that, on the law as stated by my Lord, whilst it is plainly impossible to sue on a contract for the reasons given, where the facts of the case I permit the finding that a collateral contract did exist, there is no reason why that cause of action should not succeed, even if the plaintiff is placed virtually in the same position as if he were able to sue on the contract. He is suing, not on the original contract, but on the collateral contract or warranty, so called, and he is receiving the damages which arise therefrom. I cannot think that this procedure is altogether vitiated merely because in effect he is getting the result which is prohibited (because he cannot sue on the contract at all). The number of cases of this nature which will arise will not be many.

DENNING, L.J.'s judgments in *Askey* v. *Golden Wine Co., Ltd.* (6) and *Dennis & Co., Ltd. v. Munn* (7) have been cited, but it seems to me that a doctrine of that kind makes the clearest distinction between the kind of case to which my Lord was referring and the kind of case we have had before us today. I agree with the judgment delivered by my Lord, and in my opinion the appeal should be dismissed. A

B

ROMER, L.J.: I also fully agree, and I mention just one subsidiary point which counsel for the architect put on the question of warranty, which was rejected by the official referee, and which is to some extent relied on before us. That was to the effect that an architect cannot give a warranty because he is not in a position to obtain a licence as of right. The official referee rejected that contention, and I agree with him in rejecting it. A man can give a warranty C although he cannot carry it into effect. There is no ground for criticising the learned referee's finding on that score.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Robbins, Olivey & Lake*, agents for *Nalder & Son*, Truro (for the defendant architect); *Peake & Co.*, agents for *Ratcliffe, Son & Henderson*, Falmouth (for the plaintiff builders).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

CAMILLE AND HENRY DREYFUS FOUNDATION, INC. *v.* INLAND REVENUE COMMISSIONERS.

[HOUSE OF LORDS (Lord Morton of Henryton, Lord Porter, Lord Normand, Lord Keith of Avonholm and Lord Somervell of Harrow), July 5, 6, 28, 1955.]

Income Tax—Charity—Charity established abroad—Activities exclusively abroad—Tax on income arising in United Kingdom—Liability—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5 *c.* 40), *s.* 37 (*b*).

The appellant foundation was incorporated under the Membership Corporation Law of the State of New York and carried on all its activities in the United States of America. In the years 1946-51, it received substantial royalties from a company resident in the United Kingdom. The foundation claimed that it was a " body of persons . . . established for charitable purposes only " within the meaning of the Income Tax Act, 1918, s. 37 (b), and was, therefore, exempt from paying income tax under Sch. D to the Income Tax Act, 1918, on the royalties concerned under the provisions of s. 37.

Held: the foundation was not entitled to exemption under s. 37 (b) of the Income Tax Act, 1918, since the words " body of persons . . . established for charitable purposes only " were limited to a body of persons or trusts established for such purposes in the United Kingdom.

Per LORD PORTER, LORD NORMAND, and LORD KEITH OF AVONHOLM: the word " trust " in the Income Tax Act, 1918, s. 37 (b), must be taken as referring to trusts taking effect and enforceable under the law of the United Kingdom (see p. 101, letter C, post).

Decision of the COURT OF APPEAL ([1954] 2 All E.R. 466) affirmed.

[**Editorial Note.** The Income Tax Act, 1918, s. 37 (b) (12 HALSBURY'S STATUTES (2nd Edn.) 31), has been replaced by the Income Tax Act, 1952, s. 447 (b), for which, see 31 HALSBURY'S STATUTES (2nd Edn.) 428.

As to the exemption of charities from tax under Sch. D to the Income Tax Act, 1918, and s. 37 (b), see 17 HALSBURY'S LAWS (2nd Edn.) 315, para. 622; and for cases on the subject, see 28 DIGEST 82-84, *469-483*.]

Cases referred to:

(1) *Inland Revenue Comrs.* v. *Gull*, [1937] 4 All E.R. 290; 21 Tax Cas. 374; Digest Supp.

(2) *Ormond Investment Co.* v. *Betts*, [1928] A.C. 143; 97 L.J.K.B. 342; 138 L.T. 600; 13 Tax Cas. 400; Digest Supp.

Appeal.

Appeal by the taxpayers, Camille and Henry Dreyfus Foundation, incorporated in 1946 under the laws of the State of New York, and carrying on all its activities in the United States, from an order of the Court of Appeal dated June 3, 1954, and reported [1954] 2 All E.R. 466, affirming an order of WYNN-PARRY, J., dated Feb. 18, 1954, dismissing an appeal by way of Case Stated from a decision of the Special Commissioners of Income Tax that the foundation was not exempt under the Income Tax Act, 1918, s. 37 (b), from tax on royalties paid to it in the years 1946-47 to 1950-51 inclusive by British Celanese, Ltd., a company resident in the United Kingdom. The royalties were payable under certain agreements, the benefit of which was, on July 27, 1946, assigned by Dr. Camille Dreyfus to the foundation, the main purpose of which was to advance the science of chemistry, chemical engineering and related sciences as a means of improving human relations and circumstances throughout the world, and also to promote any other scientific, educational or charitable purposes.

F. Heyworth Talbot, Q.C., and *P. Shelbourne* for the foundation.

The Attorney-General (*Sir Reginald Manningham-Buller, Q.C.*), *Roy Borneman, Q.C.*, *Sir Reginald Hills* and *E. B. Stamp* for the Crown.

The House took time for consideration.

July 28. The following opinions were read.

LORD MORTON OF HENRYTON: My Lords, the appellant foundation was incorporated under the Membership Corporation Law of the State of New York in the United States of America. In the years 1946-47 to 1950-51 inclusive the foundation received substantial royalties from British Celanese, Ltd. It is not in doubt that the foundation is liable to pay income tax on these royalties under Sch. D unless it can establish that it is entitled to exemption under the provisions of s. 37 of the Income Tax Act, 1918. That section is in the following terms:

> " Exemption shall be granted—(a) from tax under Sch. A in respect of the rents and profits of any lands, tenements, hereditaments, or heritages belonging to any hospital, public school or almshouse, or vested in trustees for charitable purposes, so far as the same are applied to charitable purposes only: Provided that any assessment upon the respective properties shall not be vacated or altered, but shall be in force and levied, notwithstanding the allowance of any such exemption; (b) from tax under Sch. C in respect of any interest, annuities, dividends, or shares of annuities, and from tax under Sch. D, in respect of any yearly interest or other annual payment forming part of the income of any body of persons or trust established for charitable purposes only, or which, according to the rules or regulations established by Act of Parliament, charter, decree, deed of trust, or will, are applicable to charitable purposes only, and so far as the same are applied to charitable purposes only; (c) from tax under Sch. C in respect of any interest, annuities, dividends or shares of annuities, in the names of trustees applicable solely towards the repairs of any cathedral, college, church or chapel, or any building used solely for the purpose of divine worship, and so far as the same are applied to those purposes."

The foundation claims that it is a " body of persons . . . established for charitable purposes only " and, therefore, comes exactly within the words of s. 37 (b). It is not in dispute that the foundation is " established " in the United States of America, and the first question which arises for decision is whether (as the foundation contends) the words just quoted cover a body of persons or trust " established for charitable purposes only " in any part of the world, or are limited (as the Crown contends) to a body of persons or trust established for such purposes in the United Kingdom. If the former view is correct, a further question will arise, viz., whether the objects of the foundation, as expressed in its certificate of incorporation, are exclusively charitable purposes. It has rightly been conceded on behalf of the foundation that this question has to be decided according to the law of England.

The first question was considered by LAWRENCE, J., in *Inland Revenue Comrs.* v. *Gull* (1) ([1937] 4 All E.R. 290). That learned judge felt himself constrained, by reason of the terms of certain later enactments, to hold (ibid., at p. 293) that the exemption afforded by s. 37 (b)

> ". . . applies only to the income of bodies of persons or trusts established in the United Kingdom ",

although he decided in favour of the taxpayer on the ground that the trust there in question was, in fact, established in the United Kingdom. The later enactments which so constrained the learned judge are referred to by JENKINS, L.J., in his judgment in the present case, in terms which I gratefully adopt ([1954] 2 All E.R. at p. 479):

> "The consideration which LAWRENCE, J., regarded as constraining him to construe s. 37 as he did was the legislative interpretation placed on s. 37 by s. 21 of the Finance Act, 1923, which provided for the exemption of charities in the Irish Free State in respect of income tax for the year 1923-24, and by s. 32 of the Finance Act, 1924, and s. 21 of the Finance Act, 1925, which respectively provided for a like exemption for the years 1924-25 and 1925-26, 1926-27 and 1927-28, and finally by the Finance Act, 1926, s. 23, and Part 2 of Sch. 2 to that Act which provided under para. 3 of the latter that: 'Section 21 of the Finance Act, 1925, which grants an exemption for charities in the Irish Free State, shall cease to have effect.' To appreciate the force of this consideration it is necessary to read at length s. 21 of the Finance Act, 1923, which is in these terms: 'Subject as hereinafter provided, s. 37 of the Income Tax Act, 1918 (which grants exemption in respect of charities), shall, in the case of rents and profits of any lands, tenements, hereditaments, or heritages belonging to any hospital, public school, or almshouse in the Irish Free State, or vested in trustees in the Irish Free State for charitable purposes, and in the case of a body of persons or trust established in the Irish Free State for charitable purposes only, and in the case of income which according to rules or regulations established by Act of Parliament, charter, decree, deed of trust or will in the Irish Free State, is applicable to charitable purposes only, or which, in the names of trustees in the Irish Free State, is applicable solely towards the repairs of any cathedral, college, church or chapel, or any building used solely for the purpose of divine worship, apply, as respects income tax chargeable for the year 1923-24, as if the Irish Free State had not been constituted: Provided that this section shall not apply except where the lands, tenements, hereditaments or heritages belonged to the hospital, public school, or almshouse, or were vested in the trustees, on Apr. 5, 1923, or the interest, annuities, dividends, shares of annuities, yearly interest or other annual payment arise from investments which were held by the body of persons, trust, or trustees, or were subject to rules or regulations as aforesaid, on Apr. 5, 1923.' It is clear that, for the purposes of this section and the subsequent legislation on the same topic, it was assumed that the exemption afforded by s. 37 to bodies of persons or trusts established for charitable purposes only was limited to bodies of persons or trusts established in the United Kingdom, and that the secession of the Irish Free State from the United Kingdom would consequently have the effect of depriving bodies of persons or trusts established in the Irish Free State of the exemption in the absence of legislation continuing it in their favour."

The foundation's claim to exemption under s. 37 (b) was rejected by the Special Commissioners. They felt that they were bound by the decision of LAWRENCE, J., in *Gull's* case (1), and, accordingly, held that the exemption applied only to the income of bodies of persons or trusts established in the United Kingdom. WYNN-PARRY, J., took the same view. The Court of Appeal, not being bound by *Gull's* case (1), considered the matter fully, and dismissed the appeal. The main points of the argument presented to the Court of Appeal by counsel for the foundation were summarised by JENKINS, L.J., in his judgment ([1954] 2 All E.R. at p. 483). The argument followed the same lines in this House and counsel accepts that summary as being fair and accurate.

My Lords, the question now before the House is one which turns on the language of the relevant statute. It is at once apparent that the phrase in s. 37 (b) "any body of persons or trust established for charitable purposes only" is not expressly limited to bodies of persons or trusts established in the United

Kingdom, but the Court of Appeal held that it should be construed as being so limited. This conclusion was based entirely on a consideration of the true construction of the Act of 1918, and your Lordships have had the advantage of reading and considering three full and clear judgments delivered in the Court of Appeal, expressing this view and dealing very fully with the argument presented by counsel for the foundation in that court, and in your Lordships' House. I agree with the conclusion reached by the Court of Appeal, and, as no question of principle arises in this case, and my reasons are in substance the same as those appearing in the judgments of that court, I shall not detain your Lordships by setting them out in my own words. I shall only add that, if I had been of opinion that the words in question were "open to two perfectly clear and plain constructions" (to quote LORD BUCKMASTER in *Ormond Investment Co.* v. *Betts* (2) ([1928] A.C. at p. 154)), I should have felt no hesitation in deciding that the Crown's construction gave effect to the intention of the legislature, having regard to the language of the later enactments to which I have already referred.

As your Lordships did not find it necessary to call on counsel for the Crown to present any argument, I express no opinion on the question whether the objects of the foundation are exclusively charitable purposes according to the law of the United Kingdom. This question does not arise, if your Lordships agree with my opinion on the first question, but the Special Commissioners answered it in the affirmative, and the Court of Appeal saw no good reason for disturbing that finding.

I move that the appeal be dismissed with costs.

LORD PORTER: My Lords, I agree with the opinion which has just been expressed by the noble and learned Lord on the Woolsack; and I also agree with the opinion, about to be expressed, of my LORD NORMAND, which I have had an opportunity of reading.

LORD NORMAND: My Lords, I agree with the speech delivered by my noble and learned friend on the Woolsack. I have only a few observations to add. They are prompted by a passage in the judgment of SIR RAYMOND EVERSHED, M.R., on the word "trust". He says ([1954] 2 All E.R. at p. 472) that, in s. 37 (b) of the Income Tax Act, 1918:

> ". . . the word 'trust' is a word peculiarly referable to our own system of law. It is true that to other countries, which have adopted our own legal system and essential characteristics, the word 'trust' would have a precise and certain significance. But if the foundation's argument is sound, the formula in question should have a universal application so that the term 'body of persons or trust' would be intelligible in reference to countries other than those which have embraced our legal conceptions."

It seems that in this passage "our own system of law" and "our legal conceptions" must mean the English system of law and English legal conceptions. He says elsewhere (ibid., at p. 471), following the same train of ideas, that it is

> ". . . a significant characteristic of our system that to the Attorney-General representing the Crown, as parens patriae, belongs the right and duty of invoking the powers of the courts to secure the due execution of charitable trusts . . ."

and there it is clearly the English system that he has in mind, for it goes without saying that the Attorney-General has no right to invoke the powers of the courts beyond the boundary of England, and in Scotland the Lord Advocate has no general right or duty to intervene comparable to the right and duty of the Attorney-General in England.

It should be beyond doubt that Scottish trusts are "trusts" within the meaning of that term as used in s. 37 (b). The history of the origin and development of the law of trusts in Scotland is not at all the same as the history

A of the origin and development of the law of trusts in England, and, since the term " trusts " applies proprio vigore and without any interpretation clause to Scottish trusts, it must be understood in a sense which embraces trusts under both systems of law, and must not be held to connote any specialties of the English law. For this reason, it must cover the case in which a fund is held as their property in law by persons who are directed to hold it, subject to purposes which operate as B a qualification of their rights, and constitute a burden on the property preferable to all claims by or through them, and subject also to a reversionary right remaining with the truster, his heirs and assignees, so far as the estate is not exhausted by the purposes. I do not put forward this as a definition of " trust " but it is a description of a typical trust according to Scots law, and it contains I believe nothing repugnant to the English conception of trust. If, however, C " trust " must be understood in so general a sense as this, it may well be impossible to deny that it is a term which would be intelligible in reference to many other systems of law which do not derive from the law of England.

I respectfully accept JENKINS, L.J.'s statement ([1954] 2 All E.R. at p. 486) that

> D " ' trusts '. . . must be taken as referring to trusts taking effect and enforceable under the law of the United Kingdom."

This statement of the meaning of " trust " depends on the context of s. 37, and not on the connotation of the word " trust " alone.

I have dealt with this point at greater length than is necessary for the purpose of deciding this appeal, because difficulty enough has already been created for E the courts in Scotland, by the duty to apply characteristically English law in determining whether a Scottish trust is, for the purpose of income tax, a charitable trust, and it would be a great misfortune if any shadow of suspicion were to arise that a Scottish trust could not enjoy the benefits of s. 37 (b) unless it possessed the special characteristics of a trust under the law of England.

LORD KEITH OF AVONHOLM: My Lords, I agree that this appeal F fails, for the reasons stated by my noble and learned friend on the Woolsack. I would only add that I concur in the observations made by my noble and learned friend, LORD NORMAND.

LORD SOMERVELL OF HARROW: My Lords, I have had the advantage of reading the opinion that has just been delivered by my noble and learned G friend on the Woolsack. I agree with it and do not desire to add anything to it.

Appeal dismissed.

Solicitors: *Linklaters & Paines* (for the foundation); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

SHELL-MEX AND B. P., LTD. *v.* CLAYTON (VALUATION OFFICER) AND ANOTHER. A

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Parker, L.JJ.), June 27, 28, 29, July 22, 1955.]

Rates—De-rating—Freight-transport hereditament—Installations for unshipping B *and storing oil—Ratepayer selling agent for oil companies—Use of hereditament for dock purposes—Occupation and use of hereditament as part of a dock undertaking—Oil " intended for the use of " the ratepayer—Rating and Valuation (Apportionment) Act,* 1928 (18 *&* 19 *Geo.* 5 *c.* 44), *s.* 5 (1) (*c*), (3), *s.* 6 (3) (*b*).

The ratepayer was the occupier of a hereditament comprising land along C the banks of the River Humber which it held under leases from the British Transport Commission (the dock authority) or their predecessors in title. The ratepayer was the sole selling agent in the United Kingdom of three oil producing companies. Substantially the whole of the ratepayer's business consisted of the sale and distribution of that oil, and it was remunerated for its services by the three oil companies on a commission basis. There stood D on the hereditament, which was some 51½ acres in area, offices, stores, garages, filling sheds, pump houses, a boiler house, tanks and ancillary buildings, all of which erections save one were occupied by the ratepayer. In addition, the ratepayer owned and occupied a barge berth erected on part of the foreshore, in part leased from the Board of Trade and in part under licence from the British Transport Commission and their predecessors in title. E The said berth was some one thousand feet from the hereditament and was connected with the pump houses and tanks on the hereditament by means of pipe lines which were owned, occupied and used exclusively by the ratepayer. The ratepayer used the said land as a terminal depot in its business of importing, distributing and marketing oil. Incoming tankers unshipped their cargoes of oil at two jetties which belonged to the British Transport F Commission and which constituted a dock within the Rating and Valuation (Apportionment) Act, 1928, s. 5 (3)*. The unshipping was effected by pumping the oil from the tankers through a system of pipes running along the jetties and leading to the storage tanks on the hereditament, and the ratepayer took delivery of the oil at the ship's rail. The total tankage capacity at the hereditament was 211,781 tons and the tanks habitually G contained between one hundred thousand and one hundred and fifty thousand tons of oil, which was sufficient to cover one month's deliveries. The average receipts and deliveries of oil approximately balanced, and the stock held at the hereditament was in the nature of a reserve. The ratepayer distributed supplies of oil by land and water transport to its own depots and to various categories of customers. The ratepayer consumed H a relatively insignificant quantity in its own operations. Oil was shipped into barges at the barge berth (which was a dock within the meaning of s. 5 (3)* of the Act of 1928). Approximately one-quarter of the oil brought into the hereditament from the tankers was dutiable, and the whole hereditament, including the pipes and the storage tanks, was a bonded warehouse. The terms of the leases under which the hereditament was held showed them I to have been granted for the purpose of receiving into the hereditament oil unshipped at the jetties. It was contended for the ratepayer that the hereditament was a freight-transport hereditament within s. 5 (1) (c) of the Rating and Valuation (Apportionment) Act, 1928,* as being a hereditament (i) used partly for dock purposes and (ii) so used as part of a dock

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* The text of s. 5 (1) (c) is printed at p. 106, letter C, post; the text of s. 6 (3) (b) is at p. 108, letter B, post, and the definitions of "dock", "dock purposes " "dock undertaking " are at p. 106, letter F, post.

A undertaking and (iii) whereof a substantial proportion of the volume of business was concerned with shipping and unshipping merchandise not belonging to or intended for the use of the ratepayer.

Held: the hereditament was not a freight-transport hereditament as, although the first essential of the definition in s. 5 (1) (c) was satisfied the second and third essentials of the definition were not satisfied, viz.—

B (i) although the hereditament was used in part for dock purposes within the meaning of the Act of 1928 and the part so used was not in whole used primarily for warehousing oil not in the course of being transported and thus was not excepted from this branch of the definition of freight-transport hereditament by virtue of s. 6 (3) (b) of the Act of 1928 (*Mersey Docks & Harbour Board* v. *West Derby Assessment Committee & Bottomley* ([1932] C 1 K.B. 40), and *Union Cold Storage Co.* v. *Moon* ([1932] 2 K.B. 648) followed; observations of LORD KEITH and LORD PATRICK in *Aberdeenshire Assessor* v. *Shell-Mex & B.P., Ltd.* (1953 S.C. at pp. 218, 221) distinguished), yet

(ii) no part of the hereditament was used as part of a dock undertaking, neither as part of the dock undertaking of the British Transport Commission, since the ratepayer did not provide facilities for unshipping oil for anyone D wishing to import it but only for its own business (*Clyde Navigation Trustees* v. *Inland Revenue* (1930 S.C. 454) applied; *Clyde Navigation Trustees* v. *Glasgow Assessor* (1931 S.C. 400) not followed), nor as part of a dock undertaking of the ratepayer, since the barge berth was occupied in connection with the ratepayer's entire undertaking at the hereditament rather than the converse; further, the rights to use the pipe lines running along the commis- E sion's jetties did not constitute a dock undertaking (dicta of LORD PATRICK and LORD KEITH in *Aberdeenshire Assessor* v. *Shell-Mex & B.P., Ltd.* (1953 S.C. at pp. 219, 224) applied), and accordingly the requirements of the definition of " dock undertaking " in s. 5 (3) of the Act of 1928 were not satisfied, and

(iii) the oil was " intended for the use of " the ratepayer within the F meaning of s. 5 (1) (c) of the Act of 1928, since the ratepayer's business consisted in the sale and distribution of oil (dictum of LORD KEITH in *Aberdeenshire Assessor* v. *Shell-Mex & B.P., Ltd.* (1953 S.C. at p. 218) applied).

Observations on the award of costs where the valuation officer of the Inland Revenue and the rating authority are both parties to an appeal (see pp. 117-119, post).

G Appeal dismissed.

[**Editorial Note.** In the present case the Court of Appeal, if they had been free to follow their own judgments, would have decided that any question whether a hereditament was a freight-transport hereditament within s. 5 (1) (c) was to be decided apart from s. 6 (3) (b) of the Rating and Valuation (Apportionment) H Act, 1928, and that s. 6 (3) (b) only became relevant when it had been decided of a hereditament that it came within s. 5 (see p. 108, letter I, post). They were bound, however, by authority to hold that if it was shown that the whole of the hereditament was primarily used for warehousing within s. 6 (3) (b) it was wholly disqualified from de-rating as a freight-transport hereditament notwithstanding that it or part of it was also used for purposes connected with un- I shipping (see p. 113, letter C, post).

For apportionment where a freight-transport hereditament is used partly for transport purposes, see 27 HALSBURY'S LAWS (2nd Edn.) 463, para. 891.

For the Rating and Valuation (Apportionment) Act, 1928, s. 5, s. 6 (3) (b), see 20 HALSBURY'S STATUTES (2nd Edn.) 184, 187, 188.]

Cases referred to:

(1) *Aberdeenshire Assessor* v. *Shell-Mex & B.P., Ltd., Scottish Oils & Shell-Mex, Ltd.* v. *Inverness Assessor*, 1953 S.C. 211; 3rd Digest Supp.

(2) *Mersey Docks & Harbour Board* v. *West Derby Assessment Committee & Bottomley*, [1932] 1 K.B. 40; 95 J.P. 186; Digest Supp.

(3) *Union Cold Storage Co.* v. *Moon*, [1932] 2 K.B. 648; 101 L.J.K.B. 791; 147 L.T. 487; 96 J.P. 432; Digest Supp.

(4) *Clyde Navigation Trustees* v. *Inland Revenue, Inland Revenue* v. *Kirkwall Assessor*, 1930 S.C. 454; Digest Supp.

(5) *Clyde Navigation Trustees* v. *Glasgow Assessor*, 1931 S.C. 400; Digest Supp.

(6) *British Motor Syndicate, Ltd.* v. *Taylor & Son, Ltd.*, [1900] 1 Ch. 577; 69 L.J.Ch. 377; 82 L.T. 106; *affd.* C.A., [1901] 1 Ch. 122; 70 L.J.Ch. 21; 83 L.T. 419; 36 Digest (Repl.) 1010, *3579*.

Case Stated.

This was a Case Stated by the Lands Tribunal (SIR WILLIAM FITZGERALD, President), pursuant to the Lands Tribunal Act, 1949, s. 3 (4), for the decision of the Court of Appeal.

The ratepayer appealed to the Lands Tribunal against the decision of a local valuation court sitting at Kingston-upon-Hull on Sept. 25, 1952, dismissing the ratepayer's appeal that a hereditament occupied by the ratepayer and situated at Salt End, Preston, within Holderness rural district rating area, ought to be treated as a freight-transport hereditament within the meaning of the Rating and Valuation (Apportionment) Act, 1928, s. 5 (1). The said hereditament was described in Part 1 of the Valuation List as " tanks, works and appurtenances " and was assessed at the rateable value of £16,986. On Mar. 28, 1952, the ratepayer made a proposal that the hereditament ought to be treated as a freight-transport hereditament. The local valuation court decided that the hereditament ought not so to be treated. The Lands Tribunal found the following facts.

(i) The said hereditament comprised three parcels of land at Salt End on the banks of the River Humber.

(ii) The ratepayer was the lessee of the said land which extended to 51½ acres or thereabouts. The said three parcels were held on different leases from the British Transport Commission (formerly the Docks and Inland Waterways Executive) or their predecessors in title at a total ground rent of £4,195 per annum.

(iii) On the said land the ratepayer (or its predecessors in title) had erected offices, stores, garages, filling sheds, pump houses, a boiler house, tanks and ancillary buildings. The said erections, save for one building which was let to the Petroleum Power Company, were occupied by the ratepayer.

(iv) In addition, the ratepayer owned and occupied exclusively a barge berth which was erected on part of the foreshore in part leased from the Board of Trade and in part under licence from the British Transport Commission and their predecessors in title. The said berth, which was approximately one thousand feet distant from the said hereditament, was connected with the pump houses and tanks on the said land by means of pipe lines which were owned, occupied and used exclusively by the ratepayer.

(v) From the south-west corner of the said land two jetties, which were the property of the British Transport Commission, ran out into the River Humber. Number 1 jetty was used jointly by the ratepayer, the Esso Petroleum Company, the Hull Distillery, and British Industrial Solvents, but the ratepayer had its own pipe lines, twelve in number, which ran along the said jetty and were connected with the pump houses and tanks on the said land. Number 2 jetty was used jointly by the ratepayer and the Esso Petroleum Company and the pipe lines thereon, ten in number, were common to both users for the length of the said jetty at the shore end of which connections were made between the said ten and the said twelve pipe lines. In addition, along number 2 jetty there ran a four-inch steam pipe and two-inch air pipe. The steam pipe was used in common by the ratepayer and the Esso Petroleum Company and connections were made at the shore end to a steam pipe of the ratepayer. The air pipe belonged entirely to the ratepayer and was used exclusively by it.

(vi) The ratepayer carried on the business of distributing and marketing oil in the United Kingdom. In order to carry on that business, the ratepayer had established in the United Kingdom a number of " terminal depots ", of which the hereditament at Salt End was one. The main function of such terminal depot was to replenish the supplies of a number of internal depots which were dependent on the terminal depot for their supplies of oil. The essential function of the subsidiary depot was the supply of oil to consumers.

(vii) Oil was brought to the Salt End installation in ocean-going tankers of an average capacity of ten thousand to twelve thousand tons and unloaded at the said jetties. In every case the ratepayer took delivery of the oil at the ship's rail.

(viii) Tankers were unloaded at the said jetties by means of pipes which were coupled to the ends of the above-mentioned pipe lines which ran along the said jetties. There were no grid boxes on either of the said jetties. (Grid boxes are chambers in which pipe lines end, and in which ships' flexible discharge pipes can be coupled to the pipe lines. The oil is pumped from the tanker via the pipe lines into tanks at the hereditament.)

(ix) The ratepayer was bound to have at a terminal such as the Salt End depot a tankage capacity in excess of that which would be required to meet the day-to-day requirements of the subsidiary depots because it must correlate the intake of oil to the movements of tankers. A much smaller amount of excess capacity was required to meet unexpected demands.

(x) The whole of the said hereditament including the said pipes was a bonded warehouse. In 1951 approximately a quarter of the total oil which passed through the installation was dutiable.

(xi) Products from consigning companies were received by the ratepayer as consignee and agent. On the sale of the product the ratepayer accounted to each consignor for its pro rata share of the receipts from sale after deducting commission of eight per cent., except in respect of a small quantity (·17 per cent.) used by the ratepayer itself for which the latter paid an agreed price. The same product received from different consigning companies was in practice mixed on the hereditament, although by special arrangement it would be possible to keep separate the contribution of each consignor.

(xii) The main function of the Salt End terminal depot with regard to onward transmission of oil was to dispatch oil by water, rail or road, whichever were appropriate, to its dependent depots in order to replenish their supplies.

(xiii) During the calendar year 1951 the total tonnage of oil handled at the hereditament was approximately 1,320,000 tons. This tonnage was dealt with approximately as follows:

540,000 tons sent to the dependent depots of the ratepayer;
160,000 tons sent to the other petrol companies;
277,000 tons sold direct to customers from the hereditament;
290,000 tons ships' bunkering;
53,000 tons supplied to the Air Ministry and for export, together with a tonnage of approximately 2,250 tons representing fuel for the ratepayer's road vehicles and like purposes used and paid for by the ratepayer.

The ships bunkered were tankers chartered by the consigning companies and vessels, such as trawlers, owned by other persons.

(xiv) Of the 540,000 tons delivered to the dependent depots about 316,000 tons were sent on by water. Of this 316,000 tons 260,000 tons were shipped from the said barge berth. In addition, 82,000 tons of national benzole product were also shipped from the said berth, making a total of 342,000 tons shipped from the barge berth during 1951.

(xv) In disposing of oil the ratepayer was described in the appropriate documents as " seller " and it invariably sold it in its own name.

The Lands Tribunal dismissed the appeal.

Michael Rowe, Q.C., and *G. D. Squibb* for the ratepayer.
Maurice Lyell, Q.C., and *P. R. E. Browne* for the valuation officer.
H. Edmund Davies, Q.C., and *E. P. Wallis-Jones* for the rating authority.

Cur. adv. vult.

July 22. **SIR RAYMOND EVERSHED, M.R.:** The judgment which I am about to read, and which has been prepared by JENKINS, L.J., is the judgment of the court.

The ratepayer contends that the hereditament described in the Case Stated by the Lands Tribunal, and consisting of its terminal depot at Salt End adjacent to the Port of Hull, ought for rating purposes to be treated as a " freight-transport hereditament " under the Rating and Valuation (Apportionment) Act, 1928, s. 5 (1), which includes in the category of " freight-transport hereditament":

> " (c) A hereditament occupied and used wholly or partly for dock purposes as part of a dock undertaking being an undertaking whereof a substantial proportion of the volume of business is concerned with the shipping and unshipping of merchandise not belonging to or intended for the use of the undertakers."

As appears from the above definition of the relevant type of freight-transport hereditament, the ratepayer in order to make its contention good must show that the hereditament in question satisfies all the following conditions, viz.: (i) that it is occupied and used wholly or partly for dock purposes; (ii) that it is so occupied and used as part of a dock undertaking; and (iii) that such dock undertaking is one whereof a substantial proportion of the volume of business is concerned with the shipping and unshipping of merchandise not belonging to or intended for the use of the undertakers.

Section 5 (2) (c) of the Act defines " dock purposes " as meaning (so far as material for the present purpose) " all purposes connected with the shipping or unshipping at a dock of . . . merchandise ". Section 5 (3) of the Act adds the following further definitions:

> " ' Dock ' includes any harbour, wharf, pier, jetty or other works in or at which vessels can ship or unship merchandise or passengers not being a pier or jetty primarily used for recreation. ' Dock undertaking ' means an undertaking carried on by a dock authority, but also includes any other undertaking comprising as part thereof a dock in so far only as its business is carried on at and in connection with that dock. ' Dock authority ' means any person or body of persons, whether incorporated or not, who are authorised to construct or are owners or lessees of any dock authorised by or under any Act."

We will treat as incorporated in this judgment the facts set out in the Case Stated* and make special reference only to the essential points on which the arguments for and against the ratepayer's claim have turned.

As to the first of the three conditions above stated, is the hereditament occupied and used wholly or in part for dock purposes, i.e., for purposes connected with the shipping or unshipping of merchandise at a dock ? On this question, the essential matters of fact are these: The ratepayer uses the hereditament as a terminal depot in its business of importing, distributing and marketing oil. Incoming tankers unship their cargoes of merchandise in the shape of oil at two jetties belonging to the Transport Commission which are undoubtedly a dock within the meaning of s. 5 (3). The unshipping is effected by pumping the oil from the tankers through a system of pipes running out along the jetties and leading to the storage tanks on the hereditament, and the ratepayer takes delivery of it at the ship's rail. The total tankage capacity at the hereditament is 211,781 tons and the tanks habitually contain stocks of oil substantially in excess of day-to-day requirements, the stocks on hand (according to typical figures given in the Case) being as a rule of the order of one hundred thousand to one hundred and fifty thousand tons and sufficient to cover, say, one month's deliveries in the event of receipts being suspended. The ratio of receipts to distribution varies from month to month, but it would seem that over a period they more or less balance, so that the surplus of, say, one hundred thousand to one hundred and fifty thousand tons we have mentioned is in the nature of a reserve. From the stocks of oil in the tanks the ratepayer distributes supplies by land and water transport to its own internal depots and also to various categories of customers and consumers. It also effects sales of oil to customers direct from the hereditament and consumes a relatively insignificant quantity in its own operations. The media of distribution used by the ratepayer include a barge berth owned and occupied by it at Hedon Haven some three hundred yards to the south-east of the southernmost portion of the hereditament, and connected with pump houses and tanks on the hereditament by means of pipes owned and occupied exclusively by the ratepayer. The barge berth (at which oil is shipped into barges) is undoubtedly a dock within the meaning of s. 5 (3). Approximately one-quarter of the oil brought into the hereditament from the incoming tankers is dutiable, and technically the whole hereditament, including the pipes and storage tanks on it, is a bonded warehouse in which, pending distribution, the dutiable oil can lie without payment of duty. The ratepayer must have available on the hereditament a tankage capacity in excess of the day-to-day requirements of distribution, because it must correlate the intake of oil to the movements of tankers, and also, but to a much smaller degree, for the purpose of meeting unexpected demands. The provisions of the leases under which the hereditament is held by the ratepayer clearly show them to have been granted for the very purpose of enabling the lessees to receive into the hereditament oil unshipped at the jetties.

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* These are stated at pp. 104, 105, et seq., ante.

On these facts, counsel for the ratepayer argues that the hereditament is, within the meaning of s. 5 of the Act, occupied and used, if not wholly, at all events partly, for dock purposes, i.e., purposes connected with the unshipping of merchandise (that is, oil) at a dock (that is, the Transport Commission's jetties). He observes with force that the unshipping operations here in question consist of pumping the oil from the tankers into the storage tanks through the pipes leading to them from the jetties, and that oil in bulk cannot be unshipped merely by putting it over the ship's rail on to a jetty, but must be transferred from the ship's tanks into suitable receptacles on shore. He bases himself on the simple proposition that pipes through which, and tanks into which, cargoes of oil in bulk are discharged from ships cannot reasonably be said not to be used for purposes connected with the unshipping of that oil. He says that it is only incumbent on the ratepayer in the first instance to show that the hereditament is used partly, that is, to some extent, for dock purposes. Once that is shown, the ratepayer's claim that the hereditament is a "freight-transport hereditament" is made good so far as the first of the three conditions (i.e., occupation and use wholly or partly for dock purposes) is concerned, and, provided the other two conditions are satisfied, it will remain to consider whether there should be any, and, if so, what, apportionment under s. 6 of the Act. It will be convenient at this point to refer to the terms of that section. So far as material for the immediate purpose, it provides as follows:

> "(1) In every valuation list every freight-transport hereditament, which is occupied and used wholly for transport purposes shall be shown as being so occupied and used, and as respects every such hereditament occupied and used partly for transport purposes the net annual value thereof shall be shown in the prescribed manner as being apportioned between the occupation

> and user of the hereditament for transport purposes and the occupation and user thereof for other purposes. (2) Where a freight-transport hereditament is not occupied and used for more than one transport purpose the nature of that purpose shall be shown . . . (3) For the purpose of determining in what proportions a freight-transport hereditament is occupied and used for transport purposes and for other purposes, respectively, the hereditament shall be deemed to be occupied and used for transport purposes, except in so far as it is occupied and used for the purposes of a dwelling-house, hotel, or place of public refreshment: Provided that . . . (b) in the case of a hereditament . . . occupied and used for dock purposes as part of a dock undertaking no part of the hereditament, being a building, yard, or other place primarily occupied and used for warehousing merchandise not in the course of being transported, shall be deemed to be occupied and used for transport purposes."

Counsel for the ratepayer by no means admits that the hereditament or any part thereof is primarily occupied and used for the purpose of " warehousing merchandise not in course of being transported " within the meaning of s. 6 (3) (b), and argues that the status of a bonded warehouse technically possessed by the hereditament with respect to the dutiable one-fourth or thereabouts of the oil brought into it is a minor and incidental matter which should not affect the result. But, whether he is right or wrong on these points, he says they have no bearing on the question whether the hereditament is a freight-transport hereditament within the meaning of s. 5 of the Act, whatever their effect may be on any ensuing apportionment.

Counsel for the valuation officer, on the other hand, contends that the hereditament is occupied and used simply for storage purposes and not to any extent whatever for purposes connected with the unshipping of merchandise at a dock. He claims that the process of unshipping is complete the moment the oil is over the ship's rail or, in other words, the moment it passes out of the ship's pipes into one of the pipes lying along the jetties, and that everything happening beyond this point is part of the process of storage and distribution, or, in other words, disposal by the consignee of merchandise which has finished its journey by reaching his hands. Counsel for the valuation officer compares the pipes to a consignee's lorries, into which goods are put over the ship's rail, and compares the passage of the oil into the tanks through the pipes to the conveyance of such goods to some destination determined by the consignee, such as a warehouse perhaps many miles distant from the dock. He relies in support of this argument on the technical status of the hereditament as a bonded warehouse, which he says is essentially a place where a consignee who has taken delivery of merchandise may deposit it pending disposal without in the meantime paying the duty on it. Alternatively, counsel for the valuation officer says that the hereditament is primarily used for warehousing merchandise not in the course of being transported within the meaning of s. 6 (3) (b) of the Act and that this proviso is relevant, not merely to the question of apportionment under s. 6, but also to the prior question whether the hereditament is occupied and used for purposes connected with the shipping or unshipping of merchandise at a dock so as to fulfil the first of the three conditions imposed by s. 5 (1) (c).

If the matter were free from authority, we would have little hesitation in holding that, in accordance with counsel for the ratepayer's argument, the hereditament is at all events partly occupied and used for purposes connected with the unshipping of oil at a dock (i.e., the jetties) within the meaning of s. 5 (2) (c) and that this question falls in the first instance to be determined without regard to s. 6 (3) (b). The phrase " connected with " is a phrase of wide and general import, and we find it extremely difficult to hold that the tanks on the hereditament have no connection with the unshipping of the oil which they are designed to receive. Counsel for the valuation officer's argument to the contrary

A seems to us highly artificial. We are not persuaded that when oil is being pumped directly from a tanker into and through one of the pipes lying along the jetties, that pipe is not being used for a purpose connected with the unshipping of that oil or that the tank on the hereditament to which that pipe leads is not being used for such a purpose when it is being filled with oil flowing from the tanker through that pipe. As to the application of s. 6 (3) (b), we would, for our part, be disposed B to hold that it only becomes relevant if and when the hereditament has been found to be a freight-transport hereditament within the meaning of s. 5, that is to say, for the present purpose a hereditament occupied and used wholly or partly for dock purposes and fulfilling the other two conditions imposed by s. 5 (1) (c). If the hereditament is found to be so occupied and used, whether wholly or partly, then, as it seems to us, and only then, does it become relevant C to consider whether, for the purposes of apportionment, it should to any, and, if so, what, extent be deprived of the status of a freight-transport hereditament accorded to it under s. 5 on the ground that it, or some part of it, is primarily occupied and used for warehousing merchandise not in the course of being transported within the meaning of s. 6 (3) (b).

But the matter is not free from authority. We should first refer to the Scottish D case of *Aberdeenshire Assessor* v. *Shell-Mex & B.P., Ltd.* (1) (1953 S.C. 211). That case concerned the ratepayer's terminal depot at Aberdeen which was let to the ratepayer by the Aberdeen Harbour Commissioners but actually occupied and operated by the ratepayer's managing agent for Scotland, Scottish Oils and Shell-Mex Ltd. The only material (or supposedly material) difference between the facts of that case and this one appears to have been that in the Scottish E case connection was made between the ship's pipes and the shore pipes in chambers termed " grid boxes " situated on the quays or jetties, whereas there are no such boxes in the present case. For reasons which will shortly appear, we will quote what is said in the present Case Stated concerning them:

> " 12. . . . There are no grid boxes on either of the said jetties. Grid F boxes are simply chambers in which pipe lines end, and in which ships' flexible discharge pipes can be coupled to the pipe lines."

The claim made by the ratepayer and its subsidiary in the Scottish case was closely comparable to the present claim and was made under the Act of 1928 as applied, without any material variation, to Scotland. LORD KEITH said (1953 S.C. at p. 218): G

> " In my opinion, neither the ground leased in these cases nor the plant erected thereon is used for dock purposes, i.e., purposes connected with the shipping or unshipping of merchandise. I consider that the land and plant are used not merely primarily but solely for the storage and distribution of oil and spirit in connection with a business quite separate and H distinct from any of the activities carried on at the adjacent docks. I proceed in no way upon the terms of s. 6 (3) (b) of the Act of 1928, which applies, in my opinion, to warehouses forming part of an admitted dock occupied by a dock undertaking and at least partly used for dock purposes. That is not the position, in my opinion, of the premises here. Any shipping I begins and any unshipping ends, in my opinion, at the grid boxes. We are not told exactly what these grid boxes are, but I assume that they are tanks or receptacles sunk below the surface of the quay, which hold considerable quantities of oil and like products. It will be easier to confine myself to the unshipping process. The shipping process is largely the same in reverse, but is insignificant in bulk. The grid boxes may be regarded as temporary receptacles for the unshipped oil and it may be said therefore that they are connected with the unshipping of oil. What the result may be as regards the grid boxes taken in isolation I shall consider later. But when the

> oil is pumped from the grid boxes to the depot, that, in my opinion, has nothing to do with unshipping the oil, no more than has the conveying by a consignee of goods from a temporary storage or transit shed on the quay. The shed may be connected with the unshipping of goods. But when goods are carried away from the shed a second stage has begun, viz., the transporting of goods from the dock to the consignee's place of business. If in the present case the depot instead of being twenty to thirty yards from the quayside were twenty to thirty miles away and the oil were collected at the quay direct from the ship into road oil-tankers, the unshipping would be finished when the oil was discharged into the tankers. I regard the pipes from the grid boxes and the ancillary pumping plant as merely a means of conveying or transporting the oil from the grid boxes to the depot."

It will be seen that this passage supports to the full counsel for the valuation officer's primary argument that the purposes here are purely storage purposes wholly unconnected with the shipping or unshipping of oil. But, unfortunately, Lord Keith seems to have been misinformed as to the nature of the " grid boxes " and to have been under the impression that they were tanks or receptacles which held considerable quantities of oil, whereas they are in fact merely chambers giving access to the ends of the shore pipes for the purpose of connecting them with the ships' pipes. If and so far as Lord Keith's judgment was founded on this misapprehension, it cannot (if we may respectfully say so) be regarded as authoritative. But, although he seems to have attached some importance to the grid boxes, his reasoning and the illustrations he gives seem to us to make it reasonably plain that his view would have been the same if there had been no grid boxes. Lord Patrick came to the same conclusion, but, unlike Lord Keith, called in aid the restrictive effect of s. 6 (3) (b), thus providing support for the second branch of counsel for the valuation officer's argument. After quoting s. 6 (3) (b), which he described as having " a vital bearing on the determination of what lands and heritages are excluded from the benefit of de-rating ", he said (1953 S.C. at p. 221):

> " It results that you may have lands and heritages occupied and used *partly* for dock purposes as part of a dock undertaking in the sense of s. 5 (1) (c). Nevertheless, if the whole or part of such lands and heritages consists of buildings, yards or other places *primarily* occupied and used for warehousing merchandise not in the course of being transported, such whole or part cannot be treated as occupied and used for ' transport purposes ', i.e., by definition for ' dock purposes,' i.e., by further definition for purposes connected with the shipping or unshipping of merchandise, and so cannot have the benefit of de-rating."

Lord Sorn, with some doubt, expressed his concurrence and, as to s. 6 (3) (b), he said (ibid., at p. 227):

> " I desire to reserve my opinion upon the applicability of s. 6 (3) (b) to the question we have to decide. My impression is that s. 6 (3) (b) was not intended to affect the definition of a freight-transport hereditament contained in s. 5 (1) (c), and that it only comes in at the later stage of apportionment. I think that the proviso, which deals with places used primarily for a certain kind of warehousing, was meant, not to exclude such places from the benefit of de-rating, but only to exclude them from the operation of s. 6 (3). For the meaning and effect of s. 6 (3) (b) at the stage of apportionment, I refer to the explanation given by Greer, L.J., in *Mersey Docks & Harbour Board* v. *West Derby Assessment Committee & Bottomley* (2) ([1932] 1 K.B. 40)."

In *Mersey Docks & Harbour Board* v. *West Derby Assessment Committee & Bottomley* (2), Scrutton L.J., seems to have been clearly of opinion that the effect of proviso (b) to s. 6 (3) was to exclude premises to which it applied from the benefit of de-rating. He said this about warehouses in general and bonded warehouses in particular ([1932] 1 K.B. at p. 96):

> " It is probably true that nearly all goods that go into a dock warehouse will ultimately go out. Goods are not put into warehouses to stay there for ever. They are put into warehouses to stay till their owner is ready to take them out, because he has sold them, or determined a destination for them which he did not know when he put them in warehouse, and therefore warehoused them till he did know on what fresh transit he would send them. This is especially true of bonded warehouses where the owner of goods leaves them for some time, because, when he takes them out he will have to pay duty on them, and where, not having sold them, he does not then want to transport them any further. So he warehouses them not in the course of transport."

The same learned lord justice said (ibid., at p. 98):

> " On these facts, for the reasons given, I am of opinion that these three bonded warehouses are not subjects for derating. The great bulk of the goods received in them are not received for or in course of transport. They are received because their transport is to stop. The consignee has received them but does not want their transport to proceed. He does not know where they are going, nor does he yet want to pay duty on them; he therefore stores them in bond, often for a very substantial time. The warehouse is primarily occupied and used for warehousing merchandise not in course of transport, and is excluded from de-rating. I therefore agree with the result arrived at by the Divisional Court as to these warehouses, though as they have not given reasons for their decision, and indeed had not before them the detailed facts before us, I may have arrived at the same result as they did for different reasons. In my view, it can only be in the most unusual cases that a bonded warehouse would be entitled to the benefit of de-rating."

Slesser, L.J., said (ibid., at p. 119):

> " As regards s. 5, I think that, whatever may be the meaning of the words ' connected with the . . . unshipping at a dock of . . . merchandise ', it is clear from the proviso to s. 6 (3), that any part of the hereditament being a building, yard, or other place primarily occupied and used for warehousing merchandise not in the course of being transported must be excluded from what might otherwise be a hereditament under s. 5 (1) (c), as being used wholly or partly for dock purposes. Although the phrase ' wholly or partly ' in s. 5 extends in my view to an occupation or user of a part either defined by physical limitation or by commercial function, it may well be, in a particular case, that the whole hereditament in the physical sense may, as a place, primarily be occupied and used for warehousing merchandise not in the course of being transported and so nevertheless be wholly excluded from the special list under the proviso of s. 6, which is limited by its language to physical occupation within metes and bounds, notwithstanding that the hereditament might otherwise fall within the wider functional definition of s. 5 as being partly connected with the unshipping of goods."

On the other hand, Greer, L.J., said (ibid., at p. 109):

> " In my opinion the effect of proviso (b) is that if you find a building, yard, or other place, which is partly occupied and used for transport purposes, but is primarily occupied and used for warehousing merchandise not in the course of being transported, then no part of that building, yard, or other place is to be affected by the restraint on apportionment enacted by subs. (3), but it remains subject to the provision as to apportionment contained

> in sub-s. (1), that is to say, it is taken out of sub-s. (3), but is left to be dealt with under sub-s. (1) without the gloss put on the operation of that sub-section by sub-s. (3). The net annual value must then be apportioned. In many cases the place used for warehousing merchandise not in the course of being transported may be a part of a larger hereditament, and definable by metes and bounds, and in these cases there will be no difficulty in making an apportionment. There is great difficulty in applying this proviso to the case where the hereditament that is rated is a warehouse partly used for transport purposes but primarily used for warehousing merchandise not in the course of being transported, the part user not being determined by metes and bounds. Though difficult, the task is not impossible, and in my judgment the Act requires it to be done."

In *Union Cold Storage Co.* v. *Moon* (3), SCRUTTON, L.J., said ([1932] 2 K.B. at p. 657):

> "I have, however, received a very clear impression from the language of the Act of 1928 that Parliament did not intend to give the benefit of de-rating to premises whose primary purpose and use was storage or warehousing. From industrial hereditaments to be de-rated, those were excluded whose primary purpose and use was storage: s. 3. In the case of freight-transport hereditaments, those were excluded in whole or part which were primarily occupied and used for warehousing merchandise not in course of transport: s. 6 (3) (b). But the language of the Act as to apportionment between different purposes, primary or secondary, gives rise to great difficulties."

The learned lord justice also said (ibid., at p. 660):

> "In my view the construction and result of s. 6 as a whole is as follows: The direction to apportion contained in sub-s. (1) is restricted in two respects by sub-s. (3). First, if the whole or part of the hereditament is primarily used for warehousing merchandise not in course of being transported, the premises so primarily used are not to be deemed to be used for transport purposes, though there is a secondary use of such premises for transport purposes. Secondly, unless premises are shut out from being subject-matter of de-rating or apportionment by the first restriction, they are to be deemed wholly used for transport purposes, though in fact they are partly used for other purposes, unless those other uses are for a dwelling-house, hotel, or place of public refreshment, when there can be apportionment. It is suggested that the main body of sub-s. (3) and proviso (b) cancel each other and leave sub-s. (1) requiring apportionment. But to apportion premises primarily used for storage not in course of transport seems to me directly contrary to proviso (b). You cannot apportion premises which are not to be deemed to be occupied and used for transport purposes; or, which is the same thing, to be deemed not to be occupied and used for transport purposes."

LAWRENCE, L.J., concurred with SCRUTTON, L.J.'s judgment, expressing his complete agreement with it, both on the interpretation which ought to be placed on s. 6 of the Act and on the manner in which its provisions ought to be applied to the facts of the case then before the court. GREER, L.J., concurred in the result, though with some doubt as regards the construction of s. 6. He said (ibid., at p. 665):

> "I am not sure that my brethren and I are in agreement as to the right construction of s. 6 of the statute. I am inclined to adhere to the views I expressed in the Liverpool cases (2), but this has no bearing on the question involved in the appeal, and makes no substantial difference in the advice to be given to the assessment committee as to the way in which they should

A approach the question of apportionment. I therefore think it unnecessary, and probably it might be embarrassing, to restate views with which the majority of the court do not agree."

Notwithstanding the attractions of the reasoning of GREER, L.J., and the approval of that reasoning tentatively expressed by LORD SORN, we are thus, as B it seems to us, precluded by two decisions of this court from adopting what, from the ratepayer's point of view, is the most advantageous application of counsel for the ratepayer's argument, the effect of which would be that, once the hereditament has been found to be occupied and used partly for dock purposes, the hereditament, given fulfilment of the other two conditions, is to be treated, by virtue of s. 6 (3), as being wholly a freight-transport hereditament, C subject to apportionment under proviso (b) to non-transport purposes of any

> "part of the hereditament . . . primarily occupied and used for warehousing merchandise not in the course of being transported . . ."

We think it also follows from the two decisions of this court to which we have referred that, if it is shown that the whole of the hereditament is primarily used D for warehousing within the meaning of s. 6 (3) (b), it is wholly disqualified from de-rating as a freight-transport hereditament notwithstanding that it or part of it is also used for purposes connected with unshipping. If, on the other hand, it is shown that any part of the hereditament is used, to some extent at least, for purposes connected with unshipping and not, or not primarily, for warehousing merchandise not in the course of being transported, then (given fulfilment of the E other two conditions) it would seem that there should be an apportionment, the effect of which would apparently be to give the benefit of de-rating to the whole of the hereditament, including any parts of it not used for dock purposes, but with the exception of any part primarily used for warehousing merchandise not in the course of being transported, which, by virtue of s. 6 (3) (b), is not to be deemed to be occupied for transport purposes.

F With respect to the opinions of LORDS KEITH and PATRICK in the *Aberdeen* case (1), we are not prepared to hold that no part of the hereditament in the present case is occupied and used for dock purposes, i.e., purposes connected with the shipping or unshipping of merchandise at a dock within the meaning of s. 5. Nor are we prepared to hold that the whole of it is used primarily for the warehousing of merchandise not in course of being transported within the meaning G of s. 6 (3) (b). We cannot see that (for example) the pipes and pumps on the hereditament are warehouses or used for warehousing primarily or at all. They seem to us to be physically and functionally incapable of such description or use. The statute does not refer to use for purposes connected with warehousing, but to a building, yard, or other place used for warehousing, which denotes a structure or place actually used for warehousing. We do not think the circum-H stance that the whole hereditament is technically a bonded warehouse can reasonably be held to alter this conclusion.

The question whether the storage tanks may not be primarily used for warehousing within the meaning of s. 6 (3) (b) presents more difficulty. These tanks are no doubt used not merely for the purpose of receiving the oil pumped from the tankers, but also for containing it pending distribution. On a literal construction I of the language of this proviso, it is difficult to maintain that each of the tanks is not a " place " or, having regard to the distinctive function of a warehouse in the ordinary sense of that expression as a repository for goods pending disposal, that the storage of oil in them pending distribution is not at best capable of being described as " warehousing." Moreover, once it has reached the tanks, the oil is, we suppose, no longer " in the course of being transported." In view of the fact that only one-quarter or thereabouts of the oil is dutiable, we can attach no great importance to the technical status of the hereditament as a bonded warehouse, but, for what it is worth, it tends to support the view that the tanks are to some extent used for warehousing. We cannot, however, entirely exclude a doubt proceeding from the manifest difference between these tanks and anything which would, in common speech, be ordinarily described as a warehouse. Accordingly, while we propose to assume for the purposes of this case that the tanks are to some extent used for "warehousing" within the meaning of proviso (b), we prefer to express no final opinion on the point.

But, on this assumption, are the tanks *primarily* so used? We find difficulty in forming any concluded view on that question. The tanks are, as a practical matter, necessary for the purpose of unshipping the oil. If there were no tanks, there could be no unshipping. The exigencies of sea-borne supply demand that a stock of oil in excess of day-to-day requirements should be maintained in the tanks, and the element of storage or warehousing in their use is largely due to that circumstance. There is, as it seems to us, no conclusive reason for regarding the unshipping use as secondary and the warehousing use as primary, rather than regarding the warehousing use as secondary and the unshipping use as primary, or, for that matter, regarding both as of equal importance. We find it unnecessary to resolve this question for the purpose of deciding this case and are content to hold that, so far as the first of the three conditions is concerned, counsel for the ratepayer is entitled to succeed to the extent that the hereditament is used, partly at all events, for dock purposes and that it is not shown that the whole of it, or every part of it used for dock purposes, is primarily used for warehousing oil not in the course of being transported.

We now turn to the second of the three conditions. Given that the hereditament is occupied and used wholly or partly for dock purposes, is it so occupied and used as part of a dock undertaking? Counsel for the ratepayer puts this part of his case in three ways. First, he says that the hereditament is occupied and used by the ratepayer as part of the dock undertaking carried on by the British Transport Commission in the shape of the Port of Hull. Secondly, he says that the hereditament is so occupied and used by the ratepayer as part of the dock undertaking carried on by it at its own dock in the shape of the barge berth. Thirdly, he says that the pipes running out along the jetties and the ratepayer's rights of user over them suffice to constitute a dock, and that the hereditament is occupied and used by the ratepayer as part of a dock undertaking carried on by it at that dock.

As to the first of these submissions, it would seem at first sight to be plainly negatived by the fact that the hereditament is in lease to and exclusively occupied by the ratepayer for the purposes of its own business of importing and distributing oil and thus excluded and segregated from the British Transport Commission's dock undertaking. But counsel for the ratepayer relies on s. 6 (3) (a) of the Act, which is in these terms:

> "no part of a freight-transport hereditament which is so let out as to be capable of separate assessment shall be deemed to be occupied and used for transport purposes unless it is actually so occupied and used."

This seems to show that a part of a freight-transport hereditament may be occupied and used as part of a dock undertaking even though the undertakers have let it to somebody else. There have been two Scottish cases bearing on the point. In *Clyde Navigation Trustees* v. *Inland Revenue* (4) (1930 S.C. 454), parts of dock premises let to ship owners and stevedores for the purposes of their own shipping or stevedoring businesses were held not to be part of the dock undertaking. On the other hand, in *Clyde Navigation Trustees* v. *Glasgow Assessor* (5) (1931 S.C. 400), the opposite conclusion was reached. The difference in the results reached by these two cases apparently turned to some extent on a distinction made in Scotland between buildings erected by a lessor and buildings erected by a lessee. The passage most favourable to the argument of counsel for the ratepayer in the second of these two cases is in the judgment of LORD HUNTER, where, after referring to s. 6 (3) (b), he said (1931 S.C. at p. 405):

> "That means, I think, that, where one finds subjects, capable of separate assessment and leased to tenants, which are so used and occupied as to fall within the definition of freight-transport, one must treat the subjects, although let, as part of the dock undertaking for purposes of de-rating. That is the case here."

LORD FLEMING did not go so far. He said (ibid., at p. 406):

> "But s. 6 (3) (a) seems to me to imply that subjects which would otherwise be entitled to be regarded as freight-transport lands and heritages are not to be deprived of the benefits of de-rating merely because they have been let to and are occupied by some person other than the dock authority."

Counsel for the ratepayer relies strongly on the terms of the leases under which the various parts of the hereditament are held by the ratepayer. He says these leases show that the ground was let with a view to the erection and operation thereon of a terminal oil depot for the unshipping, storage and distribution of oil, in connection with which the lessees were to have unshipping facilities in the shape of the pipes running out along the jetties. There was thus, he argues, something in the nature of an arrangement between the dock undertakers and the lessees under which the lessees were to extend the activities of the dock undertaking to the importation of oil. Therefore, says counsel for the ratepayer, the installation should be regarded as constructed and operated as part of the dock undertaking. We cannot accept this argument. We would be disposed to agree with counsel if what the ratepayer did was to provide unshipping and storage facilities for anyone having occasion to import oil; but the ratepayer does nothing of the sort. It uses the hereditament and the pipe lines on the jetties simply and solely for the purposes of its own individual business, and not by way of performing the functions properly within the province of the dock undertakers as such. Notwithstanding the second of the two Scottish cases just cited (5), we find it impossible to hold that, in occupying and using the hereditament for its own private purposes, the ratepayer is occupying and using the hereditament as part of the dock undertaking carried on by the British Transport Commission. To hold the contrary would involve the conclusion that the tenants of every industrial site let by the commission in the vicinity of the Port of Hull would be occupying and using their respective sites as part of the commission's dock undertaking if their leases or tenancy agreements allowed them the use for their own private purposes of the dock facilities provided by the commission. In the result, therefore, we find ourselves in agreement with the conclusion of the Lands Tribunal on this point, though we cannot accept the tribunal's reasoning so far as it is based on the circumstance that, when originally let to the ratepayer or its predecessors, the various parts of the hereditament were open or waste land subsequently built on by the lessees. So far as English law at all events is concerned, this seems to us an irrelevant consideration.

As to counsel for the ratepayer's second submission on this part of the case, it is to be observed that the expression " dock undertaking " is defined in s. 5 (3) of the Act as meaning " an undertaking carried on by a dock authority, but also [including] any other undertaking comprising as part thereof a dock in so far only as its business is carried on at and in connection with that dock." The purport of the limiting words introduced by the phrase " in so far only as " is somewhat obscure. In the present case the barge berth is undoubtedly a " dock." It is comprised in the ratepayer's undertaking. Therefore, apart from the limiting words, the whole of the ratepayer's undertaking is, by virtue of the definition, a dock undertaking. That obviously requires some qualification, and a qualification is provided by the limiting words. These words seem to say in A effect that, notwithstanding the earlier part of the definition, the ratepayer's undertaking is only to rank as a dock undertaking as regards that part of its business which is carried on at and in connection with the barge berth. That would appear to mean that the barge berth and the business of shipping oil there are to be regarded as a dock undertaking carried on as a distinct department of the ratepayer's enterprise. The question then arises whether the hereditament is B occupied as part of that circumscribed branch of the ratepayer's entire undertaking. There was some argument as to the meaning of the word " at " in the definition, and it was suggested that the hereditament, though only some three hundred yards from the barge berth and connected with it by a pipe line, was too far away from the barge berth to be capable of being rightly described as occupied and used as part of an undertaking the business of which was to be treated as C confined to business carried on " at and in connection with " the barge berth. We are not impressed by this argument. We do not think the word " at " can be given so close a geographical significance as necessarily to exclude premises only three hundred yards distant from the actual dock (i.e., the barge berth) and physically connected with it by pipes from the category of premises occupied and used as " part " of the undertaking carried on at the dock. But we think D counsel for the ratepayer's submission fails on the ground that the hereditament, while it could properly be described as occupied and used in connection with (inter alia) the barge berth to which it supplies oil, cannot reasonably be regarded as occupied and used as part of the barge berth undertaking. The barge berth is no more than one of the media through which oil is distributed from the hereditament by land and water, and distribution is only one aspect of the activities E carried on at the hereditament. We think the true position is that the barge berth is occupied and used as part of the undertaking carried on by the ratepayer on the hereditament and not that the hereditament is occupied and used as part of the barge berth undertaking.

Counsel for the ratepayer's third submission on this part of the case is to the effect that the rights of laying, maintaining and using the pipe lines running F out along the British Transport Commission's jetties conferred on the ratepayer by the various leases under which the hereditament is held suffice to constitute a dock comprised in the ratepayer's undertaking as part of which the hereditament is occupied and used. We do not agree. We think these rights are rights over the commission's dock and not a dock in themselves. We agree with what was said by LORD KEITH and LORD PATRICK about a similar submission in G the *Aberdeen* case (1) (1953 S.C. at pp. 219, 224). Accordingly, we think that the hereditament fails to satisfy the second of the three conditions postulated by s. 5 (1) (c).

As to the third and last condition, if (contrary to our view) the hereditament is occupied and used as part of a dock undertaking, is it an undertaking whereof a substantial proportion of the volume of business is concerned with the shipping H and unshipping of merchandise not belonging to or intended for the use of the undertakers ? As appears from the Case Stated, the whole, or substantially the whole, of the oil unshipped at the jetties is oil consigned by " Shell " Marketing Co., Ltd., Eagle Oil and Shipping Co., Ltd., and Anglo-Persian Oil Co., Ltd., to the ratepayer as their sole agent for the sale and distribution of oil for consumption in the United Kingdom under an agreement made between I these three consigning companies of the one part and the ratepayer of the other part and dated Dec. 21, 1931. Substantially the whole of the ratepayer's business consists of the sale and distribution of this oil and it is remunerated for its services by the three consigning companies on a commission basis. The ratepayer is given wide powers under the agreement in regard to prices, terms and conditions of sale and so forth. The agency is exclusive, and the ratepayer has, moreover, a positive right to be supplied by the consigning companies with the oil it requires. Although the property in the oil does not, under the terms of the agreement, pass to the ratepayer as between itself and the consigning companies, the ratepayer must surely have a good title to the oil as against all other persons. In these circumstances, we think it might almost be said that the oil is merchandise " belonging to " the ratepayer within the meaning of s. 5 (1) (c). At all events, we think the oil must be " intended for the use of " the ratepayer within the meaning of the sub-section. It is argued against this view that " use " means consumption. We think that is an unduly narrow meaning. We apprehend that a retail tradesman can, with perfect accuracy, be said to be using his stock when he sells it to customers and to have used it up when it is all sold. So here we think that inasmuch as the ratepayer's business consists of the sale and distribution of oil, albeit as agent for others, it is using in its business the oil which it sells and distributes, and the oil is clearly brought to the hereditament with the intention that it should be so used. The word " use " in its natural meaning is a word of wide import. In *British Motor Syndicate, Ltd.* v. *Taylor & Son, Ltd.* (6), STIRLING, J., pointed out that ([1900] 1 Ch. at p. 583)

> " The first meaning assigned to the word ' use ' in JOHNSON'S DICTIONARY is ' to employ to any purpose '; it is, therefore, a word of wide signification."

In this wide sense it is, we think, apt to cover the commodity in which a merchant trades, be he a petroleum merchant, a timber merchant, or other merchant. The commodity is employed in the merchant's business; it is used to supply his customers. We agree on this aspect of the case with the observations of LORD KEITH at the end of his judgment in the *Aberdeen* case (1) (1953 S.C. at p. 220). Accordingly, we think that, even if (contrary to our view) the ratepayer was occupying and using the hereditament as part of a dock undertaking comprising docks in the shape of either the barge berth or the ratepayer's rights over the British Transport Commission's jetties, it would still fail to satisfy the third of the three conditions laid down by s. 5 (1) (c) of the Act.

For these reasons, we think that the ratepayer has failed to bring the hereditament within the second and third of the three essential conditions of de-rating demanded by s. 5 (1) (c). We have thus reached the same result as the Lands Tribunal, though not for entirely the same reasons, and it follows that in our opinion this appeal fails and should be dismissed.

P. R. E. Browne: I ask that the ratepayer should be ordered to pay the costs of the valuation officer.

Michael Rowe, Q.C.: I cannot resist that, my Lord, so long as I am not asked to pay two sets of costs.

SIR RAYMOND EVERSHED, M.R.: What happened below ?

E. P. Wallis-Jones: Below, the costs were awarded to the valuation officer and no costs were awarded to the rating authority. That was the position which arose. There was no argument. There was nobody present, in fact, to argue on the matter of costs when the judgment was given below. On the position as it now arises, I seek to address your Lordship briefly on this question of costs here. I, of course, concede immediately that the matter is entirely within the discretion of this court and, secondly, that it is the practice and this would be a case where no more than one set of costs would normally be awarded. I do wish to say something on this point, however, because there has been some comment previously on the matter of the appearance of the rating authority in this case. May I say that they are a respondent to this appeal. They are brought here on the appeal. They have done nothing wrong. They consider it their duty to defend the rate, and they do consider indeed that it might be negligent on their part if they did not take all necessary steps in the defence of the rate. The position is that you have a small rating authority and a very large sum of money in issue.

SIR RAYMOND EVERSHED, M.R.: You never had any conflict of interest with the valuation officer's case, had you ?

E. P. Wallis Jones: No, my Lord, subject to this: We were not in a position to know to what extent this appeal would be proceeded with and, indeed, what would or might happen hereafter. I seek to make no reflection whatsoever on the Inland Revenue. We know that they have many aspects to consider and that there may be aspects of importance nationally which conflict with local interests, the interests of the rating authority. I refer to the possibility of the compromise of an appeal, the settlement of appeal, or the failure to proceed with further appeal, should that be necessary. Not only is the matter now one of rating, which is in the hands of the Inland Revenue; there also can occur questions of taxation, and there may conceivably (one can understand) be inter-relation between those two matters, having regard in particular to the contentions that have been raised in this case as to where lay the property in this oil which is handled at this hereditament. Therefore it was felt that there might at any stage develop some conflict, and, in order to preserve the position and the interest of the rating authority, it was most desirable that they should be represented throughout the course of any appeals that might result from the earlier findings in this matter.

It is true—and I again concede this—that there is the possibility of parties with similar interests being represented by the same solicitors and same counsel. On that, may I say first this: The rating authority has sought throughout to be as fully co-operative in this matter as possible. May I say, secondly, that at no time has it been suggested by the Inland Revenue solicitor or anyone on his behalf that they should appear at any stage also on behalf of the rating authority; indeed, quite the contrary. From the correspondence, which can be referred to if necessary, it is quite clear they accepted the position that we would be represented and appear here in this court. Further than that, the rating authority has sought continuously at all stages to keep any costs incurred down to a minimum by means of full collaboration, not only in the matter of discovery at an earlier date, but also in the matter of the settlement of the Case Stated that has been before your Lordships on this appeal. In those circumstances, the question may well arise (and, in my submission, does arise) for consideration whether, having regard to the fact that it is the practice only to allow one set of costs, it is not proper that there should be some apportionment of those costs.

Therefore, with that explanation of why the rating authority considered it its duty to be here and the course they have followed in the prosecution of this appeal, it is a matter, I would submit, for your Lordships' consideration whether there should be a direction that there might be some apportionment of such costs as are allowed against the unsuccessful appellant.

P. R. E. Browne: May I just add a word about that? The position now as to the responsibility for the List is laid down by s. 33 (1) of the Local Government Act, 1948, which provides:

> "Valuation lists shall, instead of being prepared and amended by [the people who used to do them,] be prepared and amended by valuation officers of the Commissioners of Inland Revenue . . . and (b) save as hereafter provided in this Part of this Act, rating authorities shall have no functions in relation to the preparation and amendment of valuation lists."

So the statutory duty with regard to the preparation, and so on, of the List is now fairly placed on the valuation officer and he must be the person primarily responsible for the custody of the List, so to speak, and for seeing that correct principles are observed. So far as this particular case is concerned, the ground on which the Lands Tribunal made an order for costs in favour of the valuation officer was stated in this way:

> "Generally speaking, this tribunal feels that, when a ratepayer has

> A appealed unsuccessfully, he ought not to be penalised by having to pay two sets of costs. In this appeal, I consider that the burden of the respondents' case was carried by the Inland Revenue and I shall award the costs to them. At the same time, I would like to emphasise how indebted I was to counsel for the rating authority for the arguments he adduced before me."

B Without any (I hope) disrespect to anybody else, I would submit that that was also the position in this court and that the right order in this case would be to make the same order, namely, that there should be only one set of costs, if your Lordships so feel, but that those costs should be paid to the valuation officer.

I, of course, entirely accept that my learned friend's clients have co-operated, C but in fact they have, I am instructed, never invited the Inland Revenue to appear on their behalf. As your Lordship will appreciate, there are certain difficulties about the Crown delegating representation. That did not arise in this case, because I do not think the rating authority, equally, ever asked us to allow them to appear for us. I would have submitted, in the circumstances of this case—the matter is, of course, entirely in your Lordships' discretion—that the proper order would be that the one set of costs should be paid to the valuation D officer and not to the rating authority.

(*Their Lordships conferred*)

SIR RAYMOND EVERSHED, M.R.: We think it would be only right to impose on the ratepayer one set of costs. We are far from saying that the E rating authority has not acted rightly in attending in court; but, on the other hand, we do not think ourselves we should give any direction. It is obvious, in the light of the statutory provisions, that the burden and task of resisting the appeal would fall on the valuation officer, but we think that the taxing officer might, on looking at the correspondence and other matters that have been referred to, think it proper to apportion some part of the costs to the rating F authority. In the circumstances, we feel we should leave that open, simply confining our order to a direction that the ratepayer should pay one set of costs, taxed as between party and party.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Sidney Morse & Co.* (for the ratepayer); *Solicitor of Inland Revenue* (for the valuation officer); *Smith & Hudson*, agents for *Mainprize, Rignall & Whitworth*, Hull (for the rating authority).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

PENFOLD *v.* PEARLBERG.

[CHANCERY DIVISION (Roxburgh, J.), July 26, 27, 1955.]

Practice—Inspection of house property—Property not in possession of party to action—R.S.C., Ord. 50, *r.* 3.

The plaintiff contracted to sell to the defendant leasehold property described in the particulars of sale as "Practically rebuilt under the War Damage Act . . . Requisitioned by the local authority . . ." An abstract of title was delivered but the defendant failed to deliver any requisitions or to take any further step. The plaintiff began an action for specific performance, and before delivering her defence, the defendant requested the plaintiff to afford facilities for her inspection of the property. The request was refused by the plaintiff, who was, however, prepared to give the necessary facilities after the pleadings were closed. The defendant applied under R.S.C., Ord. 50, r. 3, for inspection of the property. The property was at all material times in the possession of the local authority, which was not a party to the action.

Held: the power to make an order under R.S.C., Ord. 50, r. 3, for the inspection of property, being land or a building, was not restricted to land or a building in the possession of a party to the action, and, therefore, inspection would be ordered to be given subject to the consent of the local authority.

Coomes & Son v. *Hayward* ([1913] 1 K.B. 150) considered.

[As to the inspection of property, see 26 HALSBURY'S LAWS (2nd Edn.) 58, para. 95; and for cases on the subject, see DIGEST (Pleading) 661, *2806-2808.*]

Case referred to:

(1) *Coomes & Son* v. *Hayward*, [1913] 1 K.B. 150; 82 L.J.K.B. 117; 107 L.T. 715; 13 Digest 499, *494*.

Procedure Summons.

In an action by the vendor for specific performance of a contract for the sale of a leasehold dwelling-house, the defendant applied for an order under R.S.C., Ord. 50, r. 3, that she might be at liberty by herself or by her surveyor to inspect the said dwelling-house and for that purpose to enter on the said premises.

N. S. S. Warren for the defendant.
K. E. B. Kemp for the plaintiff.

ROXBURGH, J.: This is an interesting and I think important point, on which I must confess that I have some doubt, but I propose to construe the relevant rule, R.S.C., Ord. 50, r. 3, in a manner which may perhaps be called robust, because I think that a great waste of costs might, in this case and in other similar cases, result if the rule were construed otherwise.

By a contract in writing contained in a memorandum dated Jan. 27, 1955, the defendant agreed to buy from the plaintiff the leasehold premises known as No. 1, Aldershot Road, Kilburn, for £680. The memorandum was signed for the defendant by one H. H. Pearlberg, who is alleged to be (and for the purpose of this application I will assume to have been) the duly authorised agent of the defendant for that purpose. The said premises are held under a lease dated Nov. 12, 1885, for a term of ninety-nine years from Dec. 25, 1884, at the yearly rent of £8. A deposit was paid, and the statement of claim alleges that the plaintiff duly delivered an abstract within the time limited, that the defendant did not deliver any requisitions within the time limited or at all, and that the defendant must be deemed to have accepted the plaintiff's title. The statement of claim further alleges that, notwithstanding repeated requests by the plaintiff's solicitor and in breach of the said contract, the defendant has wrongfully refused and neglected to take any steps towards completion; and it further alleges that the plaintiff at all material times has been and is now ready and willing to fulfil all his obligations under the said contract. Naturally, on what I have said, he is claiming specific performance.

In the particulars of the property in question, it is stated as follows: "Practically rebuilt under War Damage Act . . . Requisitioned by the local authority at a compensation rental amounting to" a certain sum. Counsel tells me that the defendant suspects (I think that that is the fair way of putting it) that the property was not practically rebuilt under the War Damage Act. If it was, the defendant, as far as I know, has no defence to the action, and presumably the defence will collapse. On the other hand, if it was not practically rebuilt, the action would appear certain to fail, and therefore presumably the action will collapse. The whole fate of the action is likely to depend on this question whether the premises were practically rebuilt under the War Damage Act, 1943, and once the premises are inspected, I should think two competent surveyors, if they met together, could not possibly disagree on the subject.

In those circumstances, the defendant's solicitors wrote to the plaintiff's solicitor as follows:

> "Our client is advised that she should have an inspection made of the above property as soon as possible for certain purposes concerning her defence in these proceedings. We shall be glad to learn, therefore, whether your client is prepared to afford facilities for an inspection at a reasonable time and upon reasonable notice being given of the surveyor's intention to visit."

The answer from the solicitor for the plaintiff was:

> "I duly received your . . . letter . . . and my client is advised that your client should not be granted facilities for inspection of the property until after the pleadings are closed, when I shall be glad to give you the necessary facilities for inspection."

It is to be noticed there, and though it does not really affect the construction of the rule it does go very strongly to the merits or demerits of the resistance to inspection, that there is no suggestion that the plaintiff was not in a position to give inspection; on the contrary, there is a positive allegation that after the pleadings are closed, inspection will be given. That is how the matter stood when the defendant took out a summons asking for inspection under R.S.C., Ord. 50, r. 3.

At the hearing counsel took (and most properly took, because I do not think the point is an easy one) the objection that the plaintiff was not in possession of the property, and I think that is well founded. The precise position of a requisitioning authority is always a question of some difficulty, but the one thing that I think is quite clear is that the requisitioning authority is in possession of the premises during the period of requisition, and I shall certainly assume, though there is no evidence on this point, that the premises are still requisitioned as they were stated to be at the date of the contract. It is said that I cannot do anything, notwithstanding the positive refusal of the plaintiff to give inspection now, unless I, by the pressure of my decision, compel the defendant to add the local authority as a party to the action, solely for the purposes of the inspection. There is no reason whatever to suppose that the local authority would raise any objection, and the whole of that procedure would, as far as I can see, be almost certainly a pure waste of money.

That there is no reasonable alternative is clear, I think, from *Coomes & Son* v. *Hayward* (1) ([1913] 1 K.B. 150) where the Divisional Court, in dealing with an unconditional order for inspection made by the registrar of a county court—and if I may say so, such an order was plainly wrong, and I am not suggesting for a moment that I can make an unconditional order—made some observations which are obiter dicta so far as the present case is concerned but certainly lead to the suggestion which emerges at the end of the judgment of SCRUTTON, J., that the proper course in this case would be to add the local authority.

I find myself not bound by any authority to put such a narrow construction on R.S.C., Ord. 50, r. 3. The rule is in two separate parts, and I do not consider that the second part necessarily governs the first. Rule 3 provides:

> "It shall be lawful for the court or a judge, upon the application of any party to a cause or matter, and upon such terms as may be just, to make any order for the detention, preservation, or inspection of any property or thing, being the subject of such cause or matter, or as to which any question may arise therein . . ."

I emphasise the words "upon such terms as may be just." Pausing there, it seems to me that I have the plainest possible authority for making the order which I propose to make. Then the rule goes on:

> ". . . and for all or any of the purposes aforesaid, to authorise any persons to enter upon or into any land or building in the possession of any party to such cause or matter . . ."

This is not land or a building in the possession of any party, and it is therefore said that because of that consequential provision in the rule, the ambit of the general words of the rule which precede are restricted to land in the possession of a party. Nobody has ever so held. I quite agree that there are passages which suggest that perhaps, if the matter had been considered, it might have been so held, but in my view it is quite unnecessary and would do nothing but increase costs in a case like the present if the rule were thus construed. There is not the slightest reason to suppose that the local authority would refuse to allow inspection. On the other hand, the plaintiff has deliberately refused it now, assuming for himself that he has the power to grant or refuse it, which, of course, is entirely inconsistent with the argument which counsel for the plaintiff has put before me, based on the hypothesis that he has not power to give inspection and that, therefore, the order might be futile.

In my judgment, the proper order to make in such a case as this, where that is the attitude of the plaintiff, is an order for inspection subject to the consent of the requisitioning authority now in possession of the premises. Such an order is not futile. It may be that by reason of the term—and quite plainly, under the first part of the rule, I am entitled to impose terms—no inspection would ever take place under the order. Then no doubt it would be necessary, if the local authority refused, to add it as a party to this action, solely for the purpose of getting inspection, with the considerable possibility that the local authority might have to pay the costs of that waste of money. If in fact the order did not become operative, it would be because the condition precedent never took effect. I have, however, no reason whatever to assume that the order will not take effect, and I think that there is every probability that the condition will be fulfilled.

It is in the interest of saving costs that this kind of case should be within and not outside the scope of R.S.C., Ord. 50, r. 3, and I feel no difficulty in construing it in that way.

Order accordingly.

Solicitors: *Warren & Warren* (for the defendant); *W. A. L. Osborn* (for the plaintiff).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

A

CREED *v.* JOHN McGEOCH & SONS, LTD.

[Liverpool Summer Assizes (Ashworth, J.), June 8, 9, 10, July 7, 1955.]

*Child—Negligence—Allurement—Trailer left by contractors on land adjoining
road in course of construction—Contractors not in occupation of land—Child
B injured while playing with trailer—Duty of contractors to child.*

Nuisance—Highway—Trailer left on land adjoining road in course of construction.

The defendants were contractors engaged in the execution of a contract
with the Corporation of Birkenhead for the construction of roads and sewers
and the levelling of land. While so engaged they left a trailer used for transporting kerb-stones on land adjoining a nearly completed road at a point
C within ten feet of the kerbside. The adjacent length of roadway was in all
respects completed, and the whole of the road had been kerbed so that there
was no further use for the trailer in connection with the road. The contractors were under contract to do certain work, namely, the laying of main
sewers and levelling, to the land adjoining the road, but at the material date
this work had not been started nor had the ground been marked out. The
D trailer was to the defendants' knowledge attractive to children. They took
no steps to prevent injury to children occurring while work was not going on
at the site. The plaintiff, a girl aged five years, while walking with some
other young children along the road saw the trailer; they used the trailer
to play "see-saw" and the plaintiff was injured. In an action for injury
to the plaintiff caused by (i) the negligence of the defendants, or (ii) nuisance
E to the highway due to the presence of the trailer close to the road,

Held: (i) the standard of care owed by the defendants to the plaintiff was
higher than that owed by an occupier to a trespasser because the defendants
were in occupation only of such length of road as was under construction
and thus were not in occupation of the land on which the trailer stood, and
because it was not open to the defendants, having left the trailer, which was
F dangerous and attractive to children, in a place where children were known to
play, to contend that the plaintiff was a trespasser on the trailer as distinct
from a trespasser on the land; accordingly the defendants were negligent in
that they had failed to take reasonable care to avoid acts or omissions which
could reasonably be foreseen to be likely to lead to such an injury as that
which had happened to the plaintiff; and the plaintiff was entitled to
G damages.

Buckland v. *Guildford Gas Light & Coke Co.* ([1948] 2 All E.R. 1086) and
Davis v. *St. Mary's Demolition & Excavation Co., Ltd.* ([1954] 1 All E.R.
578) applied.

(ii) the defendants were not liable for nuisance to the highway because
the presence of the trailer did not constitute such a nuisance within the
H principles considered in *Jacobs* v. *London County Council* ([1950] 1 All E.R.
737) and because the conduct of the plaintiff in leaving the road to play on
the trailer would have amounted to a deliberate deviation, even if the road
had been a highway.

[**Editorial Note.** In support of the argument that the defendants were in
I occupation of the land on which the trailer stood they sought to rely on the
terms of their agreement with the corporation for the construction of the road.
Ashworth, J., intimated that the question whether vis-à-vis the plaintiff
the defendants were to be regarded as occupiers or merely as persons carrying
out work on land occupied by the corporation could not be answered by reference
to the agreement (see p. 126, letter H, post). The decision in the present case
is on negligence to children independent of occupation of land; the principles
applicable to liability for accidents to children on land being developed as a
housing estate will be found in *Phipps* v. *Rochester Corpn.* ([1955] 1 All E.R. 129).

As to the standard of care required in relation to children, see 23 HALSBURY'S LAWS (2nd Edn.) 584, para. 836; and for cases on the subject, see 36 DIGEST (Repl.) 114-122, *565-619*.]

Cases referred to:

(1) *Jacobs* v. *London County Council*, [1950] 1 All E.R. 737; [1950] A.C. 361; 114 J.P. 204; 36 Digest (Repl.) 49, *260*.

(2) *M'Alister* (*or Donoghue*) v. *Stevenson*, [1932] A.C. 562; 1932 S.C. (H.L.) 31; 101 L.J.P.C. 119; 147 L.T. 281; 36 Digest (Repl.) 85, *458*.

(3) *Buckland* v. *Guildford Gas Light & Coke Co.*, [1948] 2 All E.R. 1086; [1949] 1 K.B. 410; 113 J.P. 44; 2nd Digest Supp.

(4) *Davis* v. *St. Mary's Demolition & Excavation Co., Ltd.*, [1954] 1 All E.R. 578; 3rd Digest Supp.

(5) *Hartwell* v. *Grayson Rollo & Clover Docks, Ltd.*, [1947] K.B. 901; [1947] L.J.R. 1038; 2nd Digest Supp.

(6) *Glasgow Corpn.* v. *Muir*, [1943] 2 All E.R. 44; [1943] A.C. 448; 1943 S.C. (H.L.) 3; 112 L.J.P.C. 1; 169 L.T. 53; 107 J.P. 140; 36 Digest (Repl.) 58, *317*.

(7) *Mersey Docks & Harbour Board* v. *Coggins & Griffith* (*Liverpool*), *Ltd.*, [1946] 2 All E.R. 345; [1947] A.C. 1; 115 L.J.K.B. 465; 175 L.T. 270; 2nd Digest Supp.

(8) *Prenton* v. *General Steam Navigation Co., Ltd.*, (1944), 77 Lloyd's Rep. 174.

(9) *Lynch* v. *Nurdin*, (1841), 1 Q.B. 29; 10 L.J.Q.B. 73; 5 J.P. 319; 113 E.R. 1041; 36 Digest (Repl.) 33, *150*.

(10) *Gough* v. *National Coal Board*, [1953] 2 All E.R. 1283; [1954] 1 Q.B. 191; 3rd Digest Supp.

Action.

This was an action by the plaintiff, an infant, suing by her next friend, against the defendants for damages for injury to the plaintiff caused by the negligence of the defendants or by nuisance occasioned by the defendants. The facts appear in the judgment.

J. S. Watson, Q.C., for the plaintiff.

R. H. Forrest, Q.C., and *J. M. Kennan* for the defendants.

Cur. adv. vult.

July 7. **ASHWORTH, J.**, read the following judgment: The plaintiff is an infant, and on Aug. 1, 1953, the date when the accident happened, she was aged five years. The defendants carry on business as contractors, and on the date in question they were engaged on the performance of a contract dated June 21, 1951, made between them and the Corporation of Birkenhead, whereby they agreed to construct certain roads, sewers and formations for paths and verges situate on the Woodchurch Estate, Birkenhead.

One of the roads which the defendants agreed to construct was known as Home Farm Road. This road runs from a Roman Catholic church for a considerable distance in a north-westerly direction, eventually forming a T-junction with another road known as Meadow Crescent. On Aug. 1, 1953, the construction of this road was almost, but not quite, complete: there remained a short distance to complete near the T-junction. The accident to the plaintiff occurred, not on the road itself, but within ten feet of the roadside kerb, and I am satisfied that the road immediately adjoining the scene of the accident had been completed and kerbed.

For the purpose of transporting kerbs, each of which weighed about half a hundredweight, the defendants made use of a two-wheeled trailer fitted with a towing bar. Photographs of the trailer show that its top was a flat surface of wood. Until a date in June, 1953, the defendants had kept the trailer, when not in use, in a barn not far from the T-junction, but the barn was then demolished in the course of the development of the estate and thereafter the defendants had allowed the trailer to remain in the open, near the place at which they were at the time carrying out the work of constructing Home Farm Road. On Aug. 1, 1953, the trailer was about six feet from the roadside kerb.

The day in question was a Saturday and the accident to the plaintiff occurred in the afternoon when none of the defendants' employees was working on the site. There was no watchman on duty near the Home Farm Road. In the company of her brother aged nine and of a boy aged eleven and another child, the plaintiff left her home in Walby Crescent (which is near the Roman Catholic church) and made her way to some trees near Arrowe Park Hotel. To reach these trees the children must have gone beyond the T-junction and their way home took them along Home Farm Road, where they saw the trailer. They could not resist the temptation to amuse themselves on it, and by running or jumping from one end of the top to the other they contrived to make it into a form of see-saw. When the accident happened the plaintiff was on the ground trying to lift and lower the towing bar so as to assist the see-saw motion. Unfortunately, the bar came down suddenly and caught the index and middle fingers of her right hand.

On the other side of Home Farm Road, opposite the trailer, there was a concrete mixer belonging to the defendants, and not far away there were some heaps of aggregate and sand. About twenty-five yards away there was a builder's hut belonging to the defendants. No permanent building had been put up or indeed begun on either side of Home Farm Road near the trailer, and the nearest permanent building was estimated to be some three hundred yards away. The area flanking Home Farm Road within this distance of three hundred yards was what may fairly be called waste land. It was the corporation's intention to build on it in due course, but for this purpose they were employing contractors other than the defendants.

Apart from Home Farm Road, however, the defendants had undertaken to do further work in this particular area, namely, excavations for the laying of main sewers alongside the road and also the levelling of the waste land to a width of eighty feet on either side of the road. None of this further work had been started by Aug. 1, 1953, and there was no fence or other line of demarcation to indicate the strip of eighty feet.

So far as the waste land is concerned, I am satisfied that it was freely used by members of the public and that children played on it; no steps were taken by the corporation or by the defendants to prevent such user or to drive the children off. On the other hand, whenever the defendants' employees saw children playing on their works or with their equipment, they took prompt steps to drive them away. On a number of occasions the employees had seen children playing on the trailer and had chased them off.

In these circumstances it is contended on behalf of the plaintiff that the defendants are liable for her injury and the claim is framed both in negligence and in nuisance. So far as nuisance is concerned, it is said that the presence of the trailer close to Home Farm Road constituted a nuisance to the highway. In my judgment this contention fails. In the first place, although Home Farm Road was almost complete there was no proof that it had been dedicated as a highway or that the corporation had taken it over. Secondly, I do not consider that the presence of the trailer could be said to constitute a nuisance within the principles considered in *Jacobs* v. *London County Council* (1) ([1950] 1 All E.R. 737). Thirdly, the conduct of the children in leaving Home Farm Road to play on the trailer would, in my view, amount to a deliberate deviation, even if the road were held to be a highway.

Much of the argument before me was directed to the question whether the defendants were in occupation of the ground on which the trailer rested. A somewhat unusual feature of this case is that the defendants seek to establish that they were in occupation and owed no higher duty to the plaintiff than that imposed on occupiers in respect of infant trespassers; on the other hand, the plaintiff contends that whether or not she was a trespasser vis-à-vis the true occupiers, the defendants were not in occupation and owed a higher duty of the type illustrated in *M'Alister (or Donoghue)* v. *Stevenson* (2) ([1932] A.C. 562), and more recently in *Buckland* v. *Guildford Gas Light & Coke Co.* (3) ([1948] 2 All E.R. 1086).

It may appear surprising, at least to the parties, that the measure of the defendants' obligation to the plaintiff should depend on the answer to the question whether they were in occupation of the land, and in *Davis* v. *St. Mary's Demolition & Excavation Co., Ltd.* (4) ([1954] 1 All E.R. at p. 580), ORMEROD, J., said:

> "I think any decision which puts a defendant who is not in the occupation of the land in a different position from the occupier of the land is one which must be considered with very great care and caution . . ."

It seems to me, however, that there is no escape from the conclusion that, as the authorities stand, the distinction, referred to by ORMEROD, J., does exist.

In considering whether the defendants were occupiers of the relevant land or any part of it, it is important to keep in mind the principle that the occupation need not be exclusive. In *Hartwell* v. *Grayson Rollo & Clover Docks, Ltd.* (5) ([1947] K.B. at p. 913) LORD OAKSEY, L.J., said:

> "In my opinion the true view is that when a person invites another to a place where they both have business, the invitation creates a duty on the part of the invitor to take reasonable care that the place does not contain or to give warning of hidden dangers, no matter whether the place belongs to the invitor or is in his exclusive occupation. Although the rule has generally been stated with reference to owners or occupiers of premises, it is indicated by LORD WRIGHT in the case of *Glasgow Corpn.* v. *Muir* (6) ([1943] 2 All E.R. at p. 51) that the occupation need not be exclusive. He said there: 'Before dealing with the facts, I may observe that, in cases of invitation the duty has most commonly reference to the structural condition of the premises, but it may clearly apply to the use which the occupier (or whoever has control so far as material) of the premises permits a third party to make of the premises.' Invitors, of course, do not as a rule invite others on business to premises in which the invitors have no business interest or control, but they may have an interest and control which falls short of exclusive occupation."

It is true that in both the last-mentioned cases the courts were dealing with alleged invitors, but in my view nothing turns on that point so far as the question of occupation is concerned.

In the present case counsel on both sides sought to derive support for their arguments from the conditions incorporated in the agreement between the Corporation of Birkenhead and the defendants. For my part I do not think that the question whether vis-à-vis the plaintiff the defendants are to be regarded as occupiers or merely as persons carrying out work on land occupied and controlled by the corporation can be answered by reference to that agreement. In some cases it may well be that the terms of an agreement coupled with evidence as to the defendants' conduct with reference to the land will establish conclusively that they must be regarded as occupiers, but in the present case the terms of the agreement are not such as to lead to any conclusion either way on the problem now under consideration.

Moreover, I think that there is substance in the alternative submission put forward by counsel for the plaintiff on the footing that the terms of the agreement were in the defendants' favour, namely, that the agreement should be treated so far as third parties are concerned in the same way as agreements whereby a servant of one employer renders services for another; see *Mersey Docks & Harbour Board* v. *Coggins & Griffith (Liverpool), Ltd.* (7) ([1946] 2 All

E.R. 345). In these circumstances I do not propose to lengthen this judgment by detailed reference to the provisions of the agreement.

The case of *Davis* v. *St. Mary's Demolition & Excavation Co., Ltd.* (4) has undoubtedly a resemblance to the present case, in that in both cases the defendants at the material time were carrying out work as contractors on property owned by a corporation. In *Davis's* case (4) the work involved the demolition of bomb-damaged houses, and in the present case it involves the construction of roads and ancillary works on a building estate. It is not clear from the report of *Davis's* case (4) to what extent the question whether the defendants were occupiers was argued, and the judgment is founded on the premise that they were not occupiers. The list of cases set out in the report (see [1954] 1 All E.R. 578) does not include more than one case (viz., *Buckland's* case (3)) in which the issue as to occupation was considered, and I do not accept counsel for the plaintiff's submission that the decision in *Davis's* case (4) is conclusive on that issue. In my judgment, the answer in each case depends on the particular facts of the case and especially on the nature and extent of the occupation or control in fact enjoyed or exercised by the defendants over the premises.

In *Hartwell's* case (5) and in *Prenton* v. *General Steam Navigation Co., Ltd.* (8) (1944) (77 Lloyd's Rep. 174), the facts were sufficient to render contractors occupiers of part of a ship; *Davis's* case (4) is an illustration of the converse result in relation to real property.

In my judgment, so far as Home Farm Road is concerned the defendants can only be described as occupiers of such land as was comprised in the length actually under construction. That is to say, on Aug. 1, 1953, they were not in occupation of more than a relatively short length terminating in the T-junction. The road had been completed and kerbed from the Roman Catholic church to a point between the trailer and the T-junction, and assuming in the defendants' favour that they were in occupation of successive portions of that length during their construction, the defendants had completed that work and on Aug. 1, 1953, were no longer in occupation of any part of it.

It is true that the defendants had still to carry out work of excavation alongside the roadway, in order that sewers might be laid, but this work had not been begun, at any rate in the area near the trailer, and in my view the fact that the land on which the trailer was standing would in due course be excavated by the defendants is not sufficient to render them occupiers of it on Aug. 1, 1953. Similarly, in regard to the strip eighty feet in width on either side of Home Farm Road, the defendants would in due course have to carry out levelling work, but this strip had not even been fenced or otherwise marked off from the remainder of the waste land, and in these circumstances I hold that the defendants were not in occupation of it.

The position therefore is that when the plaintiff and her companions left the roadway of Home Farm Road and went on to the land whereon the trailer stood they were not trespassers vis-à-vis the defendants in relation to that land. Nor indeed do I think that they were trespassers vis-à-vis the corporation, since the evidence established that children frequently played on the waste land without let or hindrance on the part of the corporation. In my view the principles applied in *Buckland's* case (3) and in *Davis's* case (4) are equally applicable in the present case and I refer in particular to the last two paragraphs of ORMEROD, J.'s judgment in the latter case.

In the present case the defendants were fully aware of the risk of injury to children who might play on the trailer and they also knew that it was attractive to children. Admissions to this effect were frankly made by all the witnesses called on behalf of the defendants. Moreover, Mr. Robert McGeoch, one of the directors of the defendant company, said that he had considered turning the trailer upside down as a measure of precaution, but had not taken this course as he thought that children might then sustain injury while playing with the wheels. It seems probable that in any event the defendants would not have had any occasion to make further use of the trailer in connection with Home Farm Road and it could have been removed.

In my judgment, steps could quite easily have been taken by the defendants to prevent such injury to children as occurred in this case either by turning the trailer upside down or by securing the towing bar in a fixed position, or by removing the trailer altogether. In these circumstances I hold that they were negligent.

It was argued for the defendants that even if the plaintiff was not a trespasser in regard to the land whereon the trailer stood, she was at least a trespasser in regard to the trailer itself. Reference was made to *Lynch* v. *Nurdin* (9) (1841) (1 Q.B. 29) and it was contended that the plaintiff in that case would have failed as being a trespasser had it not been for the gross negligence of the defendant, and that no such negligence has been established here. For the plaintiff, reliance was placed on *Gough* v. *National Coal Board* (10) ([1953] 2 All E.R. 1283), and although that case may be distinguishable in that the plaintiff was held to be a licensee of land occupied by the defendants, there are passages in the judgment which clearly indicate that the defendants' argument on this point should be rejected. It scarcely lies in the mouth of a defendant, who is found to have negligently left a dangerous and attractive object in a place where children are known to play, to contend that a child who has done the very thing which forms the basis of the finding of negligence should fail because he was a trespasser on the object.

I therefore hold that the present claim succeeds. Agreed medical reports by Mr. Trevor Evans, F.R.C.S., show that the plaintiff made a reasonably good recovery from what is described as a serious injury. Part of the middle finger of her right hand was amputated, and although the cosmetic deformity is said to be marked, Mr. Evans is of opinion that she will not miss the top of the middle finger greatly. The plaintiff's mother said that the plaintiff was very sensitive about her finger, but the child was not in the least reluctant in allowing me to see her hand; moreover she said that the finger did not hurt when I touched it.

In my judgment, a reasonable amount to award by way of compensation is the sum of £600. In the statement of claim there appears a small claim for special damage, but in my view none of the amounts there mentioned is recoverable by the plaintiff and I reject that claim. There will therefore be judgment for the plaintiff for £600.

Judgment for the plaintiff.

Solicitors: *Dodds, Ashcroft & Cook*, Liverpool (for the plaintiff); *Barrell & Co.*, Liverpool (for the defendants).

[*Reported by* M. DENISE CHORLTON, *Barrister-at-Law.*]

THYNNE (MARCHIONESS OF BATH) *v.* THYNNE (MARQUESS OF BATH).

[COURT OF APPEAL (Singleton, Hodson and Morris, L.JJ.), July 18, 19, 20, 21, 27, 1955.]

Divorce—Decree absolute—Amendment—Marriage as pleaded and proved dissolved by decree—Decree made absolute—Two ceremonies of marriage—Petition referred only to second ceremony—Application to amend petition and decrees by substituting references to first ceremony—Matrimonial Causes Act, 1950 (14 *Geo.* 6 *c.* 25), *s.* 4 (1)—*Matrimonial Causes Rules*, 1950 (*S.I.* 1950 *No.* 1940), *r.* 4 (1) (*a*), *r.* 6 (1), *r.* 80.

The parties were secretly married on Oct. 8, 1926, at St. Paul's Church, Knightsbridge, and on Oct. 27, 1927, they went through a second ceremony of marriage at the church of St. Martin-in-the-Fields. By her petition dated Jan. 20, 1953, the petitioner averred that she was married to the respondent on Oct. 27, 1927, at St. Martin-in-the-Fields and that he had committed adultery, and she prayed for a decree nisi of divorce and the exercise of the court's discretion in respect of her own adultery. On May 15, 1953, in the exercise of the court's discretion a decree nisi of divorce was pronounced in her favour and that decree was made absolute on June 27, 1953. Subsequently the petitioner by summons sought leave to amend her petition and the decrees nisi and absolute, disclosing in her affidavit in support of the summons that she had been lawfully married to the respondent on Oct. 8, 1926, at St. Paul's Church, Knightsbridge. She sought by the amendment to substitute in the petition and decrees the date and place of the marriage of Oct. 8, 1926, for that of the ceremony of Oct. 27, 1927.

Held: (i) a decree of divorce granted after trial by a competent court in accordance with the provisions of the Matrimonial Causes Act, 1950, puts an end to the status of marriage between the parties (dictum of BRETT, L.J., in *Niboyet* v. *Niboyet* (1878) (4 P.D. at p. 11) applied) and, if the decree gives the wrong date or place of the effective marriage ceremony the decree is not thereby rendered void (dictum of LORD BLANESBURGH in *McPherson* v. *McPherson* ([1936] A.C. at p. 203) applied).

(ii) (HODSON, L.J., dissenting): the court had power under its inherent jurisdiction to amend an order of the court after it had been drawn up and entered, so as to make the position under it clear and free from ambiguity, although that power did not extend so far as to allow the court to amend an effective part of its order, e.g., it would not enable the court to amend a decree of divorce in relation to a question of status or proof of a matrimonial offence (*Hampson* v. *Hampson* ([1908] P. 355) approved; dictum of LORD PENZANCE in *Lawrie* v. *Lees* (1881) (7 App. Cas. at p. 34) applied); accordingly in the present case, the court being satisfied that the lawful marriage between the petitioner and the respondent was solemnised on Oct. 8, 1926, the decrees nisi and absolute would be amended.

(iii) the form of the amendment would be by striking out the date and place of marriage stated in the decrees, as this would effect the intention of the court granting those decrees, viz., to dissolve the marriage subsisting between the parties, and would not create a semblance that the commissioner had considered the marriage of Oct. 8, 1926.

Decision of LORD MERRIMAN, P. ([1955] 2 All E.R. 377) reversed.

[**Editorial Note.** In *Woolfenden* v. *Woolfenden* ([1947] 2 All E.R. 653) distinction was drawn between the consequences of failure to observe the terms of a statute, in that instance the Supreme Court of Judicature (Consolidation) Act, 1925, s. 183 (3) as amended, and the non-observance of a rule. It was there indicated that failure to comply with the provisions of the statute resulted in a decree being void, although failure to comply with a rule would only render a decree voidable. That decision was before the court in the present case (see A p. 133, letter F, post), where the failure to disclose the true original marriage ceremony was a failure to comply with provisions of the Matrimonial Causes Rules, 1950, but not with provisions of the Matrimonial Causes Act, 1950.

In addition to the points apparent from the headnote above a submission was made in the present case that the Matrimonial Causes Rules, 1950 (S.I. 1950 No. 1940), r. 4 (1) (a) and r. 40 (4) were ultra vires. Morris, L.J., intimated B that he was not prepared to acknowledge any doubt as to the validity of these rules (see p. 147, letter B, post).

As to amendment after decree absolute, see 10 Halsbury's Laws (2nd Edn.) 831, para. 1328 note (m); and for cases on the subject, see 27 Digest (Repl.) 452, *3842*, *3843*.

As to amending judgments and orders under the slip rule, see 19 Halsbury's C Laws (2nd Edn.) 261, para. 561; and for cases on the subject, see Digest (Practice) 472-476, *1530-1567*.

For the Matrimonial Causes Act, 1950, s. 4 (1), see 29 Halsbury's Statutes (2nd Edn.) 394.

For the Matrimonial Causes Rules, 1950, r. 3 (1), r. 4 (1) (a), r. 6 (1), r. 40 (4), see 10 Halsbury's Statutory Instruments 197, 199, 202, 218.] D

Cases referred to:

(1) *Hampson* v. *Hampson*, [1908] P. 355; 77 L.J.P. 148; 99 L.T. 882; 27 Digest (Repl.) 690, *6608*.

(2) *Woolfenden* v. *Woolfenden*, [1947] 2 All E.R. 653; [1948] P. 27; [1948] L.J.R. 622; 27 Digest (Repl.) 686, *6564*.

(3) *Niboyet* v. *Niboyet*, (1878), 4 P.D. 1; 48 L.J.P. 1; 39 L.T. 486; 14 Digest 133, *1049*. E

(4) *MacCarthy* v. *Agard*, [1933] 2 K.B. 417; 102 L.J.K.B. 753; 149 L.T. 595; 27 Digest (Repl.) 252, *2032*.

(5) *Pearlman (Veneers) S.A. (Pty.), Ltd.* v. *Bartels*, [1954] 3 All E.R. 659; 3rd Digest Supp.

(6) *Rooker* v. *Rooker & Newton*, (1863), 3 Sw. & Tr. 526; 33 L.J.P. M. & A. 42; 164 E.R. 1379; 27 Digest (Repl.) 75, *559*. F

(7) *Marshall* v. *Marshall*, (1909), 25 T.L.R. 716; 27 Digest (Repl.) 453, *3843*.

(8) *Reder* v. *Reder*, [1948] W.N. 238; 92 Sol. Jo. 469; 27 Digest (Repl.) 552, *5026*.

(9) *Skeats* v. *Skeats & White*, (1865), 35 L.J.P. & M. 47; 27 Digest (Repl.) 553, *5034*. G

(10) *Lawrie* v. *Lees*, (1881), 7 App. Cas. 19; 51 L.J.Ch. 209; 46 L.T. 210; Digest (Practice) 477, *1583*.

(11) *Harvey (otherwise Farnie)* v. *Farnie*, (1880), 6 P.D. 35; 50 L.J.P. 17; 43 L.T. 737.

(12) *McPherson* v. *McPherson*, [1936] A.C. 177; 105 L.J.P.C. 41; 154 L.T. 221; 27 Digest (Repl.) 593, *2099*. H

(13) *Wiseman* v. *Wiseman*, [1953] 1 All E.R. 601; [1953] P. 79; 3rd Digest Supp.

(14) *Re Suffield & Watts, Ex p. Brown*, (1888), 20 Q.B.D. 693; 58 L.T. 911; Digest (Practice) 815, *3762*.

(15) *Re Swire*, (1885), 30 Ch.D. 239; 53 L.T. 205; Digest (Practice) 472, *1534*.

(16) *Hatton* v. *Harris*, [1892] A.C. 547; 62 L.J.P.C. 24; 67 L.T. 722; Digest (Practice) 473, *1537*. I

(17) *Preston Banking Co.* v. *Allsup (William) & Sons*, [1895] 1 Ch. 141; 64 L.J.Ch. 196; 71 L.T. 708; 10 Digest 805, *5110*.

(18) *Scott* v. *Morley*, (1887), 20 Q.B.D. 120; 57 L.J.Q.B. 43; 57 L.T. 919; 52 J.P. 230; 27 Digest (Repl.) 169, *1242*.

(19) *Meier* v. *Meier*, [1948] 1 All E.R. 161; [1948] P. 89; [1948] L.J.R. 436; 27 Digest (Repl.) 593, *5545*.

A (20) *Lazard Bros. & Co.* v. *Midland Bank, Ltd.*, [1933] A.C. 289; 102 L.J.K.B. 191; 148 L.T. 242; Digest Supp.

Appeal.

The petitioner appealed from an order of LORD MERRIMAN, P., dated May 5, 1955, and reported [1955] 2 All E.R. 377, whereby he dismissed her summons B for leave to amend para. 1 of her petition for divorce and for an order that consequential amendments be made in the decree nisi and the decree absolute.

On June 20, 1955, the respondent applied for leave to appeal out of time against the part of the decree absolute which recited the date and place of the marriage to be dissolved and the application was adjourned until the hearing of the petitioner's appeal. On the hearing of the appeal the application was not C entertained (see p. 139, letter I, p. 143, letter B, post).

The facts appear in the judgment of SINGLETON, L.J.

Geoffrey Lawrence, Q.C., and *Anthony Harmsworth* for the petitioner.

J. E. S. Simon, Q.C., and *Victor Russell* for the respondent.

The Solicitor-General (*Sir Harry Hylton-Foster, Q.C.*) and *Colin Duncan for* the Queen's Proctor, as amicus curiae.

D *Cur. adv. vult.*

July 27. The following judgments were read.

SINGLETON, L.J.: The petitioner and the respondent were married at St. Paul's Church, Knightsbridge, on Oct. 8, 1926. They were both quite young: as there was some objection on the part of relations, they had decided to get E married secretly. In para. 3 of her affidavit in support of the summons the petitioner deposes:

> "In order that our proposed marriage might not be discovered my former husband, when applying for the marriage licence, transposed his Christian names and omitted my first Christian name. On Oct. 8, 1926, we were F married at St. Paul's Church, in the parish of St. Paul's, Knightsbridge, in the county of Middlesex. None of our friends or relations were present at the said ceremony. There is now produced and shown to me marked 'A' a certified copy of the entry in the register relating to the said marriage."

Everyone agrees that the marriage of Oct. 8, 1926, was a lawful marriage. On Oct. 27, 1927, they went through a second ceremony of marriage. This G marriage was at St. Martin-in-the-Fields, and their friends and relations were present. On Jan. 20, 1953, the petitioner launched a petition in which she sought a dissolution of marriage on the ground of the adultery of the respondent, and she asked for the discretion of the court to be exercised in her favour. The petition was heard by His Honour JUDGE DALE, sitting as Special Commissioner, on May 15, 1953, and he granted a decree nisi of dissolution to the H petitioner. The decree was made absolute on June 27, 1953. Some time afterwards the petitioner wrote a book in which she referred to the secret marriage of which her legal advisers had had no knowledge. In the result there came a summons dated Apr. 20, 1955, by which the petitioner sought liberty to amend para. 1 of the petition,

> I "by striking out the date '27th day of October 1927' and inserting in place thereof the date '8th day of October 1926'; by inserting after the word 'Vivian' the words 'in the marriage certificate described as Winifred Louise Vivian': by inserting after the words 'Viscount Weymouth' the words 'in the marriage certificate described as Frederick Henry Thynne' and by striking out the words 'the parish church in the parish of St. Martin-in-the-Fields in the county of London' and inserting in place thereof the words 'St. Paul's Church in the parish of St. Paul's, Knightsbridge in the county of Middlesex'",

and she also asked for an order that consequential amendments should be made in the decree nisi and in the decree absolute.

The petitioner had said that she was married on Oct. 27, 1927, at St. Martin-in-the-Fields and the decree which was granted to her was drawn on that basis. With reference to the second ceremony, the petitioner in her affidavit said:

> " (7) Thereafter, in the course of time I came to look upon the latter ceremony as the valid marriage, and I have in fact at all times regarded such ceremony as constituting a valid marriage.
>
> " (8) When I gave instructions to my solicitors to present my said petition for divorce I had firmly in my mind that the said second ceremony of marriage was the one to be dissolved and I gave no thought to the said secret marriage, nor did I inform my solicitors thereof.
>
> " (9) On July 11, 1953, I was married to my present husband, Alexander Fielding, believing that I was free and fully entitled to do so. I am informed by my former husband and verily believe that he was married on July 15, 1953, to Virginia Tennant, the woman named in my petition.
>
> " (10) I have recently published a book of reminiscences in which I referred to my said secret marriage and it was only after the publication thereof that the matter in question was brought to my attention by my solicitors.
>
> " (11) Subsequently I instructed my solicitors to take steps if possible to put the matter right.
>
> " (12) I am deeply conscious of the seriousness of the position which has arisen as the result of my neglect to inform my solicitors of my said secret marriage when instructing them to prepare and present my said petition. In the premises I can only pray that this honourable court will accept my assurance that such omission on my part was not intentional or calculated in any way to deceive or mislead and that, therefore, I may be granted the relief which I humbly crave."

The summons came before Lord Merriman, P., and on May 5, 1955, he held that he had no option but to dismiss it. It may be that he regarded the decree as a nullity and that he could not by amendment make that which was a nullity into an effective decree. He is recorded as having said ([1955] 2 All E.R. at p. 383):

> " I need hardly say that both counsel rejected with equal emphasis the bare idea that the decree absolute should be set aside as a nullity. As I have no such application before me, I need only add that, even if I have jurisdiction to accede to the present application, and if the amendments proposed are intended to ensure that no question shall arise about the validity of the subsequent marriages, I am by no means sure that this object would be attained. If, as is argued, the husband and wife were divorced on June 27, 1953, when the decree was made absolute, nothing more is necessary. If they were not then divorced by reason of inherent defect in the process from beginning to end, or otherwise, I cannot divorce them now with retroactive effect. It remains, however, to consider whether I have power to correct the decrees, either under the slip rule or by virtue of the inherent jurisdiction of the court, whatever the effect of so doing may be."

This [the judgment of Lord Merriman, P.] leaves the parties in a state of uncertainty. If it is assumed that the decree is a nullity and a new petition is launched it will be met by r. 3 (2) of the Matrimonial Causes Rules, 1950, which provides that it cannot be filed so long as there is another petition by the same petitioner which has not been dismissed or otherwise disposed of by final order. And if it is sought to remove the decree, the answer may well be that it is a perfectly good decree or, at least, that it is not void.

The petitioner appeals to this court and her appeal was supported by counsel appearing for the respondent. Each asks for the help of the court in determining what the true position is if the court is not prepared to allow the appeal. Following on the decree absolute each went through another ceremony of marriage. Thus the determination of the questions raised is of importance to others beyond the parties to the appeal. Those who went through ceremonies of marriage on the faith of the decrees wish to know what their position is. If the decree nisi and the decree absolute are void and of no effect they are not lawfully married; the questions raised are of public interest. It was obvious from the commencement that on this appeal the interests of the petitioner and the respondent were the same, and it was desirable that there should be argument on the other side. Happily, the Queen's Proctor was represented by the Solicitor-General and his learned junior, and we had the advantage of their submissions. The Solicitor-General did not ask the court to say that the decree nisi was void or a nullity: he submitted that it was voidable, and that it (and the decree absolute) stood unless and until it was set aside. He submitted further that neither a court of first instance, nor the Court of Appeal, could make the amendments sought, or any amendment, after judgment was given, that is, after the decree nisi was pronounced, or after it was drawn up. It was not suggested that for this purpose there was any difference to be drawn between the decree nisi and the decree absolute. The fact that the Solicitor-General did not submit that the decree was a nullity, or that it was void, does not absolve this court from the duty of considering the question.

It is, I think, clear that neither SIR GORELL BARNES, P., nor SIR CHARLES BIGHAM, P., in cases to which I shall refer would have given leave to amend if they had regarded the respective decrees as null and void. In *Hampson* v. *Hampson* (1) ([1908] P. 355) there had been a lawful marriage at a date earlier than, and at a place other than, that named in the petition and deposed to by the petitioner. The judge who heard the petition was satisfied that there had been a lawful marriage between the parties. When the application to amend was heard it was clear that the wrong date, and place, of the lawful marriage had been given. Likewise in the present case the parties were lawfully married. No one contests it. They had acquired the status of married persons, but the petitioner gave the wrong date and place of the lawful marriage. That constituted a failure to comply with a rule. It is something for which provision is made by R.S.C., Ord. 70, r. 1. In *Woolfenden* v. *Woolfenden* (2) ([1947] 2 All E.R. 653) BARNARD, J., drew attention to the distinction between failure to observe the terms of the statute and non-observance of a rule. Failure to comply with the provisions of the statute, he held, resulted in a decree being void, whereas failure to comply with a rule would make the decree only voidable.

The grant of a decree of dissolution puts an end to the status of married persons theretofore existing between the petitioner and the respondent. In *Niboyet* v. *Niboyet* (3) BRETT, L.J., used these words (1878) (4 P.D. at p. 11):

> "Marriage is the fulfilment of a contract satisfied by the solemnisation of the marriage, but marriage directly it exists creates by law a relation between the parties and what is called a status of each. The status of an individual, used as a legal term, means the legal position of the individual in or with regard to the rest of a community."

A decree granted by a competent court puts an end to that status. There is no suggestion of fraud in this case. It appears to me that it would be highly dangerous, and contrary to the expressed intention of Parliament, to hold that a decree is void merely because it gives the wrong date and wrong place of the marriage or because the commissioner had not the true date and place before him. The question here is whether the parties were lawfully married, and we know that they were. By s. 13 of the Matrimonial Causes Act, 1950, either party may marry again after decree absolute (subject as is therein provided). Section 13 (1) reads:

> " Where a decree of divorce has been made absolute and either there is no right of appeal against the decree absolute or, if there is such a right of appeal, the time for appealing has expired without an appeal having been presented or an appeal has been presented but has been dismissed, either party to the marriage may marry again."

The section would be robbed of much of its force if it was open to a party to say that a decree was void because a wrong date had been given and the commissioner had not had before him the date of the ceremony of marriage. It is a question of status, not of ceremony. I agree with the submission of all the learned counsel who addressed us that the decree nisi, and decree absolute, granted in the present case cannot be regarded as void.

The case for amendment put forward by counsel on behalf of the petitioner and by counsel on behalf of the respondent was that the court was entitled to amend its order after judgment had been given, and entered, in some respects. Counsel for the respondent put it in this way: " The court cannot after judgment amend the effective part of the order, that is, the status, the matrimonial offence proved to have been committed, or the decree in so far as it affects status, but, short of that, it can allow, and direct, an amendment which is necessary or desirable in order to correct the record so that it is in accordance with the facts, provided that no injustice can be done to anyone thereby ". The desirability of reference in the decree to the lawful marriage, instead of to a later ceremony, was emphasised, so as to avoid any question arising hereafter. We were referred to a number of authorities bearing on this question.

In *MacCarthy* v. *Agard* (4) ([1933] 2 K.B. 417), the court gave leave to amend the title of the action and extended the time for appealing against the original judgment (see the footnote at the end of the report). The majority of the court held that there was no jurisdiction to amend the judgment. Scrutton, L.J., did not take the same view as the other members of the court. It is interesting to note his observation in these words (ibid., at p. 422):

> " I should be sorry to think that the inherent power of the court is to be in any way limited by rules."

In *Pearlman* (*Veneers*) *S.A.* (*Pty.*), *Ltd.* v. *Bartels* (5) ([1954] 3 All E.R. 659), the Court of Appeal, in approving the order of Slade, J., went further. The name of the defendant was, by amendment, altered to Joseph Bartels, trading as Bernhard Bartels. It was said that this was only an alteration in the title of the action and that the amendment could be made after judgment in accordance with the footnote to the report of *MacCarthy* v. *Agard* (4). The result of the amendment was that the plaintiffs could enforce the judgment in Germany. The Court of Appeal allowed this though it was opposed by the defendant and though it adversely affected the rights of the defendant. It is only under the inherent jurisdiction of the court that this could be done. And it might be said that in the result there was more than an alteration in the title of the action. I read the words of Denning, L.J., which show his view as to the power of the court in such a case. The learned lord justice said ([1954] 3 All E.R. at p. 660):

> ". . . the defendant now appeals to this court contending that these courts have no jurisdiction to amend a judgment once it has been entered. Reliance was placed on the decision of this court in *MacCarthy* v. *Agard* (4). The distinction between that case and the present was drawn by Slade, J., in a judgment with which I fully agree. In *MacCarthy* v. *Agard* (4) the plaintiff did not seek only to amend the name or the description of the defendant. He sought to alter the very judgment itself, which was in a special form applicable to a married woman. He asked that the operative and substantive part of the judgment should be omitted. This court, by a

majority, held that that could only be done by way of appeal . . . Nevertheless, in the course of that case itself it appears that this court gave leave to amend the title of the action. When the substantive judgment is not being altered, but only the title of the action, it is to my mind quite plain that this court has ample jurisdiction to correct any misnomer or misdescription at any time whether before or after judgment. That is what the master and the learned judge have done in this case."

HODSON, L.J., who agreed, based his judgment on R.S.C., Ord. 28, r. 12.

In the present case, that which we are asked to do is very much less. If we allow the amendments which the petitioner asks us to make we shall not affect or injure the rights of anyone. The petition was presented under the Matrimonial Causes Act, 1950, s. 1, and the claim for relief was based on the allegation that the respondent

"has since the celebration of the marriage committed adultery."

Under s. 4 of the Matrimonial Causes Act, 1950, it is the duty of the court to inquire, so far as it reasonably can, into the facts alleged. Under s. 4 (2) (a) if the court is satisfied on the evidence that the case for the petitioner has been proved, the court must pronounce a decree of divorce, subject as is provided in the section. The court must be satisfied that the petitioner and respondent were lawfully married, for without that no decree dissolving a marriage can be pronounced. It must be taken that the commissioner was satisfied of this. True, the date and place of the marriage were wrongly stated in the petition—and in the evidence, I suppose. Still the petitioner deposed to the fact that she was married to the respondent and that she had four children by him. That was evidence before the commissioner and, moreover, it is common ground that the petitioner and the respondent were in fact married, and were lawfully married, a year before the date given in the petition and at another church. A decree nisi was granted by the commissioner: that was his judgment in the suit. The decree follows Form 86 and it refers to the marriage had and solemnised on Oct. 27, 1927, at St. Martin-in-the-Fields Parish Church between the petitioner and the respondent. The Act does not require that the date and place of the marriage shall be stated; r. 4 of the Matrimonial Causes Rules, 1950, calls for it. If the date and place of the marriage had been omitted and that which was dissolved was the marriage had and solemnised between the petitioner and the respondent, I do not see that it could have been said that the decree was bad. In some cases it may happen that the party seeking relief—perhaps a refugee from the continent—cannot give the precise date of the marriage ceremony, or the name of the church, and cannot obtain any record. Though it may not be easy to establish a valid marriage in such a case, if the petitioner succeeds in doing so he or she is over the first hurdle. I infer from this that the date and place of marriage are not of vital importance. I do not mean that they are mere matters of form. Rule 4 of the Matrimonial Causes Rules, 1950, requires that they shall be given, and when this is done and a certificate is produced, proof of a lawful marriage is comparatively simple. I see no reason why the court should not be satisfied on evidence that the parties had been lawfully married even though it was impossible to ascertain the precise date of the marriage. The requirement of the rule as to place and date of the marriage goes to simplify proof, and further it helps in the keeping and checking of records. Important though compliance with the rule is, I do not regard the statement of the date, or of the place, of marriage as fundamental. As counsel for the respondent put it, it ought not to be regarded as an effective part of the order (the decree). The court before it grants a decree of dissolution must be satisfied that the parties were lawfully married and that the respondent had committed a matrimonial offence (or that there were other grounds for giving the relief sought).

In *Rooker* v. *Rooker & Newton* (6) it was impossible to prove the date or the place of the ceremony of marriage. SIR JAMES WILDE (the Judge Ordinary) said (1863) (3 Sw. & Tr. at p. 526):

> " Upon careful consideration of the evidence, I am of opinion that the marriage was sufficiently proved. It appeared from the statement of the petitioner's brother, James Rooker, that in 1842 the petitioner was resident in America, and that in 1843 he came back to this country with a lady whom he introduced as his wife, and who is undoubtedly the respondent in this suit. The history of this lady, from the time of her so coming to this country in 1843, is very clearly proved by the evidence, which proves her name to be ' Sarah Massenburgh Rooker ', and which brings home to her the act of adultery, upon which the suit is founded. It is also very clearly proved by the affidavit of Mr. Mason that, in the year 1842, the law in the State of Virginia did not require any religious ceremony for the celebration of a valid marriage, and that the ' mere cohabitation of a man and woman who proclaim themselves, and are received in society as man and wife, constituted in the eye of the law a valid marriage '. Further, that in 1842 there was ' no law in Virginia requiring any registry or record to be kept of a marriage ', though he believed the law has been since altered. He then states that, owing to the war now being carried on in Virginia, the record of any religious ceremony of marriage, which might have taken place, cannot be obtained. He goes on to state that William Yates Rooker was many years ago, and, as he believed, in 1842, rector of Christchurch, Winchester, Virginia, and that for five years he and Sarah Massenburgh Rooker resided together as man and wife in the parsonage, and were received and acknowledged as such by himself and his family and his whole congregation. A marriage is thus proved . . ."

That means a lawful marriage. The record of the proceedings in that case shows that the decree nisi was granted by SIR JAMES WILDE (the Judge Ordinary), and that

> " the marriage had and solemnised on Feb. 1, 1842 at Christchurch, Kingston Mathews, Virginia . . . be dissolved."

Obviously this was taken from the petition, for there was no proof of it.

The application which was before the learned President was to amend para. 1 of the petition and to make consequential amendments in the decree nisi and in the decree absolute. LORD MERRIMAN was of opinion that there was no jurisdiction, or no power, to make such amendments and that he had no option but to dismiss the summons. There are, or there may be, two questions for consideration. The first: Is there power to allow the amendments sought after judgment has been given ? And the second: If there is power, ought such a power to be exercised in this case ? I now come to the cases dealing with amendment of decrees. The principle is the same as in any other class of case though it may be said that from the point of view of the public it is more important in the public interest to allow an amendment which will put right a date referring to a marriage and thus to ensure a correct record than it is to amend a money judgment.

In *Hampson* v. *Hampson* (1), SIR GORELL BARNES, P., allowed amendments to be made in circumstances precisely similar to those in the case now under appeal. The report is short and I propose to read the whole of it ([1908] P. 355):

> " On Mar. 13, 1899, the petitioner (wife) was married by licence to the respondent at the registrar's office in the district of Chorlton, in the county of Lancaster, and on June 21, 1899, a form of marriage was gone through by the petitioner and respondent at St. Mary's Church, Birmingham. On Oct. 1, 1906, the wife presented a petition for dissolution of marriage. In that petition the marriage was stated to have been celebrated at St. Mary's

Church, Birmingham, on June 21, 1899, and the decree nisi and decree absolute which the court subsequently pronounced referred only to that ceremony of marriage. The petitioner now moved that the decrees nisi and absolute might be rectified by inserting therein the marriage at the registrar's office instead of the subsequent ceremony of marriage in church. Notice of this motion had been served on the respondent's solicitor."

Sir Gorell Barnes, P., said (ibid., at p. 356):

> "I think the right thing to do is to amend the petition as well as the decrees made thereunder. On affidavit of service of notice of the motion, the petitioner may take the order for amendment of the petition and decrees; but no costs of this ought to be taxed against the respondent."

Lord Merriman, P., said ([1955] 2 All E.R. at p. 382) that he would most readily be guided by that decision, followed as it was to some extent by *Marshall* v. *Marshall* (7) (1909) (25 T.L.R. 716), if he could satisfy himself that there was any ground on which it could be supported. *Marshall* v. *Marshall* (7) came before Sir Charles Bigham, P., in 1909. It is sufficient for my purpose if I read the headnote (25 T.L.R. 716):

> "A wife having been married to her husband, first by a declaration before witnesses in Edinburgh, and afterwards at the Sheriff's Court, Edinburgh, obtained a decree nisi for divorce. In the petition and the decree nisi only the second ceremony was referred to. The court allowed the petition and the decree nisi to be amended by alleging also the first ceremony, but without costs against the respondent. *Hampson* v. *Hampson* (1) followed."

Thus Sir Charles Bigham had cited to him the decision of Sir Gorell Barnes in the case of *Hampson* v. *Hampson* (1). The motion in *Marshall's* case (7) was made by Mr. Victor Russell on behalf of the wife, the petitioner. Mr. Willis, who appeared for the respondent, did not consent, but did not dissent. The amendment asked for was allowed and it must be taken that the decision in *Hampson* v. *Hampson* (1) was accepted as correct. Mr. Victor Russell told us in this court that to the best of his recollection no question was raised on it. In *Reder* v. *Reder* (8) ([1948] W.N. 238) there was no application to amend, but the note of Hodson, L.J., who was a member of the court, shows that *Hampson* v. *Hampson* (1) was referred to, and the correctness of the decision does not appear to have been questioned. The commissioner had granted a decree in respect of whichever of two ceremonies of marriage was the effective one—and it was not easy to say which was. The Court of Appeal appears to have regarded the decree as a nullity: none the less the case was referred back to the commissioner, or it was suggested that he should reconsider it. I suppose there may have been a possibility of further evidence. The important feature of this case, which is incompletely reported, is that *Hampson* v. *Hampson* (1) was cited to the court.

There is an earlier authority, *Skeats* v. *Skeats & White* (9). The report reads (1865) (35 L.J.P. & M. 47):

> "In this case a decree nisi for dissolution of marriage had been pronounced, but by mistake the marriage was stated in the decree to have taken place at the church of St. George, Hanover Square, instead of at the church of the parish of St. Marylebone. Dr. Wambey now moved the court to order that the decree nisi be amended by substituting 'the parish of St. Marylebone' for 'St. George, Hanover Square', upon an affidavit showing the mistake; and he also moved that the decree nisi, when amended, should be made absolute. The Judge Ordinary granted the motion."

There is nothing in the report to show who made the mistake. The Judge

Ordinary was Sir James Wilde, later Lord Penzance, and it was Lord Penzance who in a different type of case, *Lawrie* v. *Lees* (10) said (1881) (7 App. Cas. at p. 34):

> " I cannot doubt that under the original powers of the court, quite independent of any order that is made under the Judicature Act, every court has the power to vary its own orders which are drawn up mechanically in the registry or in the office of the court—to vary them in such a way as to carry out its own meaning, and where language has been used which is doubtful, to make it plain. I think that power is inherent in every court. Speaking of the courts with which I have been more familiar all my life, the common law courts, I have no doubt that that can be done, and I should have no doubt that it could also be done by the Court of Chancery. Moreover, having regard to the orders made under the Judicature Act, I should myself have thought that it would very well have come under those orders. I recommend your Lordships not to make any variation of this order, but to affirm it as it stands without prejudice to any such application to the court below."

I am satisfied that the court has power to amend the petition and the decrees nisi and absolute in the way sought in this case. It arises under the inherent jurisdiction of the court to do what is necessary and proper to correct an order so that the position under it shall be clear and free from ambiguity. It does not extend so far as to allow an amendment of the effective part of the order, for example, the question of status, or of proof of the matrimonial offence alleged, or of the decree itself in so far as it involves an alteration of status: those questions cannot be dealt with by an amendment of the proceedings after judgment. The date of the marriage dissolved is more in the nature of a recital, and so is the place of the marriage. If either of these is, or if both are, wrongly stated in the petition and in the decrees, the court can grant liberty to amend. That is in accord with the decision in *Hampson* v. *Hampson* (1) which has never been called in question until now. It is a power, or a right, which ought not to be cut down. It enables the court, in a proper case, to put right something which is incorrectly stated and to keep its records in line with the real position. It is discretionary in the court, and it ought not to be used if it can cause injustice to anyone, or if in any sense the exercise of it can offend against the public weal. It is important to bear in mind that the commissioner intended to dissolve a lawful marriage, to put an end to the status of married persons which up to that time existed between the petitioner and the respondent: the date on which they were married was of importance, but it was not vital to proof of marriage. The submission of the Solicitor-General was that to amend in the way suggested would be to put the case on a false basis as the commissioner was never asked to consider the case on the footing of a lawful marriage in the year 1926. He submitted that the parties to the petition should be left to their own devices: and that the decree, being merely voidable, stands unless and until someone seeks to set it aside. It is not likely, I gather, that the Queen's Proctor will take any such step even if it is open to him to do so. Thus each party will remain in a state of uncertainty on that argument. Either may take proceedings to set the decree aside as she, or he, feels. Though I recognise that there may be an answer to any such step, still in one sense each remains at the mercy of the other; and it is not only the petitioner and respondent who are interested. Such a state ought not to be allowed to continue if it can be determined properly and in accord with the powers and practice of the court. It is desirable that both the petitioner and the respondent should know where they stand once and for all. That can be done if the course adopted by Sir Gorell Barnes, P., in *Hampson* v. *Hampson* (1) is followed in this case.

The Court of Appeal has wide powers given to it under R.S.C., Ord. 58, r. 4, of which I will read two parts:

> "The Court of Appeal shall have all the powers and duties as to amendment and otherwise of the High Court . . . The Court of Appeal shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require."

This rule shows that the Court of Appeal has wide powers. We know that the petitioner and the respondent were lawfully married on Oct. 8, 1926, and we are entitled to infer that the commissioner would have found that to be the date of the lawful marriage if the correct date had been given to him. I draw attention to R.S.C., Ord. 70, r. 1:

> "Non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the court or a judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the court or judge shall think fit."

This rule applies to the practice in divorce by virtue of r. 80 of the Matrimonial Causes Rules, 1950.

For the reasons I have given I have no doubt as to the power of the court to make the amendments desired. Though the petitioner brought the trouble on herself there are the interests of others, who acted on the faith of a decree of the court, to be considered. It is desirable in their interest, and in the public interest, that the questions raised should be dealt with and the position crystallised. And it is better that the records of the court should be put in order. I believe it to be of paramount importance that nothing should be said, or done, which would cut down the inherent power of the court. It was under that power that the amendment was allowed by SIR GORELL BARNES, P., in *Hampson* v. *Hampson* (1) and I am satisfied that he was entitled to make the order which he made. In the case under appeal it seems to me that a slightly different form may be adopted, and it arises from a suggestion made by MORRIS, L.J., during the argument. The references in the decree nisi and in the decree absolute to the date and place of the marriage should be struck out, and there should be a note on each of these decrees saying that the words were struck out by order of the Court of Appeal on July 27, 1955, the court being satisfied that the lawful marriage between the petitioner and the respondent was solemnised on Oct. 8, 1926, at St. Paul's Church, Knightsbridge. This would solve the difficulties which have arisen; it would overcome the point raised by the Solicitor-General that to make the amendments sought by the petitioner would create a false position in that the commissioner had not considered a marriage in 1926: and I understood junior counsel for the Queen's Proctor to agree that it could not hurt anyone.

It may be said that the petitioner is not deserving of much sympathy and that it is not easy to accept all that she says in her affidavit, but others are involved. It is better that they should know what their position is, and in my view the court ought to help as far as it can properly do so. I am in favour of allowing the appeal to the extent which I have stated.

In the circumstances, it does not appear to me to be necessary to deal with the motion of the respondent, except that it would appear that it is too late by reason of the terms of s. 31 (1) (e) of the Supreme Court of Judicature (Consolidation) Act, 1925. This seems to me to be an additional reason for allowing the amendments sought if the court has the power to allow them—as otherwise there would be no opportunity of correcting the record. I should say that there might be one or two other verbal amendments necessary in the decrees if the course which I have suggested is adopted.

HODSON, L.J.: On a summons by the petitioner (who had obtained a decree absolute of divorce from her husband) for leave to amend the petition, decree nisi and decree absolute, LORD MERRIMAN, P., dismissed the summons holding that he had no jurisdiction to order the amendments sought. The original summons and the appeal from its dismissal were supported by the respondent and on the appeal the Solicitor-General has appeared on behalf of the Queen's Proctor as amicus curiae. [HIS LORDSHIP stated the facts and continued:] In considering the question whether there is jurisdiction to amend a judgment or order save by way of appeal or under the slip rule, which has no application to this case, it is first necessary to consider whether the judgment or order is itself a nullity. The decree nisi is, I think, for this purpose on the same footing as the decree absolute (both of which are in the form commonly used since the Matrimonial Causes Act, 1857, was passed) and refers specifically to the ceremony of marriage between the parties, which in this case according to the evidence of earlier marriage now before the court was a mere ceremony having no legal effect. The decree on the face of it is good, but, if the only effect of the decree were to operate on this idle ceremony and not on the marriage status, it would be a nullity. In such a case it would not be capable of amendment and there would be no divorce. Counsel, however, on behalf of the respondent has argued that the decrees are not nullities but at worst voidable, so that this obstacle does not stand in the way of this amendment. The Solicitor-General did not resist this argument which is, I think, well founded. The term "dissolution" is inappropriate to the concept of a ceremony. What is dissolved is the status, not the ceremony. This is the subject-matter of the jurisdiction conferred on the court by the statute, now the Matrimonial Causes Act, 1950. By s. 1 a petition for divorce may be presented to the High Court either by the husband or the wife on certain grounds. The words " husband and wife " connote a marriage. By s. 4

> " if the court is satisfied . . . that the case for the petition has been proved ",

subject to certain provisos, the court is bound to pronounce a decree.

BRETT, L.J., in *Niboyet* v. *Niboyet* (3) showed the nature of the subject-matter with which the court is called on to deal when he said (4 P.D. at p. 11):

> " Marriage is the fulfilment of a contract satisfied by the solemnisation of the marriage, but marriage directly it exists creates by law a relation between the parties and what is called a status of each. The status of an individual, used as a legal term, means the legal position of the individual in or with regard to the rest of a community. The relation between the parties, and that status of each of them with regard to the community, which are constituted upon marriage are not imposed or defined by contract or agreement but by law."

In *Harvey* (*otherwise Farnie*) v. *Farnie* (11), COTTON, L.J., pointed out (1880) (6 P.D. at p. 47):

> ". . . the word ' marriage ' is used in two senses. It may mean the solemnity by which two persons are joined together in wedlock, or it may mean their status when they have been so joined."

The latter is the primary sense in which the word is used and it seems to me that, there being no question but that the parties were husband and wife when the petition was presented, the decree of divorce operated as a proper judgment on the subject-matter of the decree, namely, the marriage in that sense and accordingly is not void ab initio, there being no other ground on which it can be said to be void save that the ceremony alleged and proved was not that which marked the inception of the marriage. If the decree absolute is not a nullity but only voidable, it is difficult to see how it can now be avoided. Other parties having

A acquired rights under it the decree would appear to be unassailable (see the judgment of the Privy Council in *McPherson* v. *McPherson* (12), [1936] A.C. 177). Save in exceptional circumstances such as where a respondent has not had time or opportunity to appeal against a decree nisi—the pronouncement of the Privy Council on this topic would appear to be of general application (see *Wiseman* v. *Wiseman* (13), [1953] 1 All E.R. 601).

B It is said that although there is no slip yet the court can under its inherent jurisdiction correct the errors which are now shown to have appeared on the face of the petition and the decrees. That the court has so acted in the past is shown by the case of *Hampson* v. *Hampson* (1), which has already been cited by my Lord, a decision of SIR GORELL BARNES, P., which was followed by SIR CHARLES C BIGHAM, P., in *Marshall* v. *Marshall* (7) also cited by my Lord, both of which cases are in principle indistinguishable from this case, and, if rightly decided, should have been followed by the learned President. He felt unable to see on what principle these decisions could be supported and decided accordingly that he could not follow them. It is to be observed that in each of those cases the petitioner's application was acceded to without opposition so that the court did D not have the benefit of argument on the other side. The limits of the inherent jurisdiction of the court to amend its judgments, apart from clerical slips or omissions, have been laid down by authority, for, generally speaking, when an order or judgment of the High Court has once been perfected the court has no jurisdiction to alter it: see *Re Suffield & Watts, Ex p. Brown* (14) (1888) (20 Q.B.D. 693).

E In *Lawrie* v. *Lees* (10), LORD PENZANCE said (7 App. Cas. at p. 34):

> "I cannot doubt that under the original powers of the court, quite independent of any order that is made under the Judicature Act, every court has the power to vary its own orders which are drawn up mechanically in the registry or in the office of the court—to vary them in such a way as to carry out its own meaning, and where language has been used which is doubtful, F to make it plain."

In *Skeats* v. *Skeats & White* (9), LORD PENZANCE himself, when SIR JAMES WILDE, the Judge Ordinary, had previously acted in this sense. The report of that case reads as follows (35 L.J.P. & M. 47):

> "A decree nisi by mistake misstated the place where the marriage was G solemnised. On motion the court ordered it to be amended. In this case a decree nisi for dissolution of marriage had been pronounced, but by mistake the marriage was stated in the decree to have taken place at the church of St. George, Hanover Square, instead of at the church of the parish of St. Marylebone. Dr. Wambey now moved the court to order that the decree nisi be amended by substituting 'the parish of St. Marylebone' for 'St. H George, Hanover Square', upon an affidavit showing the mistake; and he also moved that the decree nisi, when amended, should be made absolute. The Judge Ordinary granted the motion."

In 1885, in *Re Swire* (15), COTTON, LINDLEY and BOWEN, L.JJ., followed LORD PENZANCE'S opinion. LINDLEY, L.J., said (30 Ch.D. at p. 246):

> "It appears to me, therefore, that if it is once made out that the order, I whether passed and entered or not, does not express the order actually made, the court has ample jurisdiction to set that right, whether it arises from a clerical slip or not."

BOWEN, L.J., said (ibid., at p. 247):

> "An order, as it seems to me, even when passed and entered, may be amended by the court so as to carry out the intention and express the meaning of the court at the time when the order was made, provided the amendment be made without injustice or on terms which preclude injustice."

This decision was approved by Lord Watson in the House of Lords in *Hatton* v. *Harris* (16) ([1892] A.C. 547), and followed by the Court of Appeal in *MacCarthy* v. *Agard* (4). To the same effect is *Preston Banking Co.* v. *William Allsup & Sons* (17), where Lindley, L.J., stated the general rule as follows ([1895] 1 Ch. at p. 144):

> "In my opinion, it is of the utmost importance, in order that there may be some finality in litigation, that when once the order has been completed it should not be liable to review by the judge who made it."

Lord Halsbury had in the same case said (ibid., at p. 143):

> "Even when an order has been obtained by fraud, it has been held that the court has no jurisdiction to re-hear it. If such a jurisdiction existed it would be most mischievous. The fact that in the present case the application to re-hear is made to the particular judge who made the order is immaterial; for if one judge can re-hear the order another can. Any application which may be made to the Vice-Chancellor for an order in the nature of a supplemental order is, of course, still within his jurisdiction; but he has no jurisdiction to re-hear or alter this order."

A. L. Smith, L.J., gave judgment to the same effect.

In *MacCarthy* v. *Agard* (4) judgment had been obtained against a widow in the *Scott* v. *Morley* (18) (1887) (20 Q.B.D. 120) form in the belief which she had induced that she was a married woman. This form of judgment was applicable only if this was her status. The judge in chambers discharged the judgment, but the Court of Appeal by a majority reversed his decision, holding that the jurisdiction of the court to alter a judgment did not extend to cases where the intention of the court was carried out by the order. The court did, however, alter the title of the action. This case was followed in the Court of Appeal in *Pearlman* (*Veneers*) *S.A.* (*Pty.*), *Ltd.* v. *Bartels* (5), where a judgment had been obtained in England, but it was thought that the defendant's first name was inaccurately given and that enforcement of the judgment in Germany might be difficult unless the first name were corrected, although the surname was correct. The court allowed the title to be altered by amending the first name of the defendant, but did not in my opinion go further than the manifest intention of the court which was to give judgment against a particular defendant. Both members of the court pointed out that no alteration of the judgment was being made.

Here the commissioner addressed himself to certain facts and, he having found the necessary facts proved, the judgment carried out his intention and is thus unalterable in my opinion under the inherent jurisdiction of the court as applicable to this situation and as laid down by authorities binding on this court. If he had been asked what his intention was I think he would have surely answered that he intended to dissolve the marriage of the petitioner and respondent. This he did. If he had been asked the further question—to what ceremony was your mind directed?—he must have answered to the ceremony of 1927. Of the 1926 ceremony he had never heard and it cannot therefore have been his intention to make any order relating thereto as being the inception of the marriage. He had before him evidence of marriage; the parties lived together and had children; it is true it is now shown that the evidence about the marriage ceremony was inaccurate evidence, but it does not appear to me to be possible for the court to amend the record of its judgment when it is informed that some of the information on which it acted was wrong without, as the Solicitor-General put it, distorting history. Where the court has made the order it intended to make, the judgment must stand until set aside on appeal or by action brought for the purpose. The court cannot otherwise eat its own words simply because the evidence on which it acted is shown to be wrong, whether the error is brought about deliberately or by accident. To amend the petition on which the decree was pronounced must make it appear as if the petitioner had presented

A a case different from that which she actually put forward at the hearing. Judgment having been given, I think it is too late for such an amendment. In my opinion, therefore, *Hampson's* case (1) was wrongly decided and neither the petition on which the suit was founded nor the decrees nisi and absolute can be altered. I would dismiss the appeal.

The application of the respondent for leave to appeal cannot be entertained.
B The Supreme Court of Judicature (Consolidation) Act, 1925, s. 31 (1), provides as follows:

> "No appeal shall lie . . . (e) from an order absolute for the dissolution or nullity of marriage in favour of any party who having had time and opportunity to appeal from the decree nisi on which the order was
> C founded, has not appealed from that decree."

The respondent was served with the petition and had the opportunity of reading it. If he did not do so, he cannot say that he had no opportunity to appeal against the decree nisi. The question of time does not arise. Moreover, according to the ordinary rules governing appeals he could not be permitted to give fresh evidence of facts which were at all material times within his knowledge. The motion of
D the respondent should also be dismissed.

MORRIS, L.J., stated the facts and continued: The commissioner was, therefore, satisfied (a) that the parties before him were husband and wife and (b) that they had been so since Oct. 27, 1927, as a result of a church marriage ceremony of that date. There is complete confirmation as to (a). If, however,
E correct evidence had been placed before him he would have been satisfied that the parties had in fact been husband and wife since Oct. 8, 1926, as a result of a church marriage ceremony of that date. There is no reason in this case to believe, even though it was one in which the petitioner asked for the exercise of the court's discretion, that if the learned commissioner had known that the parties had been husband and wife from Oct. 8, 1926, and not only from Oct. 27, 1927, any
F different result would have followed. No one has so suggested.

In *McPherson* v. *McPherson* (12), a decree of divorce was pronounced after a trial during which a learned judge, albeit unconsciously, had denied his court to the public in breach of their right to be present. In the course of delivering the judgment of their Lordships in the Privy Council, LORD BLANESBURGH said ([1936] A.C. at p. 203):

> G "Here their Lordships are dealing with a decree pronounced after a serious trial free from every other defect in procedure, and one entered and remaining on the court files as regular in every respect. To say that such a decree is void would seem to be out of the question. If the law were so to treat it, the remedy would be far worse than the disease it was designed to cure. To say that it is voidable states a result which, their Lordships think,
> H entirely meets the case."

In the present case there was a "serious trial." There was no defect in the procedure as such. The decrees are complete and regular on the face of them. In these circumstances I do not think that the decrees are void or are to be treated as nullities. This had not been suggested either by the parties or in the submissions
I presented for the assistance of the court on behalf of the Queen's Proctor. When the decree was made absolute the marriage was dissolved. The wife became a feme sole. The parties were free to marry again. Counsel for the respondent submitted that the effect of a decree of divorce is to dissolve a marriage between husband and wife in the sense of putting an end to their married status. I think that this is a valid submission. It is not the mere celebration or solemnisation of marriage with which the court is concerned but rather with the married state or status. An ordinary contract may be rescinded or terminated by mutual agreement. It is otherwise with a contract of marriage duly celebrated

or solemnised. Thus in *Niboyet* v. *Niboyet* (3), BRETT L.J., said (4 P.D. at p. 11):

> "Marriage is the fulfilment of a contract satisfied by the solemnisation of the marriage, but marriage directly it exists creates by law a relation between the parties and what is called a status of each. The status of an individual, used as a legal term, means the legal position of the individual in or with regard to the rest of a community. That relation between the parties, and that status of each of them with regard to the community, which are constituted upon marriage are not imposed or defined by contract or agreement but by law."

The validity of the passage which I have cited has not, I think, been questioned.

The position in the present case as I see it is that the learned commissioner thought that the parties were husband and wife, and, because of the misconduct of the husband, he pronounced a decree of dissolution of marriage. It is now known and it is not disputed that in all this he was correct. It might happen that two people marry and are then divorced and then marry again. But in ordinary cases there is only one marriage. In any case there can, of course, at any one time, only be one subsisting marriage between two people. There was only ever one marriage in this case, although there were two marriage ceremonies. The Matrimonial Causes Rules, 1950 (see r. 3, r. 4, r. 6), make it obligatory for a petitioner to state amongst many other matters the place and date of the marriage. Rule 40 (4) provides that:

> "A certificate in accordance with Form 15 or Form 16, whichever is appropriate, that the decree has been made absolute shall be prepared and filed by the registrar. The certificate shall be authenticated by fixing thereto the seal of the registry."

Form 16 includes the following words:

> "Referring to the decree made in this cause on the . . . day of . . . 19, whereby it was decreed that the marriage had and solemnised on the . . . day of . . . 19 , at . . . between . . . the petitioner and . . . the respondent be dissolved by reason that . . . unless sufficient cause be shown to the court within . . . weeks from the making thereof why the said decree should not be made absolute, and, no such cause having been shown, it is hereby certified that the said decree was on the . . . day of . . . 19 , made final and absolute and that the said marriage was thereby dissolved."

The concluding words "and that the said marriage was thereby dissolved" are not words which denote that the court is dissolving some one selected marriage between the parties, but rather that it is dissolving *the* existing marriage between the parties, which marriage resulted from a recited ceremony that took place on a named date at a named place.

In the present case the parties were husband and wife; the husband had been guilty of adultery and because of this the commissioner decided to dissolve the marriage. He should, however, have been given the correct date and place of the ceremony which brought about the married state of the parties. If he had been, his conclusion would have been no different. In the result a decree which is not a nullity came into being. It recites the incorrect information as to the marriage ceremony which was given to the court. The decree was made final and absolute on June 27, 1953. The decree absolute recites the same incorrect information. Even if either party could, for any reason, bring some proceedings to avoid the decrees neither party wishes to do so. Each has re-married. The provisions of s. 13 (1) of the Matrimonial Causes Act, 1950 have been read* and I will not read them again. It is provided by s. 31 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, as follows:

> "No appeal shall lie . . . (e) from an order absolute for the dissolution or

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* See p. 134, letter A, ante.

> A nullity of marriage in favour of any party who having had time and opportunity to appeal from the decree nisi on which the order was founded, has not appealed from that decree."

If the husband had time and opportunity to appeal from the decree nisi, then it follows that, as he did not so appeal, no appeal lay from the decree absolute. I B cannot but think that the husband had both time and opportunity to appeal. If he only read the petition against himself in a casual and not careful manner, this denotes not that he was denied opportunity but rather that he did not avail himself of opportunity. The wife could hardly appeal against a decree nisi in her favour which was pronounced in the way which she sought: and in any event she had " time and opportunity."

C In all these circumstances what then is the present position? The decrees stand. Their existence led to the forming of other marriage unions. The decrees cannot in my judgment be the subject of any appeal. The possibility of any proceedings instituted with the object of avoiding the decrees is in my judgment shadowy and remote. Now that the court has been informed, as most properly it was informed, of the fact that incorrect evidence as to the date and D place of the marriage was originally given to the court and has been embodied in the court decrees, must those decrees be left as they are or is there method by which they may be amended? This raises the question as to the powers of the court to make amendments in the terms of its orders and judgments. In addition to powers resulting from rules of court, it is clear that there are necessary powers which are inherent in the jurisdiction of the court. It would, I E think, be undesirable to limit the scope of these powers as a result of any words which describe them. I respectfully agree with what was indicated by EVERSHED, L.J., in *Meier* v. *Meier* (19) ([1948] P. at p. 95):

> " I prefer not to attempt a definition of the extent of the court's inherent jurisdiction to vary, modify or extend its own orders if, in its view, the purposes of justice require that it should do so."

F Without in any way purporting to categorise and certainly without indicating any limits, a few illustrations in regard to the court's powers may be mentioned. (a) If there is some clerical mistake in a judgment or order which is drawn up there can be correction under the powers given by R.S.C., Ord. 28, r. 11, and also under the powers which are inherent in the jurisdiction of the G court. (b) If there is some error in a judgment or order which arises from any accidental slip or omission, there may be correction both under Ord. 28, r. 11, and under the court's inherent powers. (c) If the meaning and intention of the court is not expressed in its judgment or order then there may be variation. In *Lawrie* v. *Lees* (10), LORD PENZANCE said (7 App. Cas. at p. 34):

> " I cannot doubt that under the original powers of the court, quite in- H dependent of any order that is made under the Judicature Act, every court has the power to vary its own orders which are drawn up mechanically in the registry or in the office of the court—to vary them in such a way as to carry out its own meaning and, where language has been used which is doubtful, to make it plain. I think that power is inherent in every court."

To the same effect were the judgments in *Re Swire* (15). LINDLEY, L.J., said I (30 Ch.D. at p. 246):

> " . . . if an order as passed and entered does not express the real order of the court, it would, as it appears to me, be shocking to say that the party aggrieved cannot come here to have the record set right . . . It appears to me, therefore, that, if it is once made out that the order, whether passed and entered or not, does not express the order actually made, the court has ample jurisdiction to set that right, whether it arises from a clerical slip or not."

(d) If it is suggested that a court has come to an erroneous decision either in regard to fact or law then amendment of its order cannot be sought, but recourse must be had to an appeal to the extent to which appeal is available. (e) If new evidence comes to light and can be called, which no proper and reasonable diligence could earlier have secured, then likewise amendment of a judgment cannot be sought: there might be an appeal and an endeavour to come within the rules and the well-settled principles relating to applications in such circumstances to adduce fresh evidence. (f) If a party is wrongly named or described, amendment may in certain circumstances be sought (see *Pearlman* (*Veneers*) v. *Bartels* (5)). In that case Denning, L.J. ([1954] 3 All E.R. at p. 660), pointed to the distinction between seeking to get rid of the " operative and substantive " part of a judgment and the correction of a misnomer or misdescription. An instance of an attempt to change the substantive part of a judgment is *MacCarthy* v. *Agard* (4). In that case the judgment was in the special form applicable to a married woman. The judgment had been intentionally given in that form. On ascertainment of the real facts it appeared that the defendant was not a married woman and accordingly the judgment should not have been in the special form (the *Scott* v. *Morley* (18) form). The difference was clearly one of substance. Amendment of the judgment was therefore not possible, as this court held. The proper course to adopt was to appeal. (g) A court may in the exercise of its inherent jurisdiction in some circumstances of its own motion (after hearing the parties interested) set aside its own judgment. An example of this would be where it comes to the knowledge of a court that a person named as a judgment debtor was at all material times, at the date of the writ and subsequently, non-existent (see *Lazard Bros. & Co.* v. *Midland Bank, Ltd.* (20) ([1933] A.C. 289)). Under the Rules of the Supreme Court powers are given under certain circumstances to set aside judgments obtained in default. (h) Even if a judgment has been obtained by some fraud or false evidence the court cannot amend the judgment: there must be either an appeal or there must be an action to set aside the judgment: the particular circumstances may denote what procedure is appropriate: but a power to amend cannot be invoked.

What then is the principle which applies where a court dealing with a marriage has been given the wrong date and place of its celebration and has incorporated the errors in its decree? A case can be imagined where a petitioner, in all innocence, mistakenly gives the wrong date of a marriage, first in a petition, and later in evidence. In ordinary circumstances a sight of a copy extract from the marriage register would lead to the discovery of the mistake. But if the mistake were for some reason not found out and if in the result decrees nisi and absolute referred to a marriage had and solemnised say on June 1, 1930, when the correct date was June 1, 1929, can the decrees on later application be amended? If they cannot, the position would be very unfortunate. The decrees themselves would be valid and effectual though the court would have been informed of an error, not in the operative and substantive part of the decrees, but, in what is really a recital which identifies the marriage which the court has dissolved. In the illustration which I have given it can be said that the intention of the court was to dissolve the marriage whatever was the true date of its solemnisation and that the date in the decrees can be amended so as to give proper effect to the real intention of the court. If the court, in the circumstances I have postulated, is powerless to act, it would seem as though the court was enslaved by its own decree. Where a court has decided an issue and the decision of the court is truly embodied in some judgment or order that has been made effective, then the court cannot re-open the matter and cannot substitute a different decision in place of the one which has been recorded. Those who seek to alter must in those circumstances invoke such appellate jurisdiction as may apply. But if a case arises where in the interests of accuracy it seems desirable to amend some part of a judgment, other than its operative and substantive part, it would seem to be regrettable

A if the inherent powers of the court were limited or confined. The powers extend in my judgment to enable a court so to amend a judgment that it carries out the intention of the court. Particular words and particular forms (unless specified by the legislature) are the servants of the law and not its master.

I respectfully express my concurrence with the learned President as to the importance of a faithful observance of the provisions of the Matrimonial Causes B Rules, 1950. Counsel for the respondent submitted that certain rules (r. 4 (1) (a) and r. 40 (4)) are ultra vires. I am not prepared to accept this or to acknowledge any doubt as to their validity. Furthermore the desirability of a careful following of the provisions of the rules is amply demonstrated by the situation in this case. Because of non-compliance with one of the rules the petitioner has involved herself and also the respondent in anxieties, uncertainties and expense. C Two other people are also closely and directly concerned. There was, I consider, a non-compliance with r. 4 (1) (a). It is provided that the place and date of the marriage must be stated in the petition. In fact a wrong date and a wrong place were given. The wrong date and place are, as a result, included not only in the decree nisi but also in the decree absolute which must (following r. 40 (4)) be certified in manner prescribed by Form 16 of Appendix 3 to the D rules, to which I have referred. In my judgment, if amendment is within the power of the court, it is desirable in this case, now that the true date and place of the marriage of the parties are ascertained, to make amendment so that (a) the decree of the court will not continue to include an erroneous recital and (b) so that all uncertainty may, if possible, be removed. I have come to the conclusion that it is within the power of the court to make amendment. I consider E that what the learned commissioner intended to do was to dissolve the marriage that was subsisting. If an error of a few days had been made in giving the date of the marriage, I cannot think that the decision of the court to end the marriage would have been in any way affected. There is no reason in this case to think that any different principle applies even though, under the exceptional circumstances set out in the wife's affidavit, both date and place of the marriage were wrongly F given. The court decided to end the marriage. The reason why the decrees recite the 1927 ceremony is that the court thought that it was by reason of that ceremony that the marriage began. The court never knew of the 1926 ceremony. Now that the court knows of it and of its significance it seems to me that in order that the decrees may express the intention of the court, which was to dissolve the marriage, the decrees can be amended so that they accurately express and G carry out the intention of the court. To do this the decrees should not contain any erroneous recital or any errors as to the date and place of the marriage ceremony. There was only one marriage, and there could only have been one marriage, subsisting at the date of the hearing before the learned commissioner.

It was that marriage which he intended to dissolve. So that his intention H may not be inaccurately expressed, any wrong references in regard to the marriage should be corrected. In my judgment the court has the power to make such corrections and I think that it was this power that was exercised in *Hampson* v. *Hampson* (1) and in *Marshall* v. *Marshall* (7). It would not, however, in my view be right to make any amendment which would make it seem or would suggest that the learned commissioner had been satisfied in regard to some I fact that was not mentioned to him. The wording of the decree nisi can, I think, be amended by omitting reference to the date and place of the marriage. In regard to the decree absolute, inasmuch as Form 16 has the sanction of the rules and inasmuch as the form requires the date and place of the marriage to be inserted the court could not depart from what is specified unless the court is endowed with power so to do. In my judgment the court is given power by R.S.C., Ord. 70, r. 1. The terms of the rule have been read* and I do not repeat them.

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* See p. 139, letter C, ante.

In this case because of the non-observance by the petitioner of the requirement of r. 4 of the Matrimonial Causes Rules, 1950, that the date and place of a marriage must be given (which must mean the correct date and place) a state of affairs has been brought about which enables the court to exercise the powers given to it by Ord. 70, r. 1. For the reasons I have given I consider that amendment of the decrees on the lines I have indicated can be made.

Appeal allowed.

Solicitors: *Gordon, Dadds & Co.* (for the petitioner); *Charles Russell & Co.* (for the respondent); *Queen's Proctor.*

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

CHOGLEY *v.* BAINS.

[PRIVY COUNCIL (Lord Oaksey, Lord Radcliffe, Lord Cohen, Lord Keith of Avonholm and Mr. L. M. D. de Silva), May 16, 17, 18, 19, July 13, 1955.]

Privy Council—Eastern Africa—Rent restriction—Sub-tenancy—Sub-letting without landlord's consent—Landlord's right to obtain order of possession against sub-tenant when premises lawfully sub-let—Kenya Increase of Rent (Restriction) Ordinance, 1949 (*Ordinance No.* 22 *of* 1949), *s.* 16 (1) (*i*), *s.* 16 (6).

Section 16 of the Kenya Increase of Rent (Restriction) Ordinance, 1949, which superseded earlier ordinances, imposes a prohibition on the right of a landlord to obtain from the court an order for recovery of possession of any premises to which the ordinance applies, but specifies circumstances in which such an order may be made if the court thinks it reasonable. One of these circumstances (provided by s. 16 (1) (i)) arises when the tenant has, without the consent in writing of the landlord, sub-let the whole of the premises. An " option clause " in s. 16 (1) (i) provides that " a landlord who wishes to obtain an ejectment order on this ground may have the option of obtaining a similar order against the occupier or having the occupier as his direct tenant . . ." Section 16 (6) provides that " an order against a tenant for the recovery of possession of any premises or ejectment therefrom under the provisions of this section shall not affect the right of any sub-tenant, to whom the premises . . . have been lawfully sub-let . . . to retain possession under the provisions of this section, or be in any way operative against any such sub-tenant ".

In 1948 B. was tenant of certain premises to which the ordinance applied on a yearly tenancy which contained no stipulation against the tenant's sub-letting, and the respondent was the landlord. In December, 1948, the respondent gave the tenant notice determining the tenancy on July 1, 1949. In January, 1949, the tenant sub-let, without the respondent's written consent, the whole premises to the appellant for a period up to and including July 1, 1949, determinable thereafter as the law should permit. In 1950 the respondent took proceedings against B. and (in right of the option clause above stated) against the appellant for recovery of possession. B. did not defend. The appellant contended that there was a conflict between s. 16 (6) and the option clause in s. 16 (1) (i), and that he was entitled to remain in possession.

Held: as the whole premises had been sub-let to the appellant without the written consent of the respondent, the respondent had the option under s. 16 (1) (i) of the Ordinance of 1949 to recover possession of the premises from the appellant, if the court thought it reasonable to make an

A order for possession, and there was nothing in sub-s. (6) of s. 16 which prevented the court from making the order in accordance with s. 16 (1) (i).

Appeal dismissed.

[**Editorial Note.** There is no counterpart of the option clause, mentioned above, in the English rent restriction legislation. Section 16 (6), however, is similar to s. 5 (5) of the Increase of Rent and Mortgage Interest (Restrictions) B Act, 1920 (13 HALSBURY'S STATUTES (2nd Edn.) 991). The decision in the present case has no direct application to the English law of rent restriction, but in the course of his opinion LORD RADCLIFFE indicates that such provisions as s. 16 (6) of the Ordinance of 1949 are in essence procedural and cites the English and Irish authorities which he says are against the view that such a C provision as sub-s. (6) of s. 16 makes it necessary for the landlord to establish against the sub-tenant a new right to possession independent of the circumstances which may have entitled the landlord to possession against the intermediate tenant. The landlord would, however, under the legislation exemplified in the present case, have to satisfy the court that it was reasonable to make the order against the sub-tenant (see p. 151, letters E to G, post).]

D Cases referred to:

(1) *Ward* v. *Larkins*, (1923), 130 L.T. 184; 31 Digest (Repl.) 713, *7986*.

(2) *Hylton* (*Lord*) v. *Heal*, [1921] 2 K.B. 438; 90 L.J.K.B. 606; 125 L.T. 178; 31 Digest (Repl.) 713, *7987*.

(3) *Enniskillen Urban District Council* v. *Bartley & Lynch*, [1947] N.I. 177; 31 Digest (Repl.) 714, *2590*.

E (4) *Regional Properties Co., Ltd.* v. *Frankenschwerth & Chapman*, [1951] 1 All E.R. 178; [1951] 1 K.B. 631; 2nd Digest Supp.

Appeal.

Appeal by the sub-tenant, Ismail Mohamed Chogley, from a judgment of the Court of Appeal for Eastern Africa dated May 14, 1953, affirming a judgment of the Supreme Court of Kenya dated June 9, 1952, which affirmed a judgment F of the Rent Control Board at Nairobi dated Jan. 29, 1951, whereby the appellant was ordered to give vacant possession of premises consisting of a bakery and shop in Nairobi to the respondent, Jagat Singh Bains, the landlord of those premises. The facts appear in the judgment.

Michael Albery, Q.C., and *Paul V. Baker* for the appellant.

Dingle Foot, Q.C., *R. Millner* and *Miss J. R. Bisschop* for the respondent.

G

LORD RADCLIFFE: This appeal from a judgment dated May 14, 1953, of the Court of Appeal for Eastern Africa arises out of proceedings on the part of the respondent to obtain possession from the appellant of certain premises in Nairobi consisting of a bakery and shop on plot No. 230/3 Race Course Road. The respondent is the owner of the premises in dispute, and it is common ground H that, at all times material to this appeal, they were capable of being within the protection of the Increase of Rent (Restriction) Ordinance, 1949 (hereinafter referred to as " the ordinance "). The dispute turns on the question whether that ordinance accords to the appellant, who has been in occupation of the premises since the autumn of 1942, the right to retain possession against the respondent. The latter has been trying to recover possession since December, I 1946. It is convenient at this stage to make a short statement as to the original letting of the premises and the previous proceedings concerned with their recovery. As will be seen later, those proceedings have some bearing on the matters to be considered in this appeal.

By a written agreement dated June 10, 1941, the respondent leased the premises to one Sidi Bilal for five years from July 1, 1941, at a monthly rent. There was no restriction on sub-letting. Sidi Bilal went into possession and carried on the business of a baker in the premises until September/October, 1942, when he went to India leaving the appellant in occupation and in charge of the business. It appears that some time later the appellant took over the business and ran it on his own account.

In December, 1946, the respondent sued Sidi Bilal and the appellant for possession of the premises, on the ground that the lease had expired by effluxion of time. These proceedings were begun in the Resident Magistrate's Court at Nairobi. The first outcome was that they reached the Court of Appeal for Eastern Africa, which decided that the written agreement was void for want of registration, pursuant to s. 107 of the Indian Transfer of Property Act, 1882, and ordered a re-trial before the resident magistrate. The second outcome was that, after the magistrate on re-trial had made an order for possession, the Supreme Court of Kenya, on appeal, set this order aside by judgment dated Nov. 19, 1948, holding that Sidi Bilal was entitled to a yearly tenancy which had not been lawfully determined and that the appellant was his licensee; and, on Apr. 11, 1949, the Court of Appeal dismissed an appeal by the respondent from this judgment.

By a letter dated Dec. 1, 1948, the respondent's solicitors gave notice on his behalf to Sidi Bilal determining the latter's tenancy on July 1, 1949, in the form appropriate to a notice to quit for a tenant from year to year. This notice was thus given after the Supreme Court judgment and before the judgment of the Court of Appeal. By a sub-lease in writing dated Jan. 25, 1949, Sidi Bilal sub-let the premises to the appellant from Jan. 1, 1949, up to and including July 1, 1949, "determinable thereafter as the law shall permit". Thus the sub-lease was granted after the notice to quit had been given, but before the expiry of the period of the notice: after legal proceedings for possession had been taken by the respondent against the appellant, but before the legal proceedings were begun which are the subject of the present appeal. These legal proceedings were begun on Feb. 4, 1950, by an application in writing by the respondent to the Rent Control Board at Nairobi, asking for an order against Sidi Bilal and the appellant for recovery of possession of the premises and consequential relief. Sidi Bilal did not defend the proceedings, and his part in the matter does not require further notice.

To understand the course of the suit up to the present appeal to their Lordships, it is necessary at this stage to make some reference to the provisions of the ordinance, on the true construction and effect of which must turn the questions to be decided in the appeal. The ordinance enacts a system of rent control for Kenya on the general lines that have become familiar in the system of the United Kingdom. The Kenya system did not originate with the ordinance, which itself repealed an earlier Ordinance of 1940 and seven supplementary and amending ordinances made since that date. The ordinance now in question came into operation on Sept. 6, 1949; it has been amended more than once during the currency of the present proceedings, but the citations from it are from the text as originally enacted, unless otherwise stated.

The section of which the effect is directly in dispute is s. 16, entitled "Restriction on right to possession". The purport of sub-s. (1) of this section is first to impose a general prohibition on the right of a landlord to obtain from the court an order for recovery of possession of any premises to which the ordinance applies, or for the ejectment of a tenant therefrom, and then to define a series of circumstances or occasions the existence of which will, nevertheless, entitle the landlord to obtain an order. There is nothing in the section to create rights to resume possession against contractual tenants unless those rights exist at common law; its aim is to prescribe the conditions under which such rights, if they exist, can be enforced. The circumstances or occasions so defined are very various, some depending on a failure of the tenant to observe conditions of the tenancy, some depending on objective facts bearing on the state or user of the premises, some depending on the landlord's own needs or claims. Section 16 (1) (i) contains the following definition of one of these circumstances:

> "the tenant has, without the consent in writing of the landlord, at any time between Dec. 1, 1941, or the prescribed date, whichever is the later, and the commencement of this ordinance, assigned or sub-let the whole of the premises, the remainder being already sub-let; or, at any time after the commencement of this ordinance, has, without the consent in writing of the landlord, assigned, sub-let or parted with the possession of the premises or any part thereof.
>
> "A landlord who wishes to obtain an ejectment order on this ground may have the option of obtaining a similar order against the occupier or having the occupier as his direct tenant . . ."

Section 5 of a later Ordinance of 1949 added to this paragraph the words "or sub-let part of the premises" before the words "the remainder being already sub-let"; thereby correcting what seems to have been an obvious slip in the original text.

The remainder of s. 16, after sub-s. (1), contains a number of separate provisions bearing on the circumstances in which, or the conditions under which, an order for possession can be obtained. Of these, it is only necessary to set out two.

> "(2) In any case arising under sub-s. (1) of this section no order for the recovery of possession of premises shall be made unless the central board, the coast board, or the court, as the case may be, considers it reasonable to make such an order.
>
> "(6) An order against a tenant for the recovery of possession of any premises or ejectment therefrom under the provisions of this section shall not affect the right of any sub-tenant, to whom the premises or any part thereof have been lawfully sub-let before proceedings for recovery of possession or ejectment were commenced, to retain possession under the provisions of this section, or be in any way operative against any such sub-tenant."

It is in the light of these provisions, and of other provisions that will be noticed later, that the respective claims of the respondent and the appellant have been dealt with by the courts in Kenya. The course of decision has been, briefly, as follows:—

(i) The Board of Control gave judgment on Jan. 29, 1951, holding the respondent entitled to an order for possession. In their view, the appellant was not entitled to any protection under s. 16 (6) because (a) the landlord not having given his consent to the sub-letting, the premises had not been "lawfully sub-let" to the appellant within the meaning of the sub-section, and (b) the sub-letting had been made after "proceedings for recovery of possession . . . were commenced", since the notice to quit, which was given before the date of the sub-lease, ought to be regarded as the commencement of proceedings for this purpose. As the landlord had given no consent to the sub-letting, s. 16 (1) (i) had been satisfied.

(ii) The Supreme Court of Kenya gave judgment on June 9, 1952, affirming the board's order for recovery of possession, but allowing the appellant an appeal against part of the consequential relief which related to liability for mesne profits. The court (BOURKE, J.) rested its decision on the ground that the premises had not been lawfully sub-let to the appellant in the absence of any consent on the part of the landlord. No decision was given on the issue whether the sub-letting had been made before proceedings for recovery of possession were commenced, since that question would be of no moment if the sub-letting were not lawful anyway.

(iii) The appellant then appealed to the Court of Appeal for Eastern Africa. His appeal was dismissed by the judgment of that court delivered on May 14, 1953. The grounds on which the court based its decision were different from those which had supported the decisions in the lower courts. While it was held that the sub-letting was not unlawful for the purposes of sub-s. (6), since it was not made in breach of any covenant against sub-letting or any legal prohibition of such a sub-letting, and it was further held that the notice to quit of December, 1948, could not be treated as a commencement of proceedings, the court was disposed to favour the view that the sub-letting was, nevertheless, made after the commencement of proceedings, because the original proceedings which were begun in 1946 had not been finally disposed of at the date of the sub-lease. But the main ground on which the judgment rested was that the " occupier " referred to in the second paragraph of s. 16 (1) (i) could be a person who was at the same time a lawful sub-tenant within the meaning of s. 16 (6), and that there was nothing in the provisions of the latter sub-section, or in any other of the various sections of the ordinance, which prevented the court from making an order for possession against such a sub-tenant, if the landlord could prove that the conditions of s. 16 (1) (i) had been satisfied in the sense that the sub-letting had taken place without his written consent.

This view of the matter, which has been referred to as the main ground of the Court of Appeal's judgment, commends itself to their Lordships as being clearly right, and it is the one on which their own advice to Her Majesty will rest. A decision on it adverse to the appellant renders it unnecessary to consider the further questions which bear on the application of the words of s. 16 (6) to this situation. Of such questions, one, the meaning of " before proceedings . . . were commenced," was argued on the appeal, but their Lordships express no view on it. The other, whether the premises were " lawfully sub-let ", was not argued on the appeal, because counsel for the respondent did not desire to contest the decision of the Court of Appeal on the point, a decision which is certainly supported by more than one judgment in courts outside Kenya which have had to deal with analogous provisions in other rent control legislation. On this, too, their Lordships express no view. For the purpose of this judgment, therefore, they assume, without deciding, that the provisions of s. 16 (6) are applicable to the appellant's case, and that the premises were " lawfully sub-let " to him in January, 1949.

Let them be so. It is still difficult to see why the terms of the second paragraph of s. 16 (1) (i), a paragraph which has been spoken of as " the option clause ", do not govern the situation and authorise the making of an order against him. This option clause appears to be peculiar to the legislation of Kenya and does not find a counterpart in the legislation of the United Kingdom. But what it envisages is that there has been a sub-letting or assignment of controlled premises, without the written consent of the landlord, within the dates and under the conditions that are specified: and that the landlord may choose between having an order for possession against the actual occupier at the same time as he obtains one against his own tenant, and having the actual occupier remain on in possession as his direct tenant for the future. As there was a sub-letting of the whole of the premises without the consent and the premises were in the appellant's occupation, the respondent's right to ask for an order against him would seem to be clearly established, subject to any point arising as to " reasonableness " under s. 16 (2).

The argument on which the appellant seeks to rely in resisting this claim consists of two propositions interdependent on each other. First, he says that there is a conflict between the option clause and s. 16 (6), wherever there is found to exist a " lawful sub-tenant " within the meaning of that sub-section, and that the conflict can only be reconciled by treating such " lawful sub-tenants " as a class whose rights to possession are not to be subject to the exercise of any landlord's option under the option clause. Secondly, he says that the meaning of s. 16 (6) is that a landlord cannot rely on a sub-letting without consent by his tenant as the ground for an order for possession against a " lawful sub-tenant "; and that this is the true meaning appears when s. 16 (6) is read in conjunction with the meanings attributable by s. 2 to such words as " let ", " tenant " and " tenancy ", and with s. 23 (3), a sub-section which prescribes that

> " Where the interest of a tenant of any premises is determined, either as the result of an order for possession or ejectment or for any other reason, any sub-tenant to whom the premises or any part thereof have been lawfully sub-let shall, subject to the provisions of this ordinance, be deemed to become the tenant of the landlord on the same terms as he would have held from the tenant if the tenancy had continued ".

If the landlord wishes to get a sub-tenant out under s. 16 (1) (i), the landlord must prove against the sub-tenant a separate ground of possession consisting of a new sub-letting or assignment by him without the required consent.

The second branch of this argument attributes to a provision such as s. 16 (6) a very far-reaching effect. It is not a construction which their Lordships are prepared to adopt. This is not the first occasion on which it has been necessary for courts of law to consider the significance of such a provision when related to the rest of a rent control scheme of legislation, and the current of authority is not in favour of the appellant's argument. If that argument receives some support from *Ward* v. *Larkins* (1) (1923) (130 L.T. 184), it is directly in conflict with *Lord Hylton* v. *Heal* (2) ([1921] 2 K.B. 438), which contains illuminating judgments by ROWLATT and BAILHACHE, JJ., on this point, with *Enniskillen Urban District Council* v. *Bartley & Lynch* (3) ([1947] N.I. 177), and with the decision of the Court of Appeal in England in *Regional Properties Co., Ltd.* v. *Frankenschwerth & Chapman* (4) ([1951] 1 All E.R. 178). The purport of those latter decisions, in so far as they bear on the present issue, is to treat a provision such as s. 16 (6) as being in essence procedural. It secures to a " lawful sub-tenant " the certainty that an order for possession or ejectment against his immediate sub-lessor will not destroy his own right to possession by destroying the tenancy out of which it arises and that, accordingly, a similar order must be made against him directly, if he is to be put out; and, before such an order can be made against him, the court is bound to consider any circumstances which may make it reasonable that he, personally, should not be deprived of possession. But these authorities are against the view that sub-s. (6) has any such effect as to give the " lawful sub-tenant " a right to possession independent of the circumstances, such as sub-letting without consent, which have brought about the order for possession against the landlord's direct tenant, so that, to get possession against him, the landlord must find a new ground of possession.

Their Lordships do not think it necessary for the purposes of this decision to arrive at any final view on the question whether s. 16 (6) gives the " lawful sub-tenant " any further right than that of being heard as to " reasonableness " under s. 16 (2). It would be unsatisfactory to do so, in any event, unless it were possible to consider at the same time what is the precise meaning of a " lawful " sub-letting in this connection; and that has not been an issue in the present appeal. Even if the sub-section does not secure to the sub-tenant anything more than the assurance that he is not to be bound by an order for possession made against his own lessor, it cannot be said that such an assurance is not worth legislating for, if the ground on which possession is obtained against the direct tenant is also to serve as a good ground of possession against the sub-tenant once he has been brought before the court. For regard must be paid to the fact that, under English procedure, the writ of possession which issues on a judgment for possession is a " real " writ and, in effect, is a court order in favour of the plaintiff which is valid against possessors generally. Their Lordships were rightly reminded that there are significant differences in this respect between English procedure and Kenya procedure (which is derived from the code of British India). But, for all that, it would be deliberate blindness not to recognise that s. 16 (6) of the ordinance is a reproduction of an English model —see, for instance, the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 5 (5)—and its purport must be understood in the light of its English origin.

However that may be, their Lordships are satisfied that there is nothing in s. 16 (6) which is capable of displacing the ostensible meaning of the option clause. And, if that is so, the appellant's case must fail. First, the range of sub-s. (6), however wide, cannot extend beyond a saving in favour of a sub-tenant in respect of an order for possession made against a tenant. Such a saving does not bear on what is in question under the option clause, which is the making of an order against the occupier himself in supplement to any order made against the landlord's direct tenant. Secondly, the option clause is a specific statutory power annexed only to para. (i) of the various paragraphs which are listed in s. 16 (1). It is obviously intended to deal with the particular situation which arises when the landlord's consent has not been obtained to a sub-letting, assignment or parting with possession and, whether a sub-tenant who has got in in those circumstances is truly a " lawful " sub-tenant or not, it would be an impossible method of construction to allow the general saving which sub-s. (6) makes in respect of all orders for possession obtained under any paragraph of sub-s. (1) to overrule the particular and explicit option which the ordinance confers on a landlord in a case which falls under para. (i).

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the respondent's costs.

Appeal dismissed.

Solicitors: *Herbert Oppenheimer, Nathan & Vandyk* (for the appellant); *T. L. Wilson & Co.* (for the respondent).

[*Reported by* G. A. Kidner, Esq., *Barrister-at-Law.*]

DURBIDGE *v.* SANDERSON (INSPECTOR OF TAXES).

[Chancery Division (Wynn-Parry, J.), July 26, 1955.]

Income Tax—Deduction in computing profits—" Expenses incurred wholly, exclusively and necessarily in the performance of . . . duties "—Local government officer—Allowance for meals in connection with evening work —Excess cost of meals not deductible—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 10), *Sch.* 9, *Rules Applicable to Sch. E, r.* 7.

Under the conditions of his employment the duties of the taxpayer, a local government officer, included evening attendances at council committee meetings, for which he received no extra remuneration, his salary being above the limit for the payment of overtime. On such occasions he had to buy either tea or dinner at a restaurant and received an allowance of either 2s. 6d. for tea or 6s. for dinner. He was assessed to income tax on the allowances received in the year, and claimed to deduct therefrom the cost of the meals, or, as he was held to be entitled to do by the General Commissioners of Income Tax, the excess cost of the meals over the cost which he would normally have incurred.

Held: no deduction fell to be made from the taxpayer's salary in respect of the cost of the meals under para. 7 of Sch. 9 to the Income Tax Act, 1952, since the money was not expended " wholly, exclusively and necessarily in the performance of " his duties within that provision.

Ricketts v. *Colquhoun* ([1926] A.C. 1) applied.

Nolder v. *Walters* (1930) (15 Tax Cas. 380) and *Lomax* v. *Newton* ([1953] 2 All E.R. 801) distinguished.

Appeal allowed.

A [For the expenses deductible from the emoluments of an office, see 17 HALSBURY'S LAWS (2nd Edn.) 222, para. 448; and for cases on the subject, see 28 DIGEST 88-90, *519-535*.

For the Income Tax Act, 1952, Sch. 9, Rules Applicable to Sch. E, r. 7, see 31 HALSBURY'S STATUTES (2nd Edn.) 524.]

B Cases referred to:

(1) *Lomax* v. *Newton*, [1953] 2 All E.R. 801; 34 Tax Cas. 558; 3rd Digest Supp.
(2) *Ricketts* v. *Colquhoun*, [1926] A.C. 1; 95 L.J.K.B. 82; 134 L.T. 106; 90 J.P. 9; 10 Tax Cas. 118; 28 Digest 88, *519*.
(3) *Nolder* v. *Walters*, (1930), 15 Tax Cas. 380; Digest Supp.
C (4) *Bolam* v. *Barlow*, (1949), 31 Tax Cas. 136; 2nd Digest Supp.

Case Stated.

The respondent taxpayer, a local government officer, appealed to the General Commissioners of Income Tax for the Hundred of Edmonton against the inclusion of amounts of £10 in the first year and £20 in the second in two assessments to income tax made on him under the Income Tax Act, 1952, s. 156, in D the sums of £630 and £664 in respect of the years 1952-53 and 1953-54 respectively. He was employed by Southgate Borough Council under the conditions of employment laid down in the 1952 edition of the Local Authorities Scheme of Conditions of Service. His duties included evening attendances at council committee meetings for which he received no extra remuneration as his salary was over the limit of £595 per annum for overtime provided by the scheme. When he had to E work in the evenings, as no refreshments were provided by the council he had to buy either tea or dinner at a restaurant, and he received from the council an allowance at a flat rate of 2s. 6d. for tea or alternatively, when working after 8.30 p.m., of 6s. for dinner (this sum being spent before the allowance was made), subject to submission of a certificate of expenditure. The allowances were treated as emoluments by the council for the purpose of the Income Tax Act, F 1952, s. 157. The taxpayer contended that the allowances were not taxable under s. 156 of the Act or at all, and alternatively that, if they were taxable, the actual expenditure on meals should be treated as a proper deduction under para. 7 of Sch. 9 to the Act. The Crown contended that the allowances were taxable under Sch. E of the Act as perquisites or profits of the taxpayer's office or employment within the meaning of para. 1 of Sch. 9 and that the payment G for meals could not be regarded as a proper deduction as it was not an expense incurred "wholly, exclusively and necessarily" in the performance of the taxpayer's duties within the meaning of para. 7 of Sch. 9. The commissioners found that the allowances were taxable, but that, to the extent that the expenditure at a restaurant was greater than the cost which would normally be incurred by the taxpayer for the same meals, there should be a deduction under para. 7 H of Sch. 9 to the Act. They accordingly reduced the assessments by £5 and £7 respectively. The Crown appealed.

Maurice Lyell, Q.C., and *H. H. Monroe* for the taxpayer.
F. N. Bucher, Q.C., and *Sir Reginald Hills* for the Crown.

I **WYNN-PARRY, J.:** This is an appeal from the General Commissioners of Income Tax for the Hundred of Edmonton, who found in the first place that the allowances made to the taxpayer, as referred to in the Case Stated, were taxable, and with that conclusion the taxpayer does not quarrel. The commissioners went on to say, however, that, to the extent that the expenditure at a restaurant was greater than the cost which would normally be incurred by the taxpayer for the same meals—those are tea and dinner—there should be a deduction under the Income Tax Act, 1952, Sch. 9, para. 7, and they reduced the assessments. It is with that second finding that the Revenue quarrel.

It is agreed that the office or employment held by the taxpayer falls within r. 5 of the Rules Applicable to Sch. E as set out in Sch. 9 to the Income Tax Act, 1952, sub-para. (j) of which reads:

> "offices or employments of profit under any public corporation or local authority. . ."

It is clear that the taxpayer is employed by a local authority.

The relevant rule is in these terms:

> "7. If the holder of an office or employment of profit is necessarily obliged to incur and defray out of the emoluments thereof the expenses of travelling in the performance of the duties of the office or employment, or of keeping and maintaining a horse to enable him to perform the same, or otherwise to expend money wholly, exclusively and necessarily in the performance of the said duties, there may be deducted from the emoluments to be assessed the expenses so necessarily incurred and defrayed."

The courts from time to time have commented on the strictness and the limited nature of that rule in the various forms in which it has appeared in various Taxing Acts for over a century. I do not think that I can do better as regards this than quote the observations of VAISEY, J., in the recent case of *Lomax* v. *Newton* (1). He says ([1953] 2 All E.R. at p. 802):

> " The respondent to this appeal on the part of the Crown is a Major Newton, who was a Territorial officer, second in command of the Territorial battalion of the York and Lancaster Regiment stationed at Sheffield. He was represented at a hearing before the General Commissioners for Income Tax by his commanding officer, a Lieut.-Colonel Webster. The claim of the taxpayer was that certain items of expenditure had been incurred by him, in the words of the statute ' wholly, exclusively, and necessarily in the performance of [his] duties ' as an officer of the said battalion, so as to bring him in regard to that expenditure within the provisions of r. 9 of . . . Sch. E to the Income Tax Act, 1918."

Rule 9 was the rule then in force corresponding to r. 7 of Sch. 9 to the Act of 1952.

> " Before coming to the particular items, I would observe that the provisions of that rule are notoriously rigid, narrow and restricted in their operation. In order to satisfy the terms of the rule it must be shown that the expenditure incurred was not only necessarily, but wholly and exclusively, incurred in the performance of the relevant official duties. And it is certainly not enough merely to assert that a particular payment satisfies the requirements of the rule, without specifying the detailed facts on which the finding is based. An expenditure may be ' necessary ' for the holder of an office without being necessary to him in the performance of the duties of that office. It may be necessary in the performance of those duties without being exclusively referable to those duties. It may, perhaps, be both necessarily and exclusively, but still not wholly, so referable. The words are, indeed, stringent and exacting. Compliance with each and every one of them is obligatory if the benefit of the rule is to be claimed successfully. They are, to my mind, deceptive words in the sense that, when examined, they are found to come to nearly nothing at all."

With the whole of that paragraph, and particularly the last sentence, I find myself in respectful agreement.

A number of authorities were referred to, not all of which I propose to consider. It is not possible to say that the facts of this case are at first sight completely covered by any one of the decided cases, though, on consideration, I think that it is clear which line of authority covers it.

On the one side, there is the line of cases perhaps best illustrated by *Ricketts* v. *Colquhoun* (2) (1926) (10 Tax Cas. 118), which concerned the recorder of

A Portsmouth, and related to the rule then in force corresponding to r. 7 of Sch. 9 to the Income Tax Act, 1952. A number of their Lordships who had to consider the rule in the various courts made observations emphasising in words, different but of the same import, what VAISEY, J., said in the *Lomax* case (1). In the Court of Appeal, SIR ERNEST POLLOCK, M.R., said (ibid., at p. 124):

> B "It is very easy by a general description of the facts to suppose that a hard case has arisen, but it is the duty of this court to adhere closely and accurately to the actual words of r. 9, which are of general application to all holders of offices which come within its ambit. Now the first thing is this, that at the outset you have to find that the holder is necessarily obliged to incur and defray expenses out of his emoluments, and I attach importance to C those words 'necessarily obliged' because I think they are to be read as meaning this, that where an obligation is imposed upon the holder of the office which ex necessitate of the office compels him to make outlays, it is in those cases, and after you have fulfilled that condition, that you first begin to consider what is the possible expenditure which may be deducted."

In the House of Lords, LORD BLANESBURGH, whose speech had been preceded D by those of VISCOUNT CAVE, L.C., and LORD BUCKMASTER, both of whom animadverted on the strictness of the rule, said (10 Tax Cas. at p. 135):

> "Undoubtedly its most striking characteristic is its jealously restricted language, some of it repeated apparently to heighten its effect. But I am also struck by this, that, as it seems to me, although undoubtedly less obtrusively, the language of the rule points to the expenses with which it is E concerned as being confined to those which each and every occupant of the particular office is necessarily obliged to incur in the performance of its duties, to expenses imposed upon each holder ex necessitate of his office and to such expenses only. It says:—'If the holder of an office'—the words be it observed are not 'if any holder of an office'—'is obliged to incur expenses in the performance of the duties of the office'—the duties again are F not the duties of *his* office; in other words, the terms employed are strictly, and, I cannot doubt, purposely, not personal but objective."

In the result, in that case, the recorder was held not to be entitled for income tax purposes to deduct from the emoluments of his office as recorder the cost of travelling in order to attend his quarter sessions, his hotel expenses or the cost of conveyance from his rooms to the court.

G Two cases were particularly relied on by the taxpayer before the general commissioners as well as in this court. The first is *Nolder* v. *Walters* (3), of which the headnote reads (1930) (15 Tax Cas. 380):

> "An aeroplane pilot employed by a limited company claimed deductions in the assessment of his remuneration to income tax under Sch. E in respect H of various items of expenditure. Held, that no deduction could be allowed in respect of (a) the upkeep of a motor car to convey the pilot between the aerodrome and his home, or (b) a telephone at his home; but that a decision of the General Commissioners allowing a deduction for an excess of actual subsistence expenses when away from home on duty over subsistence allowance granted by the company could not be disturbed as being erroneous in I law."

This was a decision of ROWLATT, J., who expressed the principle in clear language as follows (ibid., at p. 387):

> "It seems to me that, as a matter of principle, the rule to be applied in these cases is clear. What the statute allows to be deducted are expenses of travelling in the performance of the duties of the office, or employment, or money wholly, exclusively, and necessarily expended in the performance of the duties. As regards the latter branch, it seems quite clear that what

> is to be allowed to be deducted are expenses 'wholly, necessarily', and so on, incurred in doing the work of the office. 'In the performance of the duties' means in doing the work of the office, in doing the things which it is his duty to do while doing the work of the office."

ROWLATT, J., later dealt with that part of the case on which in the end he did not disturb the decision of the general commissioners. He said (ibid., at p. 388):

> "Then I come to the other part of the case. Some offices and employments do involve the duty of travelling. It is not a question of getting to the place of employment, but the employment may be actually to travel, as in the common case of the commercial traveller, and, as some people say, in the case of the Member of Parliament. The duties may actually be to travel, and this gentleman's duty is to travel; therefore both, I should have thought, under the general words of the latter part of the section, and, I think, under the head of travelling expenses, he is allowed the expenses of so travelling. The Solicitor-General and counsel for the Crown very fairly agree, and I think it always has been agreed, that when you get a travelling office, so that travelling expenses are allowed, those travelling expenses do include the extra expense of living which is put upon a man by having to stay at hotels and inns, and such places, rather than stay at home. Of course his board and his lodging in a sense, eating and sleeping, are the necessities of a human being, whether he has an office, or whether he has not, and therefore, of course, the cost of his food and lodging is not wholly and exclusively laid out in the performance of his duties, but the extra part of it is. The extra expense of it is, and that is the quite fair way in which the Revenue look at it."

It is against the background of what I have just read that it seems to me the next passage in this judgment has to be regarded (ibid.):

> "In this case, therefore, he would be entitled to charge something for the extra expense which he is put to by having to go and spend all the day, and often the night, away from home, because that is part of his duty; and then it comes to the question really of quantum."

The other case relied on was *Lomax* v. *Newton* (1), because VAISEY, J., having decided that the commissioners were wrong as regards certain expenses which they had allowed, came to the fifth item which was claimed in the following words ([1953] 2 All E.R. at p. 803):

> "Amounts paid for hotel accommodation at conferences and exercises in excess of detention and ration allowances: Harrogate, four days, £3; Buxton, two days, £3."

VAISEY, J., said (ibid.):

> "This is explained as being the actual cost to the taxpayer over and above the ration and detention allowance granted. No doubt, his attendance at these conferences and exercises was compulsory, and he had no choice, I am told, of the hotels at which he had to put up, and, no doubt, the supplementing of the prescribed allowances is a serious burden on a Territorial officer. *Nolder* v. *Walters* (3) comes rather near to this point."

The learned judge then read the headnote, and continued (ibid.):

> "My chief difficulty as regards this item is the paucity of the evidence. The commissioners have, however, found as a fact that this was expenditure wholly, exclusively, and necessarily incurred in the performance of the taxpayer's duties, and I cannot say that they were wrong in bringing this fifth item within the rule. *Bolam* v. *Barlow* (4) (1949) (31 Tax Cas. 136) and *Ricketts* v. *Colquhoun* (2) (10 Tax Cas. 118) may be rather difficult to reconcile with *Nolder* v. *Walters* (3), but I decide this matter on the ground that I

> A must not disturb a finding of fact which was a possible finding both as to quantum and otherwise. I am by no means sure that I should myself have decided this point as the commissioners did. While I feel bound to regard this item of £6 as having been admitted on a finding of fact which I cannot disturb, I venture to recommend that, as a precedent in other cases, it should be applied with very great caution."

B I might add that, as appears from the latter part of ROWLATT, J.'s judgment, he, in *Nolder* v. *Walters* (3), had a similar hesitation in coming to his decision. In the judgment in each of those cases, there is clearly a suggestion that judges who are invited to follow them should only do so with considerable hesitation. I share that view, particularly after the detailed analysis which counsel for the C Crown made of the various judgments and opinions in *Ricketts* v. *Colquhoun* (2).

In the case before me there is a finding in these words:

> "On occasions when [the taxpayer] had to work in the evenings he had to buy either tea or dinner at a restaurant. No refreshments were provided by the council."

D The proposition on which counsel for the taxpayer relied was expressed in these words:

> "Extra living expenses which the master requires the servant to incur in the particular place where the duty has to be done are to be allowed and were allowed in those two cases [*Nolder* v. *Walters* (3) and *Lomax* v. *Newton* E (1)] as wholly, exclusively and necessarily incurred in the duty of the office."

To support that proposition, he submitted that the proper construction of the finding which I have just read was that the taxpayer in his capacity as servant of the council as the master was under some compulsion to buy either his tea or his dinner at a restaurant. I do not so read the language employed by the commissioners. I quite agree that the first part of the sentence indicates F compulsion as regards occasions when he had to work in the evening; i.e., on occasions when, by the terms of his employment, he was properly called on by the council as his employers to work in the evenings. But, so far as the second part of the sentence is concerned, "he had to buy either tea or dinner at a restaurant", those words signify no more to my mind than that, if he desired to have tea or dinner, the commissioners were satisfied that he would have to purchase G such a meal at a local restaurant, the reason being that, as stated in the next following sentence, "No refreshments were provided by the council."

I think it is instructive, as counsel for the Crown suggested, to consider the view expressed by WARRINGTON, L.J., in his dissenting judgment in *Ricketts* v. *Colquhoun* (2). He said (10 Tax Cas. at p. 128):

> H "Now I think, and I understand on this the Attorney-General agrees, that the words 'necessarily' and 'necessary' in the rule do not mean necessary or necessarily in the abstract, but they mean necessary in regard to the circumstances of the individual concerned, the holder of the office, and in regard to the ordinary usages of mankind at this time in the history of the world . . . And, in the same way, if there are other expenses—in this I case there are the hotel expenses—if they are necessarily, wholly and exclusively incurred by reason of the fact that without incurring them he cannot perform his duties, then it seems to me a deduction ought to be allowed in respect of them."

To my mind, that is what the taxpayer seeks to say in the present case. I do not think his case can be put any higher than that language with which many people have had a great sympathy, but that view did not find favour either with the majority of the Court of Appeal or with any of their Lordships in the

House of Lords. I repeat the words of LORD BLANESBURGH (10 Tax Cas. at p. 135): A

> " in other words, the terms employed are strictly, and, I cannot doubt, purposely, not personal but objective."

Against that background of authority I turn to consider what to my mind is the crucial point in this case. The claim does not concern a period before the B taxpayer commences to perform his duties at the beginning of any day, nor a period after he has ceased to perform those duties. It concerns a period in the course of that day, and the question is, whether, when, being ordered to remain late, he takes advantage of the permission, if that is the correct word, or of his right, if it be a right, given to him to go out and have either tea or dinner, he is during that period engaged in the performance of the duties of his office or employment? C I put this example during the course of the argument, and I repeat it in my judgment. It is quite clear (and it could not be argued to the contrary) that, when he goes out during what may conveniently be described as the lunch hour to have lunch, the taxpayer could not be said to be engaged in the performance of the duties of his office so that he could make any claim in respect of the cost to him of any meal which he might eat during that day. In the case of what I D might call a normal day, he will go home at the end of the normal working hours, and again he cannot make any claim for any meal which he eats when he gets home. In the case of what I may call the exceptional day, when under the terms of his employment he is required to stay late in order to attend committee meetings, he is obviously engaged in the performance of the duties of his office or employment when he is attending on the committee, just as he would be from E the time of reporting in the morning to the time he goes out to lunch, and from a period after lunch until he either goes home or on an exceptional evening goes out to have tea or dinner. But having regard to the term of his employment that when required he must stay late, I can see no difference in principle between the nature of the interval for lunch and the interval for tea or the interval for dinner. In my judgment, this case on analysis is completely covered by the F ratio decidendi of the majority of the Court of Appeal and of the House of Lords in *Ricketts* v. *Colquhoun* (2) and it does not come within the judgment of ROWLATT, J., in *Nolder* v. *Walters* (3) or VAISEY, J., in *Lomax* v. *Newton* (1). I think both those cases are to be regarded, as the authors of the judgments would wish them to be regarded, as somewhat in the nature of exceptions. For those reasons, in my judgment this appeal must succeed. G

Appeal allowed.

Solicitors: *Gwylym T. John* (for the taxpayer); *Solicitor of Inland Revenue.*

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

NISBET SHIPPING CO., LTD. *v.* REGINAM.

[Privy Council (Viscount Simonds, Lord Oaksey, Lord Radcliffe, Lord Tucker and Lord Cohen), June 27, 28, 29, July 25, 1955.]

Privy Council—Canada—Shipping—Collision—Limitation of liability—H.M.C. ship—Canada Shipping Act, 1934 (24 *&* 25 *Geo.* 5 *c.* 44), *s.* 649 (1), *s.* 712.

By the Canada Shipping Act, 1934, s. 649 (1): " The owners of a ship, whether registered in Canada or not, shall not, in cases where all or any of the following events occur without their actual fault or privity, that is to say . . . (iv) where any loss or damage is, by reason of the improper navigation of the ship, caused to any other vessel . . . be liable to damages . . . " in excess of a certain sum. And by s. 712: " This Act shall not, except where specially provided, apply to ships belonging to His Majesty."

In 1945, whilst sailing in a convoy, a ship belonging to the appellant company was so badly damaged in a collision with a vessel of H.M. Canadian Navy that she became a total loss. The naval vessel was alone to blame for the collision and the Crown claimed to be entitled to limit liability under s. 649 (1). On behalf of the Crown it was contended that although s. 712 of the Canada Shipping Act, 1934, provided that the Act should not apply to ships belonging to the Crown, yet, as the Supreme and Exchequer Courts Act, 1887, s. 16, in effect imposed like liability on the Crown as existed between subject and subject, the rule that the Crown could avail itself of the benefit of a statute should apply to enable the Crown to take advantage of s. 649 of the Act of 1934.

Held: section 712 of the Act of 1934 precluded the Crown from having the benefit of s. 649 of the Act and the Crown was not entitled to limitation of liability; further, the fact that the Exchequer Court in exercising jurisdiction under the Act of 1887 applied to proceedings between the subject and the Crown the law which applied between subject and subject did not justify the court in applying as between subject and the Crown an enactment, viz., s. 649 of the Act of 1934, which was expressly excluded from applying to the Crown.

Appeal allowed.

[**Editorial Note.** The Canada Shipping Act, 1934, s. 649 (1), corresponds to the Merchant Shipping Act, 1894, s. 503 (1), and s. 712 of the Act of 1934 to s. 741 of the Act of 1894 (for which, see 23 Halsbury's Statutes (2nd Edn.) 656, 732). In English law, however, although the Merchant Shipping Act, 1894, contains an enactment similar to s. 712 of the Canada Shipping Act, 1934, the Crown is entitled to the benefit of those provisions of the Merchant Shipping Acts, 1894 to 1940, which limit the amount of the liability of the owners of ships, since express statutory provision to that effect has been made by s. 5 (1) of the Crown Proceedings Act, 1947 (6 Halsbury's Statutes (2nd Edn.) 50).

As to limitation of liability by shipowners, see 30 Halsbury's Laws (2nd Edn.) 940-942, paras. 1303, 1304; and for cases on the subject, see 41 Digest 914-917, *8058-8083*.]

Cases referred to:

(1) *City of Quebec* v. *Reginam*, (1894), 24 S.C.R. 420.
(2) *Filion* v. *Reginam*, (1894), 4 Exch. C.R. 134; *affd.*, (1894), 24 S.C.R. 482.
(3) *R.* v. *Armstrong*, (1908), 40 S.C.R. 229.
(4) *Gauthier* v. *Regem*, (1918), 56 S.C.R. 176; 40 D.L.R. 353.

Appeal.

Appeal by special leave by shipowners from an order of the Supreme Court of Canada dated Apr. 28, 1953, reversing in part an order of the Exchequer Court of Canada (Thorson, J.) dated July 20, 1951. In February, 1945, the Blairnevis, a steamship belonging to the appellant company, while in a naval convoy sailing from Gibraltar to England was struck on her port bow by H.M.C.S. Orkney, one of the escorting ships, and became a total loss. On a claim for damages by the appellant company against the Crown commenced by petition of right, THORSON, J., held that the Orkney was alone to blame for the collision and that the Crown was not entitled to limit liability under the Canada Shipping Act, 1934, s. 649. On appeal by the Crown, the Supreme Court of Canada affirmed THORSON, J.'s decision as to the liability for the collision, but reversed his finding as to the Crown's right to limit liability.

C. Russell McKenzie (of the Canadian Bar) and *D. H. Hene* for the appellant company.

F. P. Varcoe, Q.C. (of the Canadian Bar), *Frank Gahan, Q.C.*, and *J. G. Le Quesne* for the Crown.

VISCOUNT SIMONDS: This appeal from a decision of the Supreme Court of Canada raises a question of very great difficulty. On Feb. 13, 1945, there was a collision between H.M.C.S. Orkney and the Blairnevis, a vessel owned by the appellant company, Nisbet Shipping Co., Ltd. On July 20, 1951, it was decided by THORSON, J., sitting as President of the Exchequer Court of Canada, that Orkney was alone to blame for the collision and that the Crown was not entitled to limit liability under the provisions of the Canada Shipping Act, 1934. The latter part of this decision was, on Apr. 28, 1953, reversed by the Supreme Court of Canada (RINFRET, C.J., KERWIN, RAND, KELLOCK, ESTEY and CARTWRIGHT, JJ., dissentiente LOCKE, J.), which held that the Crown was entitled to avail itself of s. 649 of that Act. Against this decision the appellant company appeals, and the single question, simple to state but difficult to answer, is whether the Crown is, or is not, entitled to claim the benefit of the provisions of this section.

Under the law of Canada limitation of liability for damages caused by the improper navigation of a ship rests, for the purpose of this case, solely on s. 649 of the Canada Shipping Act, 1934, the relevant words of which are:

> " (1) The owners of a ship, whether registered in Canada or not, shall not, in cases where all or any of the following events occur without their actual fault or privity, that is to say—. . . (iv) where any loss or damage is, by reason of the improper navigation of the ship, caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel; be liable to damages . . . to an aggregate amount exceeding thirty-eight dollars and ninety-two cents for each ton of the ship's tonnage."

It may well be (their Lordships do not think it necessary to determine this question) that, apart from the section to which they next refer, the Crown could, in the circumstances of the present case, claim the benefit of s. 649 and limit its liability accordingly. But s. 712 provides that

> " This Act shall not, except where specially provided, apply to ships belonging to His Majesty."

On this section the appellant company relies, contending that the Act contains no special provision conferring on the Crown the benefit of s. 649 and that, accordingly, that section does not apply in respect of ships belonging to Her Majesty and the Crown cannot limit its liability under it. It is difficult to think of words more wide and comprehensive than those of s. 712, the phrase " except where specially provided " emphasising that no implication without express words would suffice to bind the Crown or, presumably, to confer a benefit on the Crown. But this difficulty has been met in two ways by the Crown. It has been urged in the first place that, as a matter of construction, the section does not apply to Her Majesty as the owner of a ship but only to the ships themselves. This appears to have been the contention urged before THORSON, J., and was by no means abandoned before their Lordships. But it was urged in the second place—and this is the argument which prevailed with the Supreme Court—that s. 712 was, in effect, irrelevant to a claim by the Crown to avail itself of the provisions of s. 649. This contention can only be understood against the background of the history of the Crown's liability for the tortious act of its servants, and specifically of its liability in respect of damage caused by the improper navigation of a ship.

Before 1887, in Canada as in England the doctrine "respondeat superior" did not apply to the Crown which was, therefore, not liable for the tortious acts of its servants. In that year, it was enacted by s. 16 of the Supreme and Exchequer Courts Act, 1887, that the Exchequer Court should have exclusive original jurisdiction to hear and determine amongst other matters

> "(c) every claim against the Crown arising out of any death or injury to the person or to property on any public work, resulting from the negligence of any officer or servant of the Crown while acting within the scope of his employment."

This section has, from time to time, been amended in such manner as to enlarge the jurisdiction of the court, and para. (c)* now reads:

> "every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment."

It is not questioned that these are apt words to give the court jurisdiction in the present case. It must, however, be noted that it was only by an amendment made in 1938, that is after the Canada Shipping Act, 1934, that such jurisdiction was given.

The Supreme and Exchequer Courts Act, 1877, both in its original and amended form, purported only to confer jurisdiction, but by a series of decisions, the authority of which cannot be questioned, it has been held that it not only conferred jurisdiction on the court but also imposed liability on the Crown: see, for instance, *City of Quebec* v. *Reginam* (1) (1894) (24 S.C.R. 420); *Filion* v. *Reginam* (2) (1894) (4 Exch. C.R. 134); *R.* v. *Armstrong* (3) (1908) (40 S.C.R. 229); *Gauthier* v. *Regem* (4) (1918) (56 S.C.R. 176). The question then is: what is the measure of the liability which is not defined by the Act but is to be inferred from the creation of jurisdiction? It is not in dispute that at least those circumstances which give rise to a claim between subject and subject will support a claim by a subject against the Crown. From this, it is an easy step to say that a subject is not entitled to any greater relief against the Crown than he would be against a fellow subject, and this is supported by reference to s. 8 of the Petition of Right Act (R.S.C., 1927, c. 158), which provides that the statement of defence or demurrer to a petition of right may raise, besides any legal or equitable defences in fact or in law available under that Act, any legal or equitable defences which would have been available if the proceedings had been a suit or action in a competent court between subject and subject. Nor can it be ignored that, though the right to limit liability for damage is not part of the common law but in England and Canada alike is the creature of statute, it is a right almost universally established in the law of nations and of considerable antiquity. It would, therefore, be easily assumed that the Crown, assenting to the imposition of a new liability, would secure for itself the advantage at least of limiting it in a manner so generally conceded. This view is thus cogently stated by RAND, J. ([1953] S.C.R. at p. 488):

> "Where liability, then, on the same footing as that of a subject, is established, giving a right to damages, I can think of no more appropriate enactment to which that basic rule of the prerogative could be applied than to a statutory limitation of those damages."

The basic rule to which the learned judge refers is that under which it is said that the Sovereign may avail himself of the provisions of any Act of Parliament.

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* Now s. 19 (c) of the Exchequer Court Act (R.S.C., 1927, c. 34), as amended.

These are the considerations which prevailed with the learned judges of the Supreme Court, with the exception of Locke, J., with whose judgment their Lordships find themselves in agreement. They are weighty considerations but, as it appears to their Lordships, they do not explain why full effect should not be given to s. 712. It is true that, in 1934, that section, which was itself a re-enactment of s. 741 of the Merchant Shipping Act, 1894, could have no operation in regard to any liability of the Crown, for it was only in 1938 that any relevant liability was imposed on the Crown. It does not, however, follow that, when that liability is imposed, as it is by the amending Act of 1938, the provisions of s. 712 can be ignored. In the United Kingdom the same problem arose when, under the Crown Proceedings Act, 1947, the Crown was for the first time made liable for the tortious acts of its servants, and it was by that Act [s. 5] specifically enacted that the sections of the Merchant Shipping Act, 1894, should apply to limit the liability of the Crown. And in Canada, similar provision is now made by the Crown Liability Act, 1953. It may be said that this latter Act can be regarded as having been passed ex majore cautela, and it certainly cannot be treated as decisive of the meaning and scope of s. 712 of the Canada Shipping Act, 1934. But it is precisely the provision which, if the liability of the Crown had been established before 1934, would have been appropriately inserted in the Act of that year as a special provision excluding the operation of s. 712, and the fact that it was not so inserted because the necessity for it was not then foreseen cannot deprive s. 712 of any part of its meaning and effect. The right to limit liability is, as has already been said, derived solely from a section of an Act which unequivocally enacts that the Act shall not apply, except where specially provided, to ships of His Majesty. Where, then, can the Crown find that right ? It appears to their Lordships that there is no sufficient justification for saying that, because the Exchequer Court in the exercise of its jurisdiction applies to proceedings between subject and Crown the law which it applies between subject and subject, therefore it should apply even that law which by the terms of the statute enacting it is expressly excluded from application to the Crown.

On this part of the case a final argument was based on s. 16 of the Interpretation Act (R.S.C., 1927, c. 1), which enacts that no provision or enactment in any Act affects in any manner whatsoever the rights of Her Majesty, Her heirs or successors, unless it is expressly stated therein that Her Majesty is bound thereby. This provision, however, appears to have no relevance to a statute which expressly enacts, as does the Canada Shipping Act, 1934, how far the rights of the Crown shall be affected. In s. 712, the relevant word is " apply ", which appears adequately to cover any provision whether it creates an obligation or confers a benefit.

Their Lordships have so far proceeded on the footing that Thorson, J., was right in rejecting the argument that a distinction can be drawn between the words in s. 712 " ships belonging to His Majesty " and such words as " His Majesty " simpliciter. In their Lordships' opinion, the learned judge took the correct view. An attempt was made at the Bar to indicate those sections to which, if the distinction was valid, s. 712 applied and those to which it did not. It soon appeared that the task was an impossible one. Nor, if such a distinction is made, does it appear at all clear why any part of Part 12 of the Act which is headed " Navigation—Collisions—Limitation of Liability " should not be properly described as provisions relating to ships belonging to His Majesty. In their Lordships' opinion, this argument of the Crown also fails.

In the result, their Lordships will humbly advise Her Majesty that this appeal should be allowed, the judgment of the Supreme Court set aside and that of Thorson, J., restored. The Crown must pay the costs of the appellant of this appeal and in the Supreme Court of Canada. *Appeal allowed.*

Solicitors: *Waltons & Co.* (for the appellant company); *Charles Russell & Co.* (for the Crown). [*Reported by* G. A. Kidner, Esq., *Barrister-at-Law.*]

FLOWERS *v.* GEORGE WIMPEY & CO., LTD.

[QUEEN'S BENCH DIVISION (Devlin, J.), January 19, 20, July 11, 20, 1955.]

Negligence—Personal injuries—Measure of damages—Loss of earnings—Deduction of industrial injury benefits—Plaintiff away from work for one year—Benefits received on basis that incapacity throughout the whole period attributable to industrial injury—Finding by court that period of incapacity attributable to injury less than that for which benefits paid—Amount to be "taken into account"—Law Reform (Personal Injuries) Act, 1948 (11 *&* 12 *Geo.* 6 *c.* 41), *s.* 2 (1).

On Apr. 29, 1953, the plaintiff, who was employed by the defendants, was injured in an accident in the course of his employment. He was struck on the legs above and below the knee by the sling of a travelling crane. His injuries consisted of bruising of the legs and shock. His recovery was delayed by the development of tumours in his knees and by his mental state. He did not resume work until May 1, 1954. An insurance officer appointed under the National Insurance (Industrial Injuries) Act, 1946, assessed the benefits to which the plaintiff was entitled under the Act on the basis that the plaintiff's incapacity for work throughout the whole period was attributable to the accident, and the plaintiff was paid injury benefit at the rate of £4 7s. a week until Aug. 30, 1953, and at the rate of £3 5s. 6d. a week until about the end of October, 1953. From then until Feb. 20, 1954, he received sickness benefit at the rate of £2 3s. a week, and thereafter he received certain lump sums as disablement gratuities. In an action against the defendants for damages for personal injuries sustained by the plaintiff, the court found that the defendants were guilty of negligence; that the period of incapacity attributable to the accident was only three or four weeks; and that the plaintiff's inability to work during the remainder of the period until May 1, 1954, was attributable to causes which were not the result of the accident. The plaintiff's loss of earnings for the period of four weeks amounted to £68. At the date of the judgment the total sums received by him as industrial injury benefit and disablement benefit were more than £136, and he was in receipt of a small disablement pension. The court awarded him £25 as general damages. On the question whether any sum should be awarded as special damages for loss of earnings in view of the provisions of s. 2 (1) of the Law Reform (Personal Injuries) Act, 1948*, by which in assessing such damages one-half of the value of any rights which had accrued or probably would accrue to the plaintiff from the injuries in respect of industrial injury benefit, industrial disablement benefit or sickness benefit, had to be taken into account against loss of earnings,

Held: the value of the rights to be set under s. 2 (1) of the Act of 1948 against loss of earnings was the total of the sums paid or likely to be payable in fact in accordance with the National Insurance (Industrial Injuries) Act, 1946 (i.e., in effect, in accordance with the decision of the insurance officer under that Act) for the blows which constituted the accident, and the words "taken into account" in s. 2 (1) of the Act of 1948 did not confer on the court any discretion to evaluate the amount so to be set against loss of earnings; therefore, as one-half of the benefits which the plaintiff had already received as industrial injury or disablement benefit was more than his loss of earnings for the four weeks during which he was away from work as a result of the injuries, he was not entitled to any sum as special damages for loss of earnings.

Stott v. *Sir William Arrol & Co., Ltd.* ([1953] 2 All E.R. 416) considered.

Per CURIAM: sickness benefit, being payable in respect of a day of incapacity for work forming part of a period of interruption of employment, may be payable when there has been no injury; and accordingly the question is left open whether the incapacity, which is the source of sickness benefit, is caused by the injury. This is a point which the court must itself decide for the purpose of its determination [of the damages] (see p. 173, letter G, post).

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* The terms of the sub-section are printed at p. 166, letter I, post.

[**Editorial Note.** In *Stott* v. *Sir William Arrol & Co., Ltd.* ([1953] 2 All E.R. at p. 417 letter G) Slade, J., left undecided the question whether the words " taken into account " in s. 2 (1) of the Law Reform (Personal Injuries) Act, 1948, meant that the value which was to be taken into account against loss of earnings should in all cases be deducted from their amount. In the present case Devlin, J., does not accept the view that the court has any discretion to evaluate the sum to be deducted, save to the extent that the court need not make an exact calculation but can take a round sum; and accordingly the amount to be deducted is the amount in fact paid or likely to be payable for the national insurance benefits specified in s. 2 (1) of the Act of 1948.

For the Law Reform (Personal Injuries) Act, 1948, s. 2 (1), s. 3, see 25 Halsbury's Statutes (2nd Edn.) 365, 367.

For the National Insurance (Industrial Injuries) Act, 1946, see 16 Halsbury's Statutes (2nd Edn.) 797.]

Cases referred to:

(1) *Ward* v. *Shell-Mex & B.P., Ltd.*, [1951] 2 All E.R. 904; [1952] 1 K.B. 280; 3rd Digest Supp.

(2) *Stott* v. *Arrol (Sir William) & Co., Ltd.*, [1953] 2 All E.R. 416; [1953] 2 Q.B. 92; 3rd Digest Supp.

(3) *Metropolitan Water Board* v. *St. Marylebone Assessment Committee*, [1923] 1 K.B. 86; 92 L.J.K.B. 161; 128 L.T. 358; 86 J.P. 225; 38 Digest 547, *903*.

Action.

The plaintiff, who was injured in an accident during the course of his employment by the defendants, claimed damages against the defendants for negligence and breach of statutory duty. The action was heard on Jan. 19 and 20, 1955, before Devlin, J., who found the defendants guilty of negligence and awarded £25 to the plaintiff as general damages. The case was then adjourned for further argument on the question of the amount which the plaintiff was entitled to recover, under the Law Reform (Personal Injuries) Act, 1948, s. 2 (1), as special damages in respect of loss of earnings. The report deals only with the question of special damages. The facts appear in the judgment.

C. J. A. Doughty, Q.C., and *J. G. K. Sheldon* for the plaintiff.

Stephen Chapman, Q.C., for the defendants.

The Solicitor-General (*Sir Harry Hylton-Foster, Q.C.*) and *Rodger Winn* as amici curiae.

Cur. adv. vult.

July 20. **DEVLIN, J.**, read the following judgment: I have already determined that as a result of the defendants' negligence the plaintiff lost earnings at the rate of £17 per week for a period of incapacity which I estimated as being between three and four weeks. Special damage, therefore, amounts at most to £68. The plaintiff was during this period in receipt of industrial injury benefit and so I have to apply the Law Reform (Personal Injuries) Act, 1948, s. 2 (1), which provides as follows:

> " In an action for damages for personal injuries . . . there shall in assessing those damages be taken into account, against any loss of earnings or profits which has accrued or probably will accrue to the injured person from the injuries, one-half of the value of any rights which have accrued or probably will accrue to him therefrom in respect of industrial injury benefit,

A industrial disablement benefit or sickness benefit for the five years beginning with the time when the cause of action accrued."

The plaintiff received benefit during the period of incapacity at the rate of £4 7s. per week. Half this figure for four weeks amounts to £8 14s., which would reduce the figure of £68 to £59 6s. As I have said, I regard the period of incapacity
B as rather less than four weeks and I think that on this basis of calculation a fair figure to take as special damages would be the round sum of £50. The defendants, however, submit that this is not the true basis. The plaintiff has been receiving benefits over a much longer period than four weeks, and totalling much more than £8 14s. There is no doubt that, for one cause or another, he was incapable of work for a long period, and the authorities responsible for assessing the
C benefit took a more favourable view of the claim which he presented to them than I have done of the one which he made in this court; they regarded the whole of his incapacity as a result of the accident. The total of the benefits which the plaintiff has received amount to date to £178 13s., and he is still in receipt of a weekly sum of £1 0s. 3d. Counsel for the defendants submits that the total benefit falls to be taken into account under s. 2 (1) of the Act of 1948. If so, a half of it
D is more than sufficient to extinguish the whole claim for loss of earnings, and counsel, therefore, submits that the plaintiff should have judgment for no more than £25, the sum which I have awarded as general damages.

This appears at first sight to be a startling submission. My first inclination would be to suppose that, where there is a difference of view over the period of disability caused by the casualty, I should concern myself only with the period
E which I have found to be correct; if the plaintiff has obtained benefit for a longer period than I think correct, that is something which lies between him and the National Insurance authorities and does not concern me. Counsel for the defendants, however, invites me to look at the matter rather differently. The benefits which the plaintiff receives are, he submits, the fruits of an insurance, to which both employer and employee contribute, and the terms of it are that
F payments made under the insurance are to be divided in the way in which the Act specifies. If the plaintiff obtains under the insurance scheme what this court must regard as a windfall, there is nothing inequitable in the notion that he should share that with the employers in the same way as he has to share the admittedly correct payments.

The point depends on the construction of s. 2 (1) of the Act of 1948. It is a
G difficult and important one, and one which affects many members of the public not directly concerned with this case. Accordingly, I asked for the assistance of the law officers in determining it, and I have had the benefit of a very full and helpful argument by the Solicitor-General. The Solicitor-General began by summarising the nature of the benefits with which s. 2 of the Act of 1948 is dealing. I shall first set them out and then recapitulate the facts which I have already
H found in so far as they are relevant to this point, and then consider the points of construction that are raised under the section.

Section 2 of the Act of 1948 specifies three classes of benefits to be taken into account—industrial injury benefit, industrial disablement benefit and sickness benefit. Industrial injury benefit and industrial disablement benefit are paid under the National Insurance (Industrial Injuries) Act, 1946, and they are
I payable by virtue of s. 7 of the Act in the case of an injured person who suffers personal injury by accident arising out of and in the course of his employment. If as the result of the relevant injury he is incapable of work, he is paid industrial injury benefit at a weekly rate during the period of incapacity. This period is not, however, to exceed six months [s. 11 (1) and (4)]. If at the end of that period he is, as the result of the relevant injury, suffering from loss of physical or mental faculty, the extent of his disability is assessed and he will be paid a disablement benefit stated in the form of a percentage which corresponds to the degree of his disablement [s. 12]. If a final assessment cannot at once be made, the matter

proceeds by means of provisional assessments for limited periods. If the amount is small, the benefit takes the form of a lump sum gratuity; if it is larger, it takes the form of a disablement pension at a weekly rate. It is to be noted that, while for this purpose it is necessary that the claimant should have a loss of faculty, that need not involve any loss of earning power, and a workman may, therefore, go back to his pre-accident rate of wage and still draw disablement benefit. Disablement benefit is, therefore, not compensation for incapacity, and an employee may after six months still be incapable of work. In such circumstances, although industrial benefit ceases, he can draw sickness benefit which is payable under s. 11 of the National Insurance Act, 1946. Sickness benefit is less to the extent of about one-third than industrial injury benefit. Industrial injury benefit, while it is paid, comprehends sickness benefit, but sickness benefit has nothing to do with industrial injury as such. The former benefit is only payable if the injury is the result of an industrial accident, while the latter is payable in the case of any sort of sickness, however caused.

It is convenient that I should state briefly how, under the National Insurance (Industrial Injuries) Act, 1946, injury and disablement benefits are determined. Under s. 25 there are provisions for the making of claims, and a group of sections in Part 3 of the Act, s. 36 to s. 52, provides for their determination. Certain medical questions—whether the accident has resulted in the loss of faculty and what is the extent of the disablement, and so on—are determined by a medical board or a medical appeal tribunal [s. 36 (1) (c)]. These questions relate to disablement benefit. All questions concerning industrial injury benefit are determined in the first instance by an insurance officer [s. 36 (2)]. There are rights of appeal from his decision to local appeal tribunals and to the industrial injuries commissioner [s. 36 (2) and s. 47]. A claim for industrial injury benefit is submitted for a certain period, for example, for a month, and, if granted, benefit will be paid for that month. If a claim based on the same injury is made for the following month, there is nothing to prevent the insurance officer taking a different view of the cause of the injury and disallowing the claim. A decision given in respect of the preceding month could not, however, be altered except by the process of review, as provided for in s. 50. Under this section the insurance officer must be satisfied by fresh evidence that the decision was given in ignorance of, or was based on a mistake as to, some material fact, or that there has been a relevant change of circumstances. If a decision is reversed or varied, repayment is to be required of benefits mistakenly paid, unless it is shown that the claimant was acting in good faith in all respects as to the obtaining and receipt of the benefit. There are similar provisions in relation to disablement benefit and sickness benefit which I need not set out in detail. Subject to the prescribed right of appeal, the insurance officer's decision on injury benefit is final; and there was in this case no appeal.

The plaintiff, who is forty-two years of age, was employed at the Isle of Grain refinery, and on Apr. 29, 1953, in the course of his work he was injured by the sling of a travelling crane which was being carelessly operated. He was struck on the legs above and below the knee and thrown to the ground. He sustained severe bruising and shock. He continued work for a couple of days, but saw his doctor at the week-end, who ordered him to stay at home. From May 4 he was paid injury benefit at the rate of £4 7s. a week until Aug. 30, when it was reduced to £3 5s. 6d. a week, at which rate it continued for the remainder of the six months' period. After he had been off work for a fortnight or more he complained of a swelling near the right knee joint. His doctor sent him to hospital where the swelling was diagnosed as a tumour, for which it was necessary to operate. The operation took place on July 8, 1953, and the tumour was removed. Before he was fit to go back to work again he complained of similar swelling in the left leg. This was the subject of a minor operation under a local anaesthetic in November, 1953. The evidence about it is not very clear, but it appears to have been caused by the formation of a ganglion. He had to have therapeutic treatment after both these operations, and his recovery was throughout delayed by his mental condition in that he suffered from what the doctors called "compensitis." The six months' industrial injury period expired about the end of October, and from then until Feb. 20, 1954, he received sickness benefit at the rate of £2 3s. a week. He did not in fact return to work until May 1, 1954. Before that he had put in a claim for disablement benefit, and his disability had been provisionally assessed at ten per cent. and he was paid disablement gratuities accordingly.*

In fact, the tumour on his right leg had been in existence a long time before the accident and it would have had to have been operated on anyway as soon as it was discovered. Whether this was known to the insurance officer or to the medical board, I do not know. It appears that his own doctor knew of it only on the day preceding the trial before me. The trial took place on Jan. 19, 1955, and on the evidence before me I held that neither the tumour nor the ganglion was caused by the accident and that I could award damages only in respect of the bruising and could take into account loss of earnings only during the limited period in which he was suffering from the bruising and the shock of the accident, which I estimated, as I have said, as between three and four weeks. On Jan. 28 another provisional assessment was made and the percentage of disablement was increased from ten per cent. to thirty per cent. Whether this was propter or merely post my decision I do not know. Obviously, the question whether a pre-existing tumour is aggravated by a blow to the extent that the blow can properly be described in law as a cause of the suffering resulting from the tumour is one which may well cause a difference of medical opinion and on which different findings may understandably be obtained. This is one of the reasons which makes it important to determine what is the true position under s. 2 (1) of the Law Reform (Personal Injuries) Act, 1948, when different findings are made.

The argument of the Solicitor-General supports in general that which has been advanced by counsel for the defendants. He submits that the court ought not, in effect, to review the findings of the insurance officer, and that it would be very inconvenient if it attempted to do so: injury benefit is paid on the insurance officer's view of the facts and it is now impossible to say how much is attributable to the bruising and how much to the tumour and ganglion and their consequences. I agree, of course, that it is no part of my duty to review the findings of an insurance officer. It is, however, my duty to assess the damages and to inquire into any facts that may be relevant for the purpose of that assessment. I see no difficulty in such an inquiry and no need to question the insurance officer if such a course conflicts with the authority of *Ward* v. *Shell-Mex & B.P., Ltd.* (1) ([1951] 2 All E.R. 904). I should simply have to determine, as in fact I have done in this case, on the medical evidence laid before me what is the probable period of incapacity if the bruising alone is to be regarded. While the answer to that must to some extent be notional, this court is well used when assessing damages to dealing with matters of that kind. In truth, I think that it is the Solicitor-General's construction which leads to the more difficult line of inquiry; for it might then be necessary to consider whether the insurance officer's decisions in the future would be likely to be affected by the decision of the court or by the evidence called before it. Let me illustrate from the facts of this case. Did the insurance officer, when he made his determination, know that the tumour was in existence before the accident? If not, is he likely in the light of this fresh evidence to alter his determination? If he alters his determination, will it affect only the future or might he consider that the non-disclosure amounted to bad faith and require repayment of past amounts? Even if he did know of the tumour, might he be influenced in making future decisions by the views expressed by the medical witnesses for the defence before me if those views were brought to his attention? These points do not, for reasons which I shall give later, in fact arise for consideration in this case. I mention them only to show the sort of difficulties which might arise.

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* According to a document put in at the final hearing by the Solicitor-General the total sums received by or awarded to the plaintiff were: £101 4s. 10d. injury benefit; £35 16s. 8d. sickness benefit; £18 5s. disablement gratuities; and £23 6s. 6d. disablement pension.

I do not think that these considerations, or any other of the general considerations to which I have hitherto referred, point to one construction or the other as being the more likely or the more reasonable one. It seems to me that it would be just as reasonable for Parliament to do the one thing as the other. It might have decided to treat payments made under the Act as if they were payments under an insurance policy in which the premium was shared, or it might have decided that earnings and benefits must correspond; it might or might not have had regard to the difficulties which might arise on either type of inquiry. I think that my only course is to take the words which Parliament actually used and give them the meaning which in their context I think that they should bear.

The first point which, I think, has to be determined is what is meant by the word " injuries " where it is used in s. 2 (1) of the Law Reform (Personal Injuries) Act, 1948. What has to be assessed is " the value of any rights which have accrued or probably will accrue to [the plaintiff] therefrom." " Therefrom " plainly means, if one reads back ," from the injuries "; and the injuries referred to, if one reads further back still, are plainly those personal injuries for which damages are being assessed. Do these injuries mean the blow or blows inflicted on the plaintiff, or do they mean the various injuries from which in consequence he suffered or is said to have suffered—that is, the bruises, the tumour and the ganglion? If these three are all separate injuries within the meaning of the sub-section, then it seems to me that the defendants' submission must necessarily fail. For the injuries for which I am assessing damages are solely the bruises, and what I should, therefore, have to inquire into would be the rights in respect of industrial injury benefit, etc., which accrue from the bruising. As I have already said, if that is the inquiry which the sub-section says is to be made, I can see no insuperable difficulty in making it. In my judgment, however, that is not the meaning which should be given to the word " injuries."

In the first place, I attach no importance to the use of the plural rather than the singular. An action for " damages for personal injuries " is a term well known to legal practitioners and the action will not fail merely because there is only one injury which could be proved. The noun is used collectively and because (as in this case, where the plaintiff was struck blows above and below the knee) there is usually more than one bodily injury arising from the same casualty. I observe that the term used in the National Insurance (Industrial Injuries) Act, 1946, is " personal injury " in the singular. I do not think, therefore, that the expression " personal injuries " necessarily points to the consequences of the blow rather than to the blow itself. Indeed, I do not think that it is intended to draw any distinction between the blows and their immediate consequences. The blows which the plaintiff sustained set up certain physical changes, such as bruises, and were capable of setting up or aggravating other physical changes, such as tumours and ganglions. Such blows may set up also mental changes resulting from shock to the nervous system. In ordinary parlance the term " injuries " is used to describe both the initial blows and some of the more immediate consequences. Bruises would, normally, be comprehended in the term " injuries " in its ordinary use. Tumours might be; mental changes might not. The ordinary meaning is, for the purposes of the Act of 1948, supplemented by a statutory definition in s. 3 of that Act which provides that the expression " personal injury " is to include " any disease and any impairment of a person's physical or mental condition." I am not concerned, however, to determine the point at which the mental or physical processes degenerate into something

A which is no longer an " injury." I am concerned to see at what point the process starts and the injury or group of injuries or complex of injuries (I think that the terms are interchangeable) begins. I think that it plainly begins with the blows, and that what follows is all part of the same injury or group or complex of injuries. The bruising is one manifestation of the injury, and the tumour, if it is due to the blows, is another manifestation. They are not, for the purpose B of the expression " personal injuries ", new and separate injuries. When, therefore, I inquire under s. 2 (1) of the Act of 1948, " What rights accrue from the ' injuries '? ", I must ask myself what rights accrue from the blows.

The rights which have to be valued are " in respect of industrial injury benefit, industrial disablement benefit or sickness benefit "—that is to say, they are rights arising under the statutes which provide for those benefits. I think C that the Solicitor-General is correct in his submission that these rights are worth what is paid in respect of them under the statute, neither more nor less. For example, if the claim is not put in within the prescribed period, they may be worth nothing. Since the statute prescribes that the insurance officer's decision is to be final, if he values them at nothing, they are in fact worth nothing. This is not because the insurance officer's view of the matter is necessarily any better D than the court's, but because the right which has to be valued is not a right to the payment which the court thinks appropriate, but a right to the payment which the insurance officer thinks appropriate. In the same way, if I had to value rights arising out of a breach of contract, and the contract contained an arbitration clause and the arbitrator had made an award of damages, the value of the rights would be the amount of his award, and it would be quite E irrelevant for me to inquire whether he had fallen into any error or not.

These considerations defeat, I think, what might otherwise be an attractive argument that the payments made to the plaintiff after the four weeks' period have accrued to him, not by reason of the injury, but by reason of a mistake made about the nature of the injury. I think that a mistake in assessing the consequences of the blow is irrelevant; it is not a matter to be inquired into at F all. The blow is the event which creates the right to benefit under the statute; the value of that right is what is paid under the statute in respect of the blow. The statute lays down its own processes, and I have to value what those processes produce. I am no more concerned with errors in the application of the process than I would be concerned if I had to value manufactured foods with errors in manufacture.

G Counsel for the plaintiff puts what is, I think, substantially the same argument in another form. He points out that the word used in the statute is " rights " and not " benefits ". He, therefore, submits that what I have to value is what the plaintiff has a right to have under the statute and not what he actually gets. It is, therefore, my duty, he argues, to determine what under my view of the facts the plaintiff ought to have got under the statute. A good way of testing this H argument is to inquire what the position would have been if the situation were reversed and the insurance officer had held that an injury which caused the plaintiff to be away from work was not caused by an industrial accident. If I held that it was and gave the plaintiff damages, ought I to deduct from the damages half the benefits which I thought he ought to have received ? Counsel for the plaintiff does not shrink from arguing that in such circumstances I ought. Nothing, I however, that I could say or do could make the insurance officer pay any benefits, so that I would be valuing at a sum of money rights which were in fact worthless. I do not think that the word " rights " in the statute is used jurisprudentially. Used, as it is, in connection with a requirement that the rights should be valued, it is, I think, used in a commercial sense; rights under a contract, for example, may be valuable or not according to whether the promisor is solvent or not. If " rights " in this sense has the same meaning as " benefits " has, as counsel for the plaintiff argues, I do not think it is an objection. I think that in substance that is what in this context it does mean, and that the word is used because what has to be valued is not merely benefits which have been received but also the right to future benefits.

In my judgment, therefore, the rights which accrue from the injuries are the sums which are, in fact, paid or likely to be payable in accordance with the statute in respect of the injury or injuries which put the statute into operation, that is, the blows which constitute the accident.

Before I turn to a third disputed point of interpretation, I think that I ought to notice another interpretation for which no one in this case has contended. It is tempting to think that the intention of the legislature in s. 2 (1) was that like should be compared with like, and that the earnings or profits which were to be put on one side of the balance sheet should have measured against them benefits which correspond. That result might be achieved in the following way. The court has to determine in the first instance " loss of earnings or profits which has accrued or probably will accrue ". Earnings or profits accrue over a period and there is, therefore, inherent in any assessment of amount a determination of the period during which the loss has been sustained. When the court turns to its next task of valuing the benefits, might it not appropriately value them over the period which it has already ascertained and for no longer ? The difficulty about this construction is that it involves reading into the section a reference to period which is not there. For this reason this construction was decisively rejected by SLADE, J., in *Stott* v. *Sir William Arrol & Co., Ltd.* (2) ([1953] 2 All E.R. 416), and no one before me has challenged the correctness of his decision. Apart from this, the case does not help on the arguments which I have hitherto been considering. In that case the plaintiff sustained injuries which incapacitated him for five weeks and resulted in a loss of earnings which, after the deduction of industrial injury benefit, amounted to £41 6s. 9d. After he returned to work, he suffered no loss of wages, but, none the less, received disablement benefit amounting to £126 13s. SLADE, J., decided that the employers were entitled to use one-half of the disablement benefit so as to extinguish their remaining liability for loss of earnings. The present case is distinguishable on the ground that in *Stott* v. *Sir William Arrol & Co., Ltd.* (2) the disablement benefit was, on any view of the sub-section, paid as the result of the injuries.

The last point which I have to consider is the meaning in the sub-section of the phrase " taken into account ". Counsel for the defendants submits, and the argument of the Solicitor-General supports him, that " taken into account " means no more than that I must make as accurate a valuation as I can of the rights, relying on exact figures where payments have already been made and on estimated figures where the future is concerned. Counsel for the plaintiff submits that the phrase gives me a discretion as to the way in which I value the rights. I was referred to *Metropolitan Water Board* v. *St. Marylebone Assessment Committee* (3) ([1923] 1 K.B. 86), where LORD HEWART, C.J., happily phrased the distinction. He said (ibid., at p. 99):

> " ' To take into account ' in the sense of including figures in a mathematical calculation is one thing; ' to take into account ' in the sense of paying attention to a matter in the course of an intellectual process is quite another thing."

In my judgment, the section which I have to construe does not contemplate an intellectual process. There is no room for the exercise of any discretion, for nothing lies between giving effect to figures and estimates, on the one hand, and rewarding deserving plaintiffs and penalising undeserving ones, on the other hand. Counsel for the plaintiff submits that I ought to take the benefits into account only in respect of the period affected by the loss of earnings, and that any other result would be inequitable. That is inviting me to exercise my discretion in order to defeat the construction which I have just put on the statute. A more appealing ground might, I think, be that I should exercise my discretion in order that the plaintiff should not be worse off than he would have been under the statute if the insurance officer had taken the same view as myself. The insurance officer, in effect, gave him a sum which works out on the average at about £3 15s. per week, of which he can, in effect, keep only one-half, that is, £1 17s. 6d. Had the insurance officer taken my view of the facts, the plaintiff would have had sickness benefit at the rate of £2 3s. per week and retained it all; but then he would not have had any disablement benefit.

In my judgment, I have no discretion which would justify me in trying to evaluate matters of this sort. Counsel for the plaintiff relied on the decision of SLADE, J., in *Stott* v. *Sir William Arrol & Co., Ltd.* (2). SLADE, J., thought that the words "taken into account" implied a discretion, and he stated that he did exercise his discretion. I think that he was using the term in a very limited sense. I dare say there may be a discretion in the sense that the court is not obliged to make exact calculations but can arrive at a round sum; I do not think that SLADE, J., can have meant that there was a discretion in the wider sense for which counsel for the plaintiff contends. Accordingly, I conclude that the argument of counsel for the defendants succeeds, and that there should be judgment in this case for £25 only.

As I have had the benefit of a full argument from the Solicitor-General, I think that I ought to mention two points which were considered in the course of the argument, but on which I have not for the purposes of this case got to reach a decision. The value of the benefits which the plaintiff has received to date as industrial injury or disablement benefit is large enough for one-half to extinguish the loss of earnings. I have been told by the Solicitor-General that no question will be raised about the plaintiff's good faith, and, accordingly, the payments which have been made to him are secure. Counsel for the defendants, therefore, succeeds without having to raise any question on sickness benefit paid in the past or about disablement pension which may be payable in the future or about the possibility of a review.

With regard to sickness benefit the Solicitor-General submitted that this does not in this case fall to be taken into account. Under s. 11 (1) of the National Insurance Act, 1946, sickness benefit is payable in respect of any day of incapacity for work which forms part of a period of interruption of employment. The incapacity may follow on an injury, but the event which brings the statute into operation is not the injury but the incapacity; sickness benefit can, of course, be payable when there has been no injury at all. The rights are, therefore, rights whose immediate source is the incapacity, and the question is left open whether or not the incapacity is caused by the injury. If it is, then the rights accrue from the injury. If it is not, then they do not. That is a point which the court must itself decide for the purposes of its own determination. This is the Solicitor-General's submission, and I think that it is right. Counsel for the defendants submits that in a case like this I ought to have regard to the view of the insurance officer and on that view the sickness was caused by the injury; the sickness benefit was in this case paid as a continuation of the industrial injury benefit and they ought not to be treated differently. Whatever the merits of this latter argument, I think that the question must be decided by my view of the meaning of s. 2 (1) of the Act of 1948. I am bound by the insurance officer's finding in respect of industrial injury benefit, not because I defer to him as a tribunal, but because I have to put a figure on rights for which his valuation is conclusive. In this sense I am bound by any valuation which it is his function to make; but I am not bound by a valuation which I think he might have made if he had applied his mind to facts which it is no part of his duty to consider. The other point on which some discussion took place was how the court should evaluate the effect of its own findings on the plaintiff's further rights under the statute. I have already mentioned some of the difficulties which might arise. Fortunately I have not got to deal with them in this case, and the Solicitor-General prudently confined himself to saying, in effect, that they would have to be solved when they were encountered.

Judgment for the plaintiff for £25 as general damages.

Solicitors: *Shaen, Roscoe & Co.* (for the plaintiff); *L. Bingham & Co.* (for the defendants); *Solicitor, Ministry of Pensions and National Insurance.*

[*Reported by* A. P. Pringle, Esq., *Barrister-at-Law.*]

Re E. (an infant).

[Chancery Division (Roxburgh, J.), July 28, 1955.]

Infant—Removal outside jurisdiction—Application under Guardianship of Infants Acts, 1886 *and* 1925*—Custody and access the subject of an order of Canadian court—Guardianship of Infants Act,* 1886 (49 *&* 50 *Vict. c.* 27), *s.* 5, *as amended by the Administration of Justice Act,* 1928 (18 *&* 19 *Geo.* 5 *c.* 26), *s.* 16.

Infant—Jurisdiction—Inherent jurisdiction of court—Need of application to make infant a ward of court—Law Reform (Miscellaneous Provisions) Act, 1949 (12, 13 *&* 14 *Geo.* 6 *c.* 100), *s.* 9 (1)*—R.S.C., Ord.* 54P, *r.* 1.

A Canadian infant aged 6½ years was the subject of an order of a Canadian court which gave her to the custody of her mother, with rights of access to the father. The mother brought the child to England by agreement with the father and subsequently married an Englishman. The father issued an originating summons intituled in the matter of the infant and " In the matter of the Guardianship of Infants Acts, 1886 and 1925 " for an order to the effect that the mother permit the child to spend a holiday in Israel with the father, where he was stationed as an officer attached to a United Nations organisation. The summons did not ask that the infant be made a ward of court.

Held: (i) the application was an application under the Guardianship of Infants Acts, 1886 and 1925, and under no other jurisdiction: under those Acts there was no jurisdiction to make an order that the mother should permit the infant to be taken out of the jurisdiction of the court, because such relief related neither to custody nor to right of access.

(ii) inherent jurisdiction, such as is proper to be exercised by the court over infants brought under its authority as wards of court, should not be exercised (in the case of an infant who is not already a ward of court) except on or after the infant's being made a ward of court pursuant to s. 9 of the Law Reform (Miscellaneous Provisions) Act, 1949; and, as in the present case no proceedings for that purpose had been taken in accordance with R.S.C., Ord. 54P, the court could not exercise on the present summons its inherent jurisdiction over wards of court.

[**Editorial Note.** The court has been said to exercise, beyond its general jurisdiction over all infants, a special jurisdiction and control over a ward of court (see 17 Halsbury's Laws (2nd Edn.) 718, para. 1470). Thus there is a special sense in which the term ward of court has been used as well as the more general sense in which all British subjects who are infants are wards of court, because they are subject to that sort of parental jurisdiction which is entrusted to the court in this country and which has been administered continually by the courts of the Chancery Division (see per Kay, J., in *Brown* v. *Collins* (1883), 25 Ch.D. at pp. 60, 61). The inherent jurisdiction of the court over infants rests in origin, however, on the position of the Crown as parens patriae, and in those cases where the consequence of an order under the inherent jurisdiction would, apart from s. 9 of the Law Reform (Miscellaneous Provisions) Act, 1949, be to make an infant, who was not hitherto a ward of court, become a ward of court, the order should not be made now except concurrently with or after an

A order has been made on an application under s. 9 (1) to make the infant a ward of court.

As to the exercise of the court's jurisdiction concerning a father's access to his child, see 17 HALSBURY'S LAWS (2nd Edn.) 661, para. 1378; and for cases on the subject, see 28 DIGEST 267, 268, *1202*, *1204-1209*.

As to an infant's becoming a ward of court, see 17 HALSBURY'S LAWS (2nd B Edn.) 717, para. 1470 note (p); and for cases on the subject, see 28 DIGEST 337, *2038* et seq.

For the Guardianship of Infants Act, 1886, s. 5, see 12 HALSBURY'S STATUTES (2nd Edn.) 943; and for the Law Reform (Miscellaneous Provisions) Act, 1949, s. 9 (1), see 28 HALSBURY'S STATUTES (2nd Edn.) 777.]

Cases referred to:

C (1) *Brown* v. *Collins*, (1883), 25 Ch.D. 56; 53 L.J.Ch. 368; 49 L.T. 329; 28 Digest 335, *2017*.

(2) *Re Newton* (*Infants*), [1896] 1 Ch. 740; 65 L.J.Ch. 641; 73 L.T. 692; 28 Digest 266, *1189*.

Adjourned Summons.

D The father of an infant applied by originating summons under the Guardianship of Infants Acts, 1886 and 1925, for an order that the mother should permit the infant to spend a holiday with him in Israel. The respondents to the summons were the mother and the infant.

R. J. Parker for the applicant.

Charles Russell, Q.C., and *C. H. Gage* for the respondents.

E **ROXBURGH, J.:** I have decided to deliver my judgment in open court because the point that has arisen arises frequently and is of undoubted importance to the profession.

The point arises in this way: The infant is a Canadian infant and she is the subject-matter of an order of a Canadian court which gave her to the custody of her mother with certain rights of access to the father. She is now 6½ years old. F There was no express provision in the Canadian order as to the infant leaving Canada. I do not know whether or not it was permissible, under the law of Canada, to take the child out of the jurisdiction without an order. Probably it was, but it is not material for me to decide, for the father undoubtedly consented on certain terms to the child being taken to London with the mother who subsequently re-married, and on this occasion married an Englishman. The G mother is domiciled in England. The child is in London, and there is not the slightest doubt that I have jurisdiction to deal with the child if my jurisdiction is properly invoked.

The object of this application is to obtain an order on the mother to permit the child to spend a holiday with the father in Israel, where he is stationed in the exercise of his profession. He is an officer attached to a United Nations H organisation.

The application is intituled solely " In the matter of the infant " and " In the matter of the Guardianship of Infants Acts, 1886 and 1925 ", and, what is still more important, it does not ask that the infant should be made a ward of court. Therefore, it is plainly an application made under the Guardianship of Infants Acts and under no other jurisdiction, inherent or otherwise.

I It is quite clear that the court, which sometimes means magistrates and sometimes a county court and sometimes the High Court, may make such order as it may think fit regarding the custody of an infant and the right of access thereto of either parent, having regard to various circumstances mentioned in the section [s. 5 of the Guardianship of Infants Act, 1886*]; but is this an application with regard to either of those matters ? It certainly is not an application with regard to custody. If it is anything, it is an application in regard to the right of access; but there is no dispute as to the right of access. There are provisions in the Canadian order with regard to the right of access. True, they are somewhat vague, but there is no dispute that the father may have access to the child in any event for periods which no doubt could be agreed if the father were in England during the summer holidays; but the father is not and does not want to come to England during the summer holidays. What he wants is some order authorising the mother, or, I think, something more, because the mother is advancing every possible objection, namely, an order ordering the mother to let the child go out of the jurisdiction to Israel.

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* 12 HALSBURY'S STATUTES (2nd Edn.) 943; the powers of the court under this provision (as amended by the Guardianship of Infants Act, 1925, s. 3) are exercisable on the application of the father by virtue of the Administration of Justice Act, 1928, s. 16.

In my view, such an order cannot be obtained under the Guardianship of Infants Acts, 1886 and 1925, and that is the importance of this matter. First of all, I would hardly have thought that it could possibly be brought within the words " right of access " on any construction, because what is really in issue is not the right of access, but the country in which the infant is to be for the time being, in other words, whether she is to remain in London or whether she is to go to Israel. Secondly, a little regard to the normal practice of the courts would show how inconvenient any other conclusion would be. In this particular case the infant is a Canadian infant and therefore the normal considerations do not apply; but it is well-known that the court practically never allows any English infant to leave the jurisdiction without undertakings by some person that the child shall be returned within the jurisdiction. The High Court has machinery which enables it to accept undertakings and to enforce them; but the words " in . . . this Act " [in s. 9 of the Act of 1886] must have the same meaning whether the Act is being applied by the magistrates* or by the county court or by the High Court, and neither the magistrates nor the county court have any machinery for accepting or enforcing undertakings. Therefore, I do not think for a moment that it is a mere accident that the powers conferred by the Guardianship of Infants Acts are less extensive than the powers which the Chancery Division of the High Court of Justice enjoys by virtue of its inherent jurisdiction over infants.

On the other hand, the inherent jurisdiction of the Court of Chancery is undoubtedly in a certain sense restricted by the Law Reform (Miscellaneous Provisions) Act, 1949, s. 9 (1), because that section provides:

> " Subject to the provisions of this section, no infant shall be made a ward of court except by virtue of an order to that effect made by the court."

That appears to me to involve this, that the court is not entitled to exercise its inherent powers in relation to infants until an order to that effect has been made by the court. I am not forgetting that there are in the rules provisions under which an interlocutory order can be made before the hearing of the summons; but that is expressly provided for by the rules to which I will come presently. Apart from the rules, this provision seems to me to show plainly that the Court of Chancery can no longer exercise its inherent jurisdiction in relation to infants until it makes an order that the infant in question is to be a ward of court, because " ward of court " has been defined to mean a person properly under the care of a guardian appointed by the court; but the term has been extended to infants brought under the authority of the court by an application to it on their behalf, though no guardian is appointed: *Brown* v. *Collins* (1) (1883) (25 Ch.D. at p. 60). The court becomes in effect the guardian of such an infant: see per KAY, L.J., in *Re Newton* (*Infants*) (2) ([1896] 1 Ch. at p. 745). Therefore, when the Act says that no infant shall be made a ward of court except by virtue of an order to that effect made by the court, it seems to me that it is in effect saying that the court shall no longer exercise its inherent powers except in relation to a

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* I.e., by virtue of s. 7 of the Guardianship of Infants Act, 1925; 12 HALSBURY'S STATUTES (2nd Edn.) 958.

A person who has been made a ward of court pursuant to s. 9 of the Law Reform (Miscellaneous Provisions) Act, 1949.

How that has to be done is clearly defined by R.S.C., Ord. 54P, which is specifically applicable to proceedings under the Law Reform (Miscellaneous Provisions) Act, 1949. In my judgment, the compliance with the rules relating to it is not a mere technicality, because, as a short study of the rules shows, B it is essential that people should know at any moment whether a person is or is not a ward of court. Order 54P, r. 1, provides:

> "An application to make an infant a ward of court shall be made to the Chancery Division either by originating summons, or by an ordinary summons in any action in the Chancery Division to which the infant is C a party. The summons [and this is important] shall, in addition to any other relief sought, ask specifically that the infant be made a ward of court."

The summons which is before me does not comply with that rule because it does not ask that the infant be made a ward of court, nor is it intituled in the matter of the Act of 1949. I think myself that that provision is intended to be D and is important. The present position is that there is before me an action in the Chancery Division to which the infant is a party, because the infant is a party to the summons under the Guardianship of Infants Acts which is before me, and such a summons is, in my view, an action within the meaning of r. 1. So that it is possible for the father to take out an ordinary summons asking that the infant should be made a ward of court; but that is by the way. The summons E as it is at present does not comply with Ord. 54P, r. 1.

Rule 2 is important and provides:

> "The summons shall forthwith after issue be produced by the applicant at the office of the Chief Master . . . for recording in the Register of Wards and shall be marked by the officer recording the summons that it has been so produced and recorded."

F That is very important because the infant becomes a ward on the moment of the issue of a properly designed summons. I have grave doubt whether I could allow the particular summons now before me to be amended having regard to the words "forthwith after issue" in r. 2 set out above, but in any case no time and very little money would be saved by an amendment as distinct from the issue of an ordinary summons as provided by r. 1. Rules 3 and 4 provide:

> G "3. Unless within twenty-one days after its issue an appointment is obtained for the hearing of the summons the infant shall cease to be a ward of court at the expiration of the said period of twenty-one days. Upon an appointment being obtained as aforesaid the infant shall continue to be a ward of court until the determination of the application.
>
> H "4. If no appointment is obtained within the said period of twenty-one days the applicant shall leave at the Chief Master's office a notice in writing to that effect for recording in the Register of Wards."

In my judgment, compliance with Ord. 54P is now necessary in order to enable the court to exercise its inherent powers over wards of court. This summons does not comply with Ord. 54P and therefore the only jurisdiction that I have I today is jurisdiction under the Guardianship of Infants Acts, 1886 and 1925, and, in my judgment, those Acts do not empower me to authorise, still less to order, the mother to send the child or allow the child to be taken to Israel.

Order accordingly.

Solicitors: *George & George* (for the applicant); *Stanley Attenborough & Co.* (for the respondents).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

Re TRUSTS AFFECTING 26 CLARENDON VILLAS, HOVE. COPELAND *v.* HOULTON.

[CHANCERY DIVISION (Wynn-Parry, J.), July 28, 1955.]

Legal Aid—Costs—Compromise—Costs of giving effect to compromise—Conveyancing matters—Legal Aid and Advice Act, 1949 (12 *&* 13 *Geo.* 6 *c.* 51), *s.* 1 (5).

The plaintiff brought an action to have property, then standing in the name of the defendant, conveyed to him on the footing that he was beneficially entitled to it. The action was compromised, the defendant admitting that she held the property on trust for the plaintiff and the parties agreed to the terms set forth in the schedule to the order. It was ordered that " it be referred to the taxing master to tax as between solicitor and client in accordance with the provisions of Sch. 3 to the Legal Aid and Advice Act, 1949, the costs to which that Act applies incurred on behalf of the plaintiff and the defendant respectively ". The schedule to the order by para. 1 provided that the defendant would convey to the plaintiff the property in question subject to an existing mortgage and, should it be necessary, for an indemnity by the plaintiff to the defendant against future liability under the mortgage. It was further provided, by para. 3 of the schedule that " The documents necessary to carry out the foregoing terms shall be in such form as counsel for the plaintiff and for the defendant shall agree and in default of agreement as the judge shall direct ". On taxation, the solicitors for the plaintiff sought to be allowed the costs of conveyancing work carried out to give effect to para. 3 of the schedule to the order. The master disallowed those costs.

Held: the costs should be allowed (subject to any question of amount) because on the true construction of the order for taxation it was intended to include all costs to which the Act of 1949 could apply, and, as para. 3 of the schedule to the order directed documents to be prepared for the purpose of carrying out the terms of the compromise, the costs were necessarily incurred " in arriving at or giving effect to a compromise . . . to bring to an end any proceedings " within s. 1 (5) of the Act of 1949, and, therefore, were costs of legal aid for which that Act made provision.

Krehl v. *Park* (1875) (10 Ch. App. 334) considered.

Lancaster v. *Lancaster* ([1896] P. 75) explained.

[For the Legal Aid and Advice Act, 1949, s. 1, see 18 HALSBURY'S STATUTES (2nd Edn.) 533.]

Cases referred to:

(1) *Lancaster* v. *Lancaster*, [1896] P. 75; *affd.* C.A., [1896] P. 118; 65 L.J.P. 34; 74 L.T. 64; 27 Digest (Repl.) 540, *4878*.

(2) *Krehl* v. *Park*, (1875), 10 Ch. App. 334; 17 Digest (Repl.) 101, *159*.

Summons to review taxation.

This summons was issued by the plaintiff to have the taxation of costs in an action reviewed and to have allowed the objections made by the plaintiff to the disallowance of certain costs. The disputed item related to conveyancing matters which arose in giving effect to a compromise reached by the parties. The facts appear in the judgment.

G. C. Raffety for the applicant.

A. L. Figgis for the Law Society.

WYNN-PARRY, J.: This is a summons to review a taxation directed by an order made by UPJOHN, J., on May 10, 1954. It is a summons which raises a question of some importance.

The action was between the plaintiff, who was the father of the defendant, and the defendant by which the plaintiff desired primarily to have a certain property conveyed to him by the defendant on the basis that he was the beneficial owner. In the event, the matter was compromised at the hearing and a consent order in the LORD TOMLIN form* was made. That order recited that the plaintiff had been granted certain certificates under the provisions of the Legal Aid and Advice Act, 1949, which, of course, were necessary to lead up to the particular form of order for taxation. It recited an admission by the defendant that she held the property in question on trust for the plaintiff, and then followed the usual recital: " And the plaintiff and the defendant by their counsel stating that they have agreed to the terms set forth in the schedule hereto and consenting to this order ". Then followed the order for taxation:

> " This court doth order that it be referred to the taxing master to tax as between solicitor and client in accordance with the provisions of Sch. 3 to the Legal Aid and Advice Act, 1949, the costs to which that Act applies incurred on behalf of the plaintiff and the defendant respectively."

It would be impossible to conceive of an order for taxation under that Act being framed in wider terms. The order then directed, in the usual way, that all further proceedings should be stayed except for the purpose of giving effect to the agreed terms, and liberty to apply was reserved.

The schedule containing the terms provided that the defendant would convey to the plaintiff the property in question subject to an existing mortgage and, should it be necessary, for an indemnity by the plaintiff to the defendant against future liability under the mortgage. With para. 2 I need not concern myself. Paragraph 3 is most important. It reads:

> " The documents necessary to carry out the foregoing terms shall be in such form as counsel for the plaintiff and for the defendant shall agree and in default of agreement as the judge shall direct."

In due course the matter went to taxation. The solicitors for the plaintiff brought in their bill, and under the heading " Part 2. Costs of conveyancing work under the order " they sought to have allowed a total sum of twelve guineas for the costs incurred in giving effect to para. 3 in the schedule to the order. The master disallowed the whole of that item, expressing no opinion as regards the question of quantum. He based his refusal on the ground that

> " costs of conveyancing work as such are not covered by the Legal Aid and Advice Act, 1949, as at present operative and the costs under objection are not therefore recoverable under such Act unless they come within the provisions of Sch. 1 of Part 1 (1) (c) thereof, viz., ' proceedings in the Supreme Court of Judicature '."

He then went on to say:

> " It has always been the practice of the taxing office that the costs of working out an order under any basis of taxation are not allowed unless otherwise so ordered by the trial judge or unless specifically referred to in and forming part of the terms of settlement as not being within the terms of the order."

He referred to *Lancaster* v. *Lancaster* (1) ([1896] P. 75), to which I shall refer later in this judgment.

The Legal Aid and Advice Act, 1949, s. 1, provides:

> " (1) This and the three next following sections provide for, and (save as hereinafter mentioned) relate only to, legal aid in connection with proceedings before courts and tribunals in England and Wales, not being proceedings in which free legal aid may be given under the enactments amended by Part 2 of this Act. (2) Unless and until regulations otherwise provide, the proceedings in connection with which legal aid may be given

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* See [1927] W.N. 290.

> are any proceedings of a description mentioned in Part 1 of Sch. 1 to this Act, except proceedings mentioned in Part 2 of that schedule."

If the matter simply rested on s. 1 (2) and Sch. 1 there might be something to be said, apart from a consideration of the authorities to which I shall later refer, for the view taken by the master. But it is essential in considering the scope of taxation under this Act to have regard to the language of s. 1 (5):

> " Legal aid shall consist of representation, on the terms provided for by this Part of this Act, by a solicitor and so far as necessary by counsel (including all such assistance as is usually given by solicitor or counsel in the steps preliminary or incidental to any proceedings or in arriving at or giving effect to a compromise to avoid or bring to an end any proceedings)."

That is clearly a definition section, and it states in perfectly clear language the matters in regard to which a legally assisted person is entitled to have representation by a solicitor and, if necessary, counsel.

I must also refer to s. 2 (2), which says:

> " Where a person receives legal aid in connection with any proceedings . . . (b) his solicitor and counsel shall not take any payment in respect of the legal aid except such payment as is directed by this Part of this Act to be made out of the legal aid fund."

It will at once become apparent from a consideration of those words why this is obviously a case of some importance. Section 1 (2) by reference to Sch. 1 indicates the proceedings in connection with which legal aid may be given, whereas s. 1 (5) shows the extent or scope of the aid when it is afforded. On the language of s. 1 (5) and without going outside it, it is perfectly clear that a legally aided person is entitled to representation by a solicitor, inter alia, for the purpose of giving effect to a compromise to bring to an end any proceedings. That at once suggests that the intention is that legal aid shall not necessarily end as soon as judgment is given in proceedings. It also clearly suggests that, although a person by his legal aid certificate is given legal aid for the purpose of bringing proceedings for the specified purpose—in this case for the recovery of the property in question—that legal aid must cover representation for the purpose of bringing those proceedings to an end, not only by a judgment after a hostile hearing, but also where the proceedings are brought to an end, doubtless with considerable saving of costs, by a compromise arrived at between the parties which from its very nature, as is the case in practically every LORD TOMLIN order, involves a working out of the terms in order to give effect to the agreement. In the present case it was clearly necessary that a certain amount of conveyancing should be done in order to work out the agreement between the parties, which agreement is scheduled to the order. That appears, as I have said, from para. 3 of the terms in the schedule.

Looking for the moment no further than the language of the Legal Aid and Advice Act, 1949, and the form of the order in this particular case, I should myself have come to the conclusion that the costs of conveyancing work under the order should be allowed in the taxation subject to any question of quantum. But as the taxing master has referred to and relied on *Lancaster* v. *Lancaster* (1) it is, I think, necessary that I should consider one or two of the authorities.

Lancaster v. *Lancaster* (1) was decided in 1896, that is, some twenty-one years after *Krehl* v. *Park* (2) (1875) (10 Ch. App. 334). In the latter case in the Court of Appeal, JAMES, L.J., said (ibid., at p. 337):

> " I am of opinion that the counsel for the respondents, the plaintiffs in the suit, are well founded in saying that, according to the well-established practice of this court, the costs of suit when given to a party are not confined to the costs of suit up to the hearing, but include the costs of all accounts and inquiries requisite for carrying out the decree: nor are these latter costs

> costs for subsequent consideration. That is the general rule, and it is very important that that general rule should not be interfered with."

The action in that case was an action for specific performance in which type of action it frequently is necessary that accounts and inquiries should be taken and made. I can see no difference in principle between such matters and the costs of a conveyance necessary to carry out the order even though it be a consent order in the LORD TOMLIN form. In that same case, MELLISH, L.J., said this in a passage which has been quoted with approval from time to time subsequently (ibid., at p. 339):

> "The rule which appears to be established is, that where costs of suit are given generally by the decree at the hearing, the subsequent costs of working out the directions of the decree will be included."

As I read the judgments in *Lancaster* v. *Lancaster* (1), that of the President and those of the Court of Appeal, the matter was decided on the basis that the costs in question could not be regarded as costs properly incurred in working out the order. On that basis, there can be no conflict between *Lancaster* v. *Lancaster* (1) and the earlier case of *Krehl* v. *Park* (2). It is quite impossible to imagine that such learned judges as considered the problem in *Lancaster* v. *Lancaster* (1) did not have clearly in their minds the rule as stated by the Court of Appeal in *Krehl* v. *Park* (2). They were dealing with a very narrow and particular problem. All that they did, as I think, was to say that in that case, applying the general rule, the costs could not be allowed because they could not be regarded as costs of suit or costs of working out the order.

I return to the order and repeat what I have already said, that it would be difficult to find an order for taxation under the Legal Aid and Advice Act, 1949, in wider terms. I construe this order without limitation as being an order specifically designed to include every item of costs to which the Legal Aid and Advice Act, 1949, could apply, and, in view of the fact that para. 3 of the schedule directs documents to be prepared for the purpose of carrying out the terms, in my view this case falls fairly and squarely within s. 1 (5) of the Legal Aid and Advice Act, 1949, as being costs necessarily incurred in arriving at a compromise to bring an end to proceedings.

Therefore, on the question of principle I am against the decision of the master. In my view, costs proper as regards quantum should be allowed to the plaintiff for the conveyancing work for giving effect to para. 3 of the terms in the schedule to the order.

Order accordingly.

Solicitors: *Bridges, Sawtell & Co.*, agents for *Robert Breach & Co.*, Hove (for the applicant); *T. G. Lund* (for the Law Society).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

PENNEY *v.* BERRY.

[Court of Appeal (Sir Raymond Evershed, M.R., Jenkins and Parker, L.JJ.), July 15, 18, 1955.]

Nuisance—Highway—Pavement—Public nuisance created by highway authority —Cover of cellar of adjoining premises not lying flush with pavement after reconstruction by highway authority—Whether owner of adjoining premises liable for resulting accident—Public Health Acts Amendment Act, 1890 (53 *& 54 Vict. c.* 59), *s.* 35 (1).

The defendant was the owner of premises adjoining the highway. In the surface of the pavement, which was part of the highway, was an opening to the defendant's cellar. The cover of the opening consisted of a metal slab, about one foot by one foot three inches in size, set in a large flagstone. In about 1950 the local authority raised the level of the pavement, and, in the course of this work, reconstructed the pavement containing the covered opening into the defendant's cellar, so that the cover had a concrete surround and rested on a ledge or rebate of concrete. From that time one side of the cover was about three-quarters of an inch higher than the pavement instead of being flush with the pavement, and, accordingly, constituted a public nuisance. In January, 1953, the plaintiff, while walking on the pavement, tripped on the cover and was injured. In an action against the defendant for damages for personal injuries the plaintiff contended, among other things, that if the defendant had not created the nuisance he had continued and adopted it, because he had been and was under a duty by virtue of s. 35 (1) of the Public Health Acts Amendment Act, 1890*, which had been adopted by the local authority, to keep the cellar-head in " good condition and repair ".

Held: an owner of land adjoining the public highway was not liable for a public nuisance on the highway which he had not created, unless he was under a duty and had power to abate it (dictum of Shearman, J., in *Horridge* v. *Makinson* (1915) (84 L.J.K.B. at p. 1296) applied); in the present case s. 35 (1) of the Act of 1890, which required cellar-heads to be kept in good condition and repair by the owners, did not extend to the defect relating to this cellar-head which was a defect of design when the pavement was reconstructed by the local authority rather than a defect of condition and repair; accordingly the defendant was not liable in damages to the plaintiff.

Appeal dismissed.

[**Editorial Note.** Parker, L.J., says (see p. 184, letter F, post) that if an adjoining frontager can be called on under s. 35 (2) of the Public Health Acts Amendment Act, 1890, to remedy a nuisance created in a public highway by the local authority it would put an intolerable burden on frontagers. The view taken by the Court of Appeal in the present case on this point is accordingly the same as that adopted by Branson, J., in *Nicholson* v. *Southern Ry. Co.* ([1935] 1 K.B. at pp. 564, 565).

As to nuisance to a highway, see 16 Halsbury's Laws (2nd Edn.) 354-363, paras. 483, 484; and for cases on the subject, see 26 Digest 416-419, *1356-1380.*

As to continuing a nuisance, see 24 Halsbury's Laws (2nd Edn.) 84, para. 148; and for cases on the subject, see 36 Digest (Repl.) 315-317, *618-633.*

For the Public Health Acts Amendment Act, 1890, s. 35, see 19 Halsbury's Statutes (2nd Edn.) 136.]

Cases referred to:

(1) *Sedleigh-Denfield* v. *O'Callaghan*, [1940] 3 All E.R. 349; [1940] A.C. 880; 164 L.T. 72; sub nom. *Sedleigh-Denfield* v. *St. Joseph's Society for Foreign Missions*, 109 L.J.K.B. 893; 36 Digest (Repl.) 316, *629.*

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* The terms of the sub-section are printed at p. 184, letter C, post.

A (2) *Horridge* v. *Makinson*, (1915), 84 L.J.K.B. 1294; 113 L.T. 498; 79 J.P. 484; 26 Digest 542, *2407*.

Appeal.

The plaintiff appealed from an order made by His Honour JUDGE MADDOCKS at Bury County Court on Apr. 4, 1955, dismissing the plaintiff's claim for damages B for personal injuries. The facts appear in the judgment of PARKER, L.J.

H. A. P. Fisher for the plaintiff.
P. Curtis for the defendant.

SIR RAYMOND EVERSHED, M.R.: I will ask PARKER, L.J., to deliver the first judgment.

C

PARKER, L.J.: This is an appeal from an order of His Honour JUDGE MADDOCKS dismissing a claim for damages for personal injuries brought by the plaintiff, Mrs. Penney, against the defendant, Mr. Berry, who was the owner of premises No. 57, Bolton Street, Ramsbottom. On Jan. 10, 1953, the plaintiff was walking along the street outside the defendant's house when she tripped on D what has been referred to, sometimes, as a grating, or a cellar-head, or a coal-hole. Whatever the correct appellation, it consists of a slab of metal, about one foot by one foot three inches in size, with six holes in it, and it is laid in a concrete surround bedded on a ledge or rebate on the concrete. It is, in fact, the cover of the opening into the defendant's cellar used in connection with his house. The learned county court judge found that, although the cover was properly bedded E down on its ledge—in other words, that it was not sticking up by reason of some coal dust or dirt—nevertheless part of it, one side of it at any rate, projected about three-quarters of an inch above the pavement, that in those circumstances the cover constituted a public nuisance, and that the plaintiff tripped on it.

The facts as found by the learned judge were these. The defendant had been the owner of the house for some time. He had bought it from his father in 1941, F and at that time the cover had been more or less in this position, but set in a large flagstone. About 1950 the local authority raised the pavement by something like six to eight inches, and, in the course of doing that, slightly altered the position of the opening into the cellar and fitted the cover into a concrete surround, so that the cover rested on this ledge or rebate in the concrete. As I understand the findings of the learned judge, from the moment that was done the cover did G not fit right down flush with the pavement, but at all times thereafter was, at any rate on one side, some three-quarters of an inch proud of the pavement. In those circumstances, the only question for this court is whether the learned county court judge was right in holding (as he did hold) that, although this was a public nuisance, the defendant was in no way liable either for its creation or for its continuation or adoption.

H Counsel for the plaintiff put his case in this way. He referred the court to *Sedleigh-Denfield* v. *O'Callaghan* (1) ([1940] 3 All E.R. 349), in which the principle was affirmed that a party, who, with full knowledge of the existence of a nuisance, fails to take any reasonable means to bring it to an end when he has ample time to do so, continues and adopts that nuisance. In that case the nuisance in question had arisen on private land. A trespasser had run a ditch on the respondent's I land into a pipe or culvert. That was known to the respondent and, in fact, he used the water that came from the culvert for his own purposes, but he failed to take any proper means of seeing that the culvert did not become blocked. As a result of its becoming blocked with leaves, damage was done to the appellant's land. In the present case there is no question of a nuisance having been created on land belonging to the defendant, and in cases such as this the general principle, as I understand it, is that there can be no duty on the owner of land adjoining the highway where the nuisance is to abate the nuisance, because the liability is, primarily at any rate, on the local authority, and, unless he has some statutory power to do so, the owner has no right to go on to the pavement to abate the nuisance. As SHEARMAN, J., put it in *Horridge* v. *Makinson* (2) (1915) (84 L.J.K.B. at p. 1296):

> "In my opinion the cases show that a liability is cast upon the owner of a house, in respect of a nuisance, only when such owner has a duty to abate the nuisance, and he fails to do so."

I think I might add that it is only when such owner has a duty and a power to abate the nuisance. Counsel for the plaintiff contended that in this case the local authority, having adopted the Public Health Acts Amendment Act, 1890, had, by reason of s. 35, put on to adjoining frontagers certain obligations. Section 35 (1) of the Act provides:

> "All . . . cellars under any street, and all openings into such . . . cellars in the surface of any street, and all cellar-heads . . . and coal-holes in the surface of any street, and all landings, flags or stones of the path or street supporting the same respectively, shall be kept in good condition and repair by the owners or occupiers of the same, or of the houses or buildings to which the same respectively belong."

It is quite clear, therefore, that there was an obligation on the defendant to keep this cover, which is a cellar-head or coal-hole, and all landings, flags or stones of this path or street supporting the same—which, as I read it, would certainly cover the concrete surround and, possibly, adjoining flagstones—in good condition and repair.

To my mind, the only question in this case is what those words "in good condition and repair" are apt to cover. Counsel for the plaintiff, in a forcible argument, said that, when considering the unit, the cover fitting into its concrete surround, one looked at the two together and said: "Are they in good condition and repair?", and that, if they were such as to constitute a public nuisance, it clearly could not be said that they were in good condition. Bearing in mind the obligation which s. 35 (1) is putting on frontagers and the fact that it is putting the obligation on the frontagers for the benefit of the local authority, I should not be astute to make the words "in good condition and repair" cover more than is necessary. It seems to me that, if an adjoining frontager can be called on, and called on at once under s. 35 (2), if counsel for the plaintiff is right, to remedy a nuisance just created by the local authority, it would be putting an absolutely intolerable burden on the frontager. It seems to me that, using the words in their ordinary sense, one looks at the cover and says: "Is it in good condition?" One looks at the surround and the flagstones and says: "Are they in good condition and repair?" Asking myself those two questions, it seems to me perfectly clear that each of them is in good condition and repair and that what is wrong, if I may use that expression, is the design or lay-out in which they were set when the pavement was reconstructed. In my view, they were in good condition and repair. Accordingly, there was no duty on the defendant to abate the nuisance nor had he the power to do so, and the liability for the nuisance would be on the local authority alone. Unfortunately for the plaintiff, owing to the relevant statute of limitations, it is now too late for her to start proceedings against the local authority and, therefore, she has, in fact, no remedy. Sorry as I am for her, I am quite clear in this case that there is no liability whatever on the defendant.

JENKINS, L.J.: I agree and find nothing which I can usefully add.

SIR RAYMOND EVERSHED, M.R.: I also agree. This is a case, unfortunately for the plaintiff, where events have proved that this cover or grating is, or may be, dangerous. If it is a fact, as it seems that it may be, that the plaintiff cannot now sue the local authority, the local authority would, no doubt, consider whether for the future they could not take some steps to put the matter right.

Appeal dismissed.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Hall & Smith*, Bury (for the plaintiff); *George Haworth & Chappell*, Ramsbottom (for the defendant).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

FRISH, LTD. *v.* BARCLAYS BANK, LTD. AND ANOTHER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Parker, L.JJ.), July 14, 15, 1955.]

Landlord and Tenant—New tenancy—Business premises—Opposition by landlord—Landlords holding as trustees—Intended letting to a beneficiary—Landlord to include " beneficiaries under the trust or any of them "—Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2 *c.* 56), *s.* 30 (1) (*g*), *s.* 41 (2).

In 1938 N.P. conveyed to the landlords certain premises to be held by them on trust for sale, and declared a discretionary trust of the income during his life for the benefit of himself and his children and a trust of capital for the benefit of his issue. The premises were occupied as business premises by the plaintiffs who were tenants. The tenants made a request to the landlords under the Landlord and Tenant Act, 1954, s. 26 (1)*, for a new tenancy for fourteen years as from May 1, 1955. Shortly thereafter N.P. wrote to the landlords requesting them to terminate the tenants' tenancy and undertaking, if possession were obtained, to take a seven years' lease of the premises at a specified rent which was higher than that paid by the tenants. The landlords gave due notice under s. 26 (6)* of the Act of 1954 that they would oppose an application to the court for the grant of a new tenancy. Their ground of opposition was that by s. 41 (2)* of the Act of 1954 a beneficiary under a trust of the reversion intending to occupy the premises for business purposes was in the same position as a landlord so intending, and accordingly that the right of opposition provided by s. 30 (1) (g)* of the Act of 1954 when a landlord intended to occupy the holding for business purposes applied in the present case, because it was intended that N.P. should occupy the premises for business purposes and he was a beneficiary under the discretionary trust of income.

Held: only those beneficiaries who have a right as against their trustees to occupy the trust property by virtue of their beneficial interests are " beneficiaries " within the meaning of that term in s. 41 (2) of the Landlord and Tenant Act, 1954; on the evidence before the court N.P. was not such a beneficiary and as the proposed letting to him on a commercial basis had no relevance to his beneficial interest under the trust, a ground of opposition under s. 30 (1) (g) of the Act of 1954 was not established.

Appeal allowed.

[For the Landlord and Tenant Act, 1954, s. 26 (6), s. 30 (1) and s. 41 (2), see 34 HALSBURY'S STATUTES (2nd Edn.) 412, 414, 425.]

Appeal.

The tenants appealed against an order of His Honour JUDGE ANDREW, dated May 16, 1955, at Bow County Court.

By a conveyance dated Nov. 11, 1938, Nathan Parnes conveyed property including certain freehold premises at 89, High Street North, East Ham, to the landlords, Barclays Bank, Ltd. and Charles Aukin, on trust for sale and to hold the proceeds of sale and the income until sale on the trusts declared by a contemporaneous settlement. The settlement declared a discretionary trust of the income during the life of Nathan Parnes for the benefit of himself and his children, and trusts of capital in favour of his issue. The tenants, Frish, Ltd., occupied and carried on a fried fish business at the premises under a lease which was initially extended under the Leasehold Property (Temporary Provisions) Act, 1951, Part 2. The tenants made application under that Act for a further extension and, after the commencement of the Landlord and Tenant Act, 1954, duly made a request, on Oct. 11, 1954, to the landlords under s. 26 (1) of the Act of 1954 for a new tenancy for fourteen years as from May 1, 1955. On Oct. 14, 1954, Nathan Parnes wrote to the landlords as follows:

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* The terms of s. 26 (1) (6), s. 30 (1) (g), and s. 41 (2) of the Landlord and Tenant Act, 1954, are printed at p. 190, letters D to I, post.

> " I Nathan Parnes declare that it is my desire and intention to carry on business at the premises 89, High Street North, E.6 now occupied by [the tenants]. 2. I request you to take the necessary steps to terminate the tenancy of [the tenants] and to endeavour to obtain possession of the property. 3. I undertake that if possession of the premises is obtained I will pay to you such sum as the tenants may be entitled to as compensation and I will take up a lease of the premises from you for the term of seven years from the date upon which vacant possession is obtained at a rent of £1,000 per annum and containing the same terms (with the necessary modifications) as the terms contained in the tenancy of [the tenants]."

On Oct. 20, 1954, the landlords gave notice under s. 26 (6) of the Act of 1954 that they would oppose an application to the court for the grant of a new tenancy on the ground set out in s. 30 (1) (g) as applied to trusts by s. 41 (2) of the Act, namely, that on the termination of the current tenancy a beneficiary under the trust (viz., Nathan Parnes) intended

> " to occupy the holding for the purposes or partly for the purposes, of a business to be carried on by him therein."

On Feb. 9, 1955, the tenants applied under s. 24 (1) of the Act for the grant of a new tenancy. On May 16, 1955, the county court judge dismissed the application, and the tenants now appealed.

G. Avgherinos for the tenants.
L. A. Blundell for the landlords.

SIR RAYMOND EVERSHED, M.R.: The question in the present case depends on the effect of a few words in s. 41 (2) of the Landlord and Tenant Act, 1954. [HIS LORDSHIP stated the facts and continued:] Section 30 (1) of the Act of 1954 reads as follows:

> " The grounds on which a landlord may oppose an application under s. 24 (1) of this Act are such of the following grounds as may be stated in the landlord's notice under s. 25 of this Act or, as the case may be, under s. 26 (6) thereof, that is to say . . . (g) subject as hereinafter provided, that on the termination of the current tenancy the landlord intends to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by him therein, or as his residence."

The initial four words " subject as hereinafter provided " in para. (g) anticipate sub-s. (2) which disqualifies an objection of that character if the interest of the landlord is one of recent acquisition. In the present case it is intended that the occupation which the landlords intend to bring into effect under the terms of that paragraph, is an occupation the nature of which is most conveniently and accurately stated by reference to a document, which has been called an undertaking, executed by Mr. Nathan Parnes, the settlor, and addressed to Barclays Bank, Ltd., and Mr. Aukin on Oct. 14, 1954. It is as follows:

> " I Nathan Parnes . . . declare that it is my desire and intention to carry on business at the premises 89, High Street North, E.6, now occupied by [the tenants]. 2. I request you to take the necessary steps to terminate

A
> the tenancy of [the tenants] and to endeavour to obtain possession of the property. 3. I undertake that if possession of the premises is obtained I will pay to you such sum as the tenants may be entitled to as compensation and I will take up a lease of the premises from you for the term of seven years from the date upon which vacant possession is obtained at a rent of £1,000 per annum and containing the same terms (with the necessary modifications) as the terms contained in the tenancy of [the tenants]."

B

At first sight it would appear a far cry, so to speak, from occupation by the landlords as stated in s. 30 (1) (g) to a proposed occupation by Mr. Nathan Parnes in accordance with the terms of this document. The document itself contains no reference to the fact that Mr. Parnes has any interest under any settlement of which the persons to whom the document is addressed happen to be the trustees. It is an offer in effect to take a lease, if the two named persons will grant it, for a term of seven years at a high rent. The rent is greater by thirty-three and a third per cent. than the rent which the present occupants are paying; and, of course, from the point of view of the trustees, assuming always the financial stability of the offeror, the suggestion is for the grant of a business tenancy on commercially advantageous terms. The argument which prevailed in the court below is that Mr. Nathan Parnes happens to be a beneficiary under the trusts on which the property is held by the landlords, and that by reason of s. 41 (2) occupation by someone who is in fact, or can be shown in fact to be, a beneficiary under the trusts on which the property is held by the landlords amounts to occupation by the landlords for the purposes of para. (g), even though the intended occupation is in no substantial sense referable to the fact of the beneficial interest of the proposed occupier. If that is the effect of the Parliamentary language, so be it. It would follow, however, that anyone who happens to have, or is able to acquire, a beneficial interest under the trusts, however remote and contingent, and who then, having acquired that characteristic, can make a commercial bargain with the trustee owners which is attractive to those owners, is entitled, if he proves the truth of the intended occupation, to destroy altogether the tenants' rights under the statute to a renewal of his tenancy.

C

D

E

F

I must now read the terms of the sub-section on which this argument rests. Although I shall come back presently to read the first sub-section of s. 41, I will read sub-s. (2) now:

> " Where the landlord's interest is held on trust the references in para. (g) of s. 30 (1) of this Act to the landlord shall be construed as including references to the beneficiaries under the trust or any of them; but, except in the case of a trust arising under a will or on the intestacy of any person, the reference in sub-s. (2) of that section to the creation of the interest therein mentioned shall be construed as including the creation of the trust."

G

By the words " the landlord's interest " must be meant the landlord's interest as s. 44 defines it, i.e., the reversionary interest of the landlord as specified in s. 44. It is the early words that are principally relied on:

H

> " Where the landlord's interest is held on trust the references in para. (g) . . . to the landlord shall be construed as including references to the beneficiaries under the trust or any of them . . . "

I

It is said, startling though it may appear at first sight, that there is no escape from the conclusion, as a matter of ordinary use of language, that any beneficiary under the trust qualifies, so to speak, as a landlord for the purposes of an objection raised under para. (g): so that although the occupation is going to be, in truth, by virtue of a commercial bargain incorporated in a lease, if in fact the occupier is at the relevant date a beneficiary, that suffices. I will not take time by adding further examples of the extreme length to which, as it seems to me, that argument would lead and to the extent to which persons whom one would suppose it would have been no part of Parliament's intention to protect would, nevertheless, be entitled to come in and object to the proposed new tenancy. I have come to the conclusion, reading that paragraph in its context, that is, both of s. 30 (1) and of s. 42 to which counsel for the landlords referred us, that the words " references to the beneficiaries under the trust or any of them " must be given some limitation. I think that they must be given, as a matter of fair interpretation of the language, a limitation in this respect, that only those beneficiaries are referred to whose interest under the trust (putting it broadly and generally) is such as to give them the right as against the trustees to occupy the property, or is such that the trustees may properly within the terms of their trust let them as beneficiaries into possession. In other words, I think that the words " beneficiaries or any of them " in that context must be limited to persons occupying by virtue of their interest as beneficiaries.

If that view is right, then, as it seems to me in the present case (whatever may happen in other cases) it must follow that the proposed occupation by Mr. Nathan Parnes under the terms of his so-called undertaking altogether negatives the proposition that he is a beneficiary for the purpose of para. (g). The trustees, as far as I can see, quite properly have made what they, no doubt rightly, think to be a good commercial bargain for the benefit of the persons interested under the trusts. Their whole case entirely disclaims any suggestion that they are proposing to let Mr. Nathan Parnes into possession because he is a beneficiary and by virtue of his rights as a beneficiary. It will be remembered that Mr. Nathan Parnes's only right as a beneficiary under the settlement is as a member of the class in whose favour the discretionary trusts exist during his lifetime, together with, I suppose, a very remote ultimate remainder if all the other interests should fail during his lifetime so that there would be a resulting trust to the settlor.

I will now go back to s. 41. The language of sub-s. (1) is as follows:

> " Where a tenancy is held on trust, occupation by all or any of the beneficiaries under the trust, and the carrying on of a business by all or any of the beneficiaries, shall be treated for the purposes of s. 23 of this Act as equivalent to occupation or the carrying on of a business by the tenant . . ."

Section 23 is the section which defines the tenancy to which Part 2 of this Act applies, and it is sufficient to observe that, by s. 23 (1), Part 2 of the Act

> ". . . applies to any tenancy where the property comprised in the tenancy is or includes premises which are occupied by the tenant and are so occupied for the purposes of a business carried on by him . . ."

It is plain, with all respect to the argument of counsel for the landlords, that s. 41 (1) is dealing only with the case where, although the tenancy is vested in someone who is properly described as the tenant, nevertheless it is found that the tenant himself happens to be a trustee and the premises are actually occupied by, and the business is actually being carried on by, not the tenant trustee himself, but by the beneficiary or beneficiaries, or one of them, for whom the tenant is a trustee. Inevitably, it seems to me, the occupation by the beneficiary is an occupation which derives its existence from the fact of the trust and the interest of the beneficiary under the trust. It was suggested by counsel for the landlords that s. 41 (1) contemplated a beneficiary sub-tenant, a person being a beneficiary to whom the tenant had granted a sub-tenancy to put him in occupation. In my judgment, that cannot be right. If there was found in possession a person carrying on a business there and owing his right of occupation to his sub-tenancy, then that sub-tenancy would be the tenancy, and the only tenancy, to which Part 2 of the Act applied.

I therefore approach s. 41 (2), which deals with the corresponding case of the landlord, bearing in mind that sub-s. (1) has said, putting it shortly, that a tenancy shall not be taken out of the Act and lose the benefit of renewal which the Act gives by reason of the circumstance that the actual occupant, the person carrying on the business, is, in truth, a beneficiary under a trust and is doing so because he is such a beneficiary. If that is right, then I think one naturally approaches sub-s. (2) with exactly the same notion. Sub-section (2) does not deprive the landlord of his chance of successful opposition merely because in the case of the landlord's interest, as has been set out in the case of the tenant's interest, the legal and equitable interests are distinct and the actual reversioner, the person who under s. 44 is the landlord because he owns the reversion, does so as trustee for someone else who, by virtue of his beneficial interest, intends* to carry on the business in the future. I think that if one reads this section in its context, that inevitably seems to be the Parliamentary intention, and I think that the way in which the sub-section is expressed supports that view. Sub-section (2) does not say that for the purpose of para. (g) the term " landlord " shall be deemed to include, where the landlord is a trustee, all or any of the beneficiaries under the trust. It uses the looser formula:

> " Where the landlord's interest is held on trust references in para. (g) . . . to the landlord shall be construed as including references to the beneficiaries under the trust . . ."

that is to say, shall be construed, so far as is necessary, to make effective the purposes which lie behind the provision. That that form of words is not mere accident is shown by the last of the sections to which I wish to refer, namely, s. 42. Section 41 dealt with the case where the existence of trusts might affect the position of one or other of the parties, tenant or landlord. Section 42 deals with the common commercial case nowadays of the tenant or the landlord being one of a group of associated companies. Thus s. 42 (1) having defined what is meant by a group of companies the second sub-section provides for the case where a tenancy happens to be held by a member of a group:

> " Where a tenancy is held by a member of a group, occupation by another member of the group, and the carrying on of a business by another member of the group, shall be treated for the purposes of s. 23 [defining relevant tenancies] as equivalent to occupation or the carrying on of a business by the member of the group holding the tenancy . . ."

That makes it plain, in my view, that what is intended is that the protection for the tenancy is not to be lost by the circumstance that the tenant is company A, but the actual occupant is company B, not by virtue of a sub-tenancy but by virtue of the commercial association between companies A and B; because, as I have said in the case of a trust, if there was a sub-tenancy, then that sub-tenancy would qualify as the tenancy for s. 23.

Then you come to sub-s. (3), which deals with the case where the landlord happens to be one of a group of companies:

> " Where the landlord's interest is held by a member of a group the reference in para. (g) . . . to intended occupation by the landlord for the purposes of a business to be carried on by him shall be construed as including intended occupation by any member of the group for the purposes of a business to be carried on by that member."

There, it is to be observed, the language is different from the language in s. 41 (2). I do not think that the difference is merely accidental, that Parliament merely wants, so to speak, to change the words for the sake of a change. In my judgment, what is clearly being said, putting it again quite broadly, is: For the purpose of enabling a landlord to oppose a tenant's claim for renewal, he can say under para. (g) that he wants to occupy the premises himself for his own business; and if he is one of a group of companies it is sufficient that he can say: " I want it to use it for my associated company B and its business, not for myself and my business ". In that case the essential thing is that the associated company should be such a company as is defined in sub-s. (1). If it is, the exact machinery whereby the occupation is to be secured is irrelevant. That is why, I think, there is the variation in language between s. 42 (3) and s. 41 (2). If the conception is to be uniform, then just as the essential thing by virtue of which the occupation is to be had under s. 42 is the qualification as an associated company, so, if the intended occupation is to be that of a beneficiary, it must be shown that it is the intention that he should so occupy by virtue of his quality or right as a beneficiary.

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* I.e., has the intention specified in s. 30 (1) (g) of the Landlord and Tenant Act, 1954.

I, therefore, have come to the conclusion, with all respect to the county court judge, that on their proper interpretation the essential words in s. 41 (2) must be given the qualification which I have suggested. It is unnecessary in the present case to consider all possible other cases, but however that qualification should be expressed, it seems to me that the consequence must necessarily exclude an opposition based, as in the present case, on an intended occupation by a person who, though he happens to be a beneficiary to a limited extent, will occupy under the terms of an intended commercial bargain to which the occupants', or proposed occupants', beneficial character under the trust is irrelevant. For those reasons I would allow the appeal.

JENKINS, L.J.: I agree. Under s. 26 (1) of the Landlord and Tenant Act, 1954:

> " A tenant's request for a new tenancy may be made where the tenancy under which he holds for the time being (hereinafter referred to as ' the current tenancy ') is a tenancy granted for a term of years certain exceeding one year, whether or not continued by s. 24 of this Act, or granted for a term of years certain and thereafter from year to year."

Other provisions are contained in that section as regards the tenant's request for a new tenancy. Sub-section (6) provides:

> " Within two months of the making of a tenant's request for a new tenancy the landlord may give notice to the tenant that he will oppose an application to the court for the grant of a new tenancy, and any such notice shall state on which of the grounds mentioned in s. 30 of this Act the landlord will oppose the application."

In s. 30 (1) a number of grounds of objection open to the landlord are set out, and in particular by para. (g) one of such grounds is:

> " subject as hereinafter provided, that on the termination of the current tenancy the landlord intends to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by him therein, or as his residence."

Section 30 (2) limits the landlord's right to oppose on the grounds specified in para. (g) to cases in which the interest, by virtue of which he is recognised as the landlord for the purposes of the Act, had been purchased or created before the beginning of the period of five years which ends with the termination of the current tenancy. Section 41 (2) of the Act provides as follows:

> " Where the landlord's interest is held on trust the references in para. (g) of s. 30 (1) of this Act to the landlord shall be construed as including references to the beneficiaries under the trust or any of them: but, except in the case of a trust arising under a will or on the intestacy of any person, the reference in sub-s. (2) of that section to the creation of the interest therein mentioned shall be construed as including the creation of the trust."

In the present case the landlords hold as trustees under a declaration of trust of the proceeds of sale of the premises in question, the premises having been conveyed to the landlords on trust for sale by a conveyance dated Nov. 11, 1938, and the declaration of trust of the proceeds of sale having been effected, in

A accordance with the usual practice, by a deed of declaration of trust of even date with the conveyance. Under the trusts of the proceeds of sale and rents and profits until sale declared by that document the trustees are to hold the income of the trust property, which includes other premises besides the premises now in question, on discretionary trusts for the benefit of the settlor and his children and remoter issue. The landlords objected to the grant of a new B tenancy applied for by the tenant on the ground that under para. (g), s. 30 (1) of the Act, as applied to cases of trust by s. 41 (2), Mr. Parnes, a beneficiary under the trust, intended to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by him therein. That is the ground of the objection stated by the landlords, but the actual proposal is to grant a tenancy of the premises to Mr. Parnes. The question in the present appeal is C whether the proposed transaction, that is to say, the granting of a tenancy to Mr. Parnes, Mr. Parnes being a beneficiary in the sense that he is one of the objects of the discretionary trusts, constitutes a valid ground of objection under the provisions of para. (g).

Counsel for the landlords supported the view taken by the learned judge to the effect that the objection was well founded by an argument which has all D the attractions of simplicity. He says that s. 41 (2) in terms provides that where the landlord's interest is held on trust references in para. (g) of s. 30 (1) to the landlord shall be construed as including references to the beneficiaries under the trust or any of them. He says those words read as they stand and in accordance with their literal meaning include all or any of the beneficiaries under the trust, and he says that it matters not what the interest of any person E claiming to be a beneficiary may be, provided that it is such an interest that he can properly be termed a beneficiary. He says, therefore, that Mr. Parnes being a beneficiary, his intention to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by him therein has the same force and effect for the purposes of the objection under para. (g) as if it had been an objection by the landlords themselves on the footing that they themselves intended F to carry on a business on the premises. Therefore, said counsel for the landlords, inasmuch as Mr. Parnes intends to occupy the premises, and inasmuch as the landlords propose to put him in occupation by means of a tenancy granted to him, the objection is sufficiently made out, and it matters not that Mr. Parnes's occupation will be referable, not to any beneficial interest he has in the interest of which the landlords are the legal owners, but simply to his position as a tenant G under the tenancy proposed to be granted to him. Counsel for the tenants on the other hand, supporting the tenants' appeal, submitted that some limitation must be put on the wide meaning of the words "the beneficiaries under the trust, or any of them". He said that the beneficial interest contemplated by s. 41 (2) must be a sufficient interest in the premises under the trust to entitle the beneficiary to occupy the premises, or, at all events, such an interest as would justify H the trustees in letting the beneficiary in question into occupation.

I agree with counsel for the tenants that some limit must be put on the meaning of the words "the beneficiaries under the trust, or any of them". In my view it is impossible to hold that any person having any beneficial interest in the premises, however remote, can oppose the grant of a new tenancy under para. (g). I think that the interest of the beneficiary must be an interest under the I trust on the strength of which he intends to occupy. If counsel for the landlords' argument were accepted the most remarkable consequences would ensue. One might, for example, have a case where the landlord's interest was settled on trust for one person for life with remainder to another. If counsel's argument is right, the reversioner could come forward and meet the tenant's application for a new lease on the ground that he, the reversioner, being a beneficiary by virtue of his interest in remainder, intended to occupy the holding, and thereupon provided the trustee could be prevailed on to grant him a new tenancy and, I suppose, to announce to the court his intention of granting such a tenancy, an objection under s. 30 (1) (g), to the grant of a new lease would be made good. Again, one might have a case where the interest of the beneficiary, although in possession, was an interest wholly irrelevant to any right to occupy the premises; as, for example, the case of a mere annuitant.

I find it unnecessary to attempt any exhaustive definition of the kinds of beneficial interest which would suffice to satisfy the sub-section, but, as I have said, some limit must, in my view, be put on the wide meaning of the words " the beneficiaries . . . or any of them ". As some limit must be placed on the words, it seems to me that in the context, and having regard to the manifest intention of para. (g), the limit must be, broadly speaking, of the nature suggested by counsel for the tenants, that is to say, the beneficiary who intends to occupy must have such an interest under the trust as either to entitle him to be put in occupation, or, at all events, to justify the trustees on his application, if they think fit to do so, in letting him into occupation. That would cover, besides the case of an absolute beneficial owner with the legal estate outstanding in a trustee, such interests as that of a life tenant. In cases of settlements otherwise than by trust for sale the question could not often arise, for in general the tenant for life under such a settlement combines in himself for a purpose of this sort the character of trustee and beneficiary. Again, the class of beneficiaries with which para. (g) is concerned might well include a person entitled to a life interest in the proceeds of sale of the premises, the premises being held on trust for sale as in the present case.

The present is a case of a trust for sale, but the person claiming as beneficiary has not got a life interest in the income of the fund. He merely has during his life the possibility of receiving such payments, if any, as the trustees may from time to time think fit to make to him in exercise of their discretion. That nebulous right or spes, as one might almost term it, clearly could not of itself give to this beneficiary any right to occupy the premises. It might conceivably be possible that if the trustees (the landlords), in the exercise of their discretion, had decided, until such time as they might decide otherwise, to pay Mr. Parnes the income of the holding in question and had further determined that for the time being they would allow him to be in occupation of the premises, treating the rent which the premises would otherwise have realised as set off against payments made, or notionally made, to him in exercise of their discretion, and if Mr. Parnes had then expressed his intention of occupying in accordance with that arrangement, he could have been brought within s. 30 (1) (g), as applied to trusts by s. 41 (2), precarious though his right of occupation might be. No such arrangement has been proposed by the landlords in the present case. They have not taken the view that they could properly let Mr. Parnes into occupation on terms such as those to which I have referred. Their proposal is simply to grant to Mr. Parnes a tenancy of the premises, and they say that because Mr. Parnes happens to be a beneficiary under the settlement, in the sense that he is one of the objects of the discretionary trust, their intention to grant him a tenancy, and his intention to occupy as tenant, suffice to support the objection under para. (g). I find it impossible to accept that conclusion. The present is not a case where a beneficiary intends to occupy in right of his beneficial interest; it is a case in which trustee landlords propose to grant a tenancy to an individual who, it so happens, has a beneficial interest as one of the objects of a discretionary trust in the proceeds of sale in the premises under the trust for sale. That intended occupation, as it seems to me, would have no relevance at all to the beneficial interest, such as it is, of Mr. Parnes under the settlement, an interest which could not of itself give him any right of occupation whatever. Accordingly I take the view that, on its true construction, the objection based on s. 30 (1) (g) as applied to the case of trusts by s. 41 (2), is not made good, and, in my judgment, in the circumstances of the present case the appeal should be allowed.

A **PARKER, L.J.:** I agree and have nothing to add.

Appeal allowed. Leave to appeal to the House of Lords refused.

Solicitors: *Donald, Darlington & Nice* (for the tenants); *Aukin & Co.* (for the landlords).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

B

BAKER *v.* BAKER.

C [LIVERPOOL ASSIZES (Davies, J.), June 6, 7, 8, 15, 1955.]

Divorce—Cruelty—Drunkenness—Other acts of ill-treatment—Knowledge of injury to other spouse's health.

Persistent drunkenness after warnings that such a course of conduct is inflicting pain on the other spouse, certainly if it is known to be injuring the other spouse's health, may of itself amount to cruelty (see pp. 194, 195,
D post).

The parties were married in 1943 and there was one child of the marriage. The husband was a heavy drinker, and before the marriage the engagement was broken off until the husband amended his ways. Not long after the marriage, however, he resumed a life of regular and persistent drinking to excess, and was often drunk.

E The husband caused the wife great mental distress by his persistent drinking, despite warnings both from her and from others that she would not be able to stand it. In the last few months of the marriage he became worse. He attacked her with words, and insisted on intercourse against her will. On two occasions he used violence towards her. On several occasions the chance of keeping the marriage going was destroyed by the
F husband reverting to drink and treating the wife in a manner which injured her and would have caused her further injury if she had remained. In July, 1954, when she was on the verge of a nervous breakdown, the wife left the matrimonial home. On a petition by the wife for divorce,

Held: the husband's conduct amounted to cruelty and the wife was entitled to a decree.

G [**Editorial Note.** The old view was that drunkenness per se was not cruelty (*Chesnutt* v. *Chesnutt* (1854), 1 Ecc. & Ad. 196). The passage cited in the judgment (p. 194, letter G, post) shows the modern approach, and, with the present case, shows a trend away from the strictness of the old view; that trend may, perhaps, be regarded as having begun with *Walker* v. *Walker* (1898) (77 L.T. 715).

H As to drunkenness in relation to cruelty, see 10 HALSBURY'S LAWS (2nd Edn.) 652, para. 958, note (s); 12 HALSBURY'S LAWS (3rd Edn.) 274, para. 525; and for cases on the subject, see 27 DIGEST (Repl.) 302, 303, *2483-2492*.]

Cases referred to:

(1) *Buchler* v. *Buchler*, [1947] 1 All E.R. 319; [1947] P. 25; [1947] L.J.R. 820; 176 L.T. 341; 111 J.P. 179; 27 Digest (Repl.) 350, *2899*.

I (2) *Kaslefsky* v. *Kaslefsky*, [1950] 2 All E.R. 398; [1951] P. 38; 114 J.P. 404; 27 Digest (Repl.) 296, *2413*.

(3) *Lang* v. *Lang*, [1954] 3 All E.R. 571; [1955] A.C. 402; 3rd Digest Supp.

Petition.

The wife petitioned for divorce on the ground of the husband's cruelty. The husband by his answer denied the alleged cruelty, made certain counter-allegations against the wife, none of which would entitle him to a decree, and pleaded condonation. The parties were married in July, 1943, and lived together until

July, 1954, when the wife left. There was one child of the marriage, a girl aged four.

The facts appear in the judgment.

D. B. McNeill for the wife.

T. H. Pigot for the husband. *Cur. adv. vult.*

June 15. **DAVIES, J.**, read the following judgment which, after referring to the pleadings and stating the facts of the marriage and its duration, continued: The gravamen of the wife's complaint is that the husband is a drunkard and by reason of and in consequence of his drinking habits cruel to her. Counsel for the husband, in the course of a most excellent final speech, was constrained to admit that his client was " a heavy drinker by any standards ", though he suggested that the extent of the husband's drinking had been exaggerated by the wife for the purposes of the present case. I do not think that it was. It appears that the husband's business consists largely of selling cleansing substances to licensed victuallers, and he protests that in order to promote sales he has to do a certain amount of drinking with customers. For many weeks of the year he was away from home except at week-ends; but it is perfectly plain that his business drinking during the week did not prevent him from drinking heavily at the week-ends as well—I suppose for pleasure. [HIS LORDSHIP reviewed the husband's evidence as to his consumption of, and expenditure on, alcohol and continued:] In addition to the husband's own evidence and that of the wife and apart altogether from his appearance in court and in the witness-box, which was obviously that of an extremely heavy drinker, there is abundant evidence in the present case from a doctor and other witnesses that the husband, if not an habitual drunkard, regularly and persistently drinks to excess and is often drunk. I have no doubt that that is what has really broken up this marriage.

However, as was pointed out by LORD GREENE, M.R., in *Buchler* v. *Buchler* (1) ([1947] 1 All E.R. at p. 322):

> " The legislature has not thought fit to make the continuous unhappiness of one spouse caused by the unkindness, the lack of consideration, the selfishness, or even the drunken degradation of the other spouse, a ground for obtaining a dissolution of the marriage."

There was also cited the well-known passage in the judgment of DENNING, L.J., in *Kaslefsky* v. *Kaslefsky* (2), which passage has now to be read in the light of the recent decision of the Judicial Committee in *Lang* v. *Lang* (3) ([1954] 3 All E.R. 571). DENNING, L.J., said ([1950] 2 All E.R. at p. 402):

> ". . . when the conduct does not consist of direct action against the other, but only of misconduct indirectly affecting him or her, such as drunkenness, gambling, or crime, then it can only properly be said to be aimed at the other when it is done, not only for the gratification of the selfish desires of the one who does it, but also in some part with an intention to injure the other or to inflict misery on him or her. Such an intention may readily be inferred from the fact that it is the natural consequence of his conduct, especially when the one spouse knows, or it has already been brought to his notice, what the consequences will be, and nevertheless he does it, careless and indifferent whether it distresses the other spouse or not. The court is, however, not bound to draw the inference. The presumption that a person intends the natural consequences of his acts is one that may—not must—be drawn. If in all the circumstances it is not the correct inference, then it should not be drawn. In cases of this kind, if there is no desire to injure or inflict misery on the other, the conduct only becomes cruelty when the justifiable remonstrances of the innocent party provoke resentment on the part of the other, which evinces itself in actions or words actually or physically directed at the innocent party."

In my judgment, persistent drunkenness after warnings that such a course of

A conduct is inflicting pain on the other spouse, certainly if it is known to be injuring the other spouse's health, may well of itself amount to cruelty. In any case, such drunkenness, if it is combined with other acts of ill treatment, may obviously be of the greatest importance.

Before the parties were married, the engagement was on one occasion broken off by the wife because of the husband's drinking but it was made up on the B latter's promise to mend his ways. For a time he was better. Not long after the marriage, however, he was drinking heavily again, and the wife threatened to leave him if he did not pull up. He was better at times, but there were occasions when he was brought home drunk and occasions when he was incapable of getting into bed. On more than one occasion during the marriage he suffered injury through falling when drunk; for example, an injury to his nose and C face and an injury to his spine. In April, 1946, when he started as a salesman, his drinking became worse for a time, but it is fair to say that in December, 1948, when the wife's mother died, the husband was kind and helpful to her though he was still drinking. Some short while before the parties moved to their last home the wife had to sell her engagement ring to help the husband who was in debt. On another occasion she had to be a passive party to a lie D which he told as to some of his company's money which was short. These are not acts of cruelty, but they are part of the picture of the life which the wife had to lead. In April, 1952, when they moved to their new house the wife had to borrow money from the husband's mother and gave her fur coat as security. The husband was in debt to his company and still is: the present debt is about £600. In addition to his drinking habits and financial difficulties, there were two occasions E when he frightened his wife by exhibitions of temper and violence, though it is not suggested that there was ever violence towards her until the year 1954.

It is now time to mention a man called C. Until February, 1954, when he obtained a divorce from his wife, C. was a married man, though he had been living apart from his wife for some years. He was called as a witness on behalf of the husband. It is beyond dispute in the present case that at the present F time the wife and C. are in love with one another and wish to marry. The wife and C. first met in 1952, when they went to a dance in a party organised by neighbours of the husband and wife. During the ensuing twelve months or so there were similar dance parties. The husband knew about these dances and made no objection. I pause here to say that I reject entirely the husband's evidence that on one of these occasions when the wife returned home very late G she was very drunk. On Jan. 1, 1954, the wife contracted whooping cough and was undoubtedly seriously ill. Eventually she went to stay near St. Asaph to recuperate. There can be no doubt that something approaching a close friendship was beginning to grow up between the wife and C., for he visited her three times while she was at St. Asaph, at her invitation. On the first occasion he was to have been accompanied by some friends who were at the last moment unable to H come. It is, of course, important, in considering the husband's conduct in the last few months of the marriage, to consider also the wife's conduct. If a wife is provoking her husband by association with another man to his knowledge and against his wishes; or indeed, if in consequence of such an association, even if unknown to her husband, she is, either deliberately or because she cannot help it, adopting a cold and provocative attitude to her husband, that may well I explain or excuse conduct on the part of the husband which would otherwise be inexcusable. However, in the present case there are two factors to be considered on the other side. In the first place, although there is no suggestion of adultery or of any impropriety apart from the fact of the association between the wife and C., that association was the result of the husband's continued drunkenness. But for the unhappiness which he had caused her, this association would never have happened. Secondly, even after the association had commenced and the wife's feelings for C. were waxing, as those towards her husband were waning, he had on two or three occasions a real opportunity of reconstituting the marriage, if only he could have behaved nicely to her and, above all, kept off the bottle.

I turn now to some notes which the wife made covering the last week of the stay in North Wales from Mar. 26 to Apr. 2, 1954. These notes are damaged; they were at one time torn up by the husband, but they were later repaired by the wife. I accept these notes as being a truthful and substantially accurate record, so far as they go. It may also be convenient that I should say here that I was impressed by the wife's evidence and demeanour in general. By and large I regard her as a truthful and accurate witness, as also was C. The husband, on the other hand, did not impress me at all. With regard to many of the matters as to which he spoke, it may well be that he was so much under the influence of drink at the time of the events as to have no clear subsequent recollection, and I have no doubt that he is so sodden with drink as to render his evidence in general most unreliable. There is no doubt that the wife's evidence must in general be accepted in preference to the husband's. It is true that there is no corroboration of her evidence so far as concerns the husband's conduct in the home. Having seen these two parties and taking the view that I do about their respective credibility and reliability as witnesses, it is in my opinion safe to act on the wife's evidence. [HIS LORDSHIP read extracts from the wife's notes, which showed that from the evening of Friday, Mar. 26, to Sunday, Mar. 28, the husband was affected by drink and that the wife had asked him not to drink any more and had warned him that she must leave him; that on Mar. 29 the husband went to work; that on the evening of Mar. 31 the husband came on the wife and C. having drinks together, stayed with them until 11 p.m. and then went to a hotel for the night; and that on Apr. 1 the husband called for the wife in the morning, that they were together throughout the day, and that in the evening she told him that they would try again together. HIS LORDSHIP continued:] With regard to the evening of Wednesday, Mar. 31, the husband says that he was most upset when he found his wife and C. in the bar, which may well be true. He also says that this was the only visit of C. to see his wife of which he knew: this may well be true also. It is, however, impossible for me to accept his evidence that on Apr. 1 the wife told him in effect that C. had proposed marriage to her and that he then asked the wife if she had committed adultery the previous evening. I accept the wife's evidence that this conversation did not take place. It is plain from her notes that on Apr. 1 there was something in the nature of a reconciliation, and I do not believe that the conversation to which the husband deposes would have resulted in this. On any view of the matter, however, this incident should have been a severe warning to the husband. She had told him on the 28th that she must, because of his drinking, leave him. He had found her in the company of C. on the 31st, and it therefore behoved him to be particularly careful in his behaviour in order to win back the wife and restore her confidence in him. He did for a week or so behave better. On or about Apr. 19 the wife was taken ill again with bronchitis. She was in bed at home for about ten days. He was at home for a week and no doubt did a good deal of domestic work; but on every single day, with his wife in bed, and despite her requests that he should not go out, he was out for practically the whole of the permitted opening hours of licensed premises. He says that this was in order to carry on his business of selling his goods, but I have no doubt that he was with this business combining a good deal of his old pleasure. He was, as the wife says and as I find, drinking heavily, going back to the old ways of which the wife had complained, at a time when the wife was seriously ill and when a decent husband might have been expected to be more than ordinarily kind and considerate.

On Apr. 29 the wife was seen by a specialist who diagnosed virus pneumonia and ordered that she be removed next day to St. Catherine's Hospital. The husband went with the doctor to fetch some drugs and admitted on his way home that he could not prevent himself from going into the public house and buying some bottles of beer to consume in the house in which his wife was so gravely ill. On May 16 the wife went to a convalescent home and later went to Ilkley to convalesce. She was in fact driven there by C., but no very serious complaint is made of this as the husband was away from home on business. On June 7 the husband fetched the wife from Ilkley. He told her that her illness had been a great shock to him, that it had taught him a lesson and that he would not drink again. For ten days they were happy and might have remained so but for the fact that the husband relapsed. On Friday, June 18, the husband came in completely drunk, hardly able to stand or to speak coherently. He said that he hated everyone in the world and the wife in particular. He called her offensive names and said that he would drink as much as he liked. The wife refused to forgive him for this conduct, and he then and on subsequent occasions said that if she would not forgive him there was no point in his ceasing to drink. From this point there are a number of very brief entries in the wife's diary which, like the earlier notes, are, I am satisfied, substantially accurate. I am satisfied that he was drunk for three nights in succession and that from June 19 to 23 he was constantly keeping the wife awake very late at night trying to make her forgive him and that on several occasions he actually forced her to have sexual intercourse with him against her will. On at least one occasion he said that he was using Chinese torture to make her submit and forgive him. On one occasion I find that when the wife was refusing intercourse he put his hands round her throat but took them away when she told him not to be a fool, remarking, however, that he ought to have pressed harder.

After this miserable week, the wife went on June 24 to St. Asaph with C. in his car without telling her husband. On that evening the husband arrived home drunk and having run short of cigarettes went to her handbag for some. In her bag he found a diary with the entry " St. Asaph " and he also found two letters from C., in themselves perfectly harmless, written to her while she was ill. According to the wife's evidence, those letters were in her bag with a number of others which had been written to her by friends while she was in hospital. Be that as it may, the husband's discovery led to a row between them about C., in the course of which the wife said that she wanted a divorce. Shortly after this, as I find, the wife telephoned to C. and as a result they did not meet again until after the wife had left the husband. The entry in the diary is as follows:

> " June 27. Roy went to Belgravia [a public house] after promising not to. Did not tell me . . . June 28: Threatened to bribe and corrupt in order to win his case and get Rosaline [the child of the marriage]. June 30: . . . Roy in Belgravia 12.30."

On July 3 the husband demanded intercourse when in drink. The wife refused. Whereupon he said, " I am going out to get drunker than you have ever seen me and when I come back I'll knock you down so hard that you'll never get up again." He did not carry out either of these latter threats, but when he came in he kept her up till half past two and held her down and had intercourse with her.

From July 10 to 17 they were away at Torquay on holiday, the child being with them. On two occasions during that week he kept her awake late at night with arguments and also woke the child. During the last few days of their cohabitation, which ended on July 26, the husband was constantly keeping the wife awake till half past two or three in the morning, trying to compel her to forgive him and wanting intercourse. Sometime during July, the wife, whose endurance was plainly coming to an end, on one occasion suggested to the husband that he should divorce her for desertion. On Thursday, July 22, the entry in the diary is in these terms:

> " Roy in bed all day. Not allowed out except to Belgravia so he could

> check on me. July 23: Told me I'm a chattel and he owns me as he's married me—especially since Rosaline was born."

Then there comes the final evening and the last serious scene on July 23. [HIS LORDSHIP said the wife's evidence relating to this occasion was that the husband was at home during the day but went out several times. Once he took her and the child for a drink. The last time he went out he said he was going for cigarettes but he returned after she had gone to bed and she got up and let him in. He refused to let her go back to bed and gave her a glass of beer. The rest of six bottles of beer which he had brought home with him he drank himself. He made the wife smoke cigarette after cigarette, on one occasion throwing away her half-smoked one and insisting on her taking another. She resisted and blew out the lighted matches which he held for her. A third match was held to her hair saying he had a good mind to burn it. He was shaking with rage. She blew that match out also. He then held her hair, pulled her head back and hit her across the face. She cried and ran out into the street to Mr. K., a neighbour. The husband followed and tried to stop her. She said her husband had been drinking and had hit her. She was very frightened and did not know what to do. She could not stand it any longer. The husband said she was hysterical and he had been trying to calm her down and would not hurt her. After Mr. K. had left she asked the husband to go to bed but he said she was not going yet and that he ought to have hit her harder. He let her go to bed at 2.0 a.m. but came up, held her down, and insisted on having intercourse with her against her will. HIS LORDSHIP continued:] This is, in substance, denied by the husband who said he gave her a backhander in the face when she became hysterical as he was talking to her about C.

Mr. K. gave evidence about this incident. He said that he saw them, and that the wife was hysterical. The husband had been drinking, a condition he had seen him in before. The husband explained that there was another man. He was distressed at having struck her. He said: " I would rather cut off my right arm than hit a woman "—or words to that effect. He may well have had C. in his mind. Indeed this fact may well be the reason for his having forced intercourse on the wife during this period and for much of his ill treatment of her in June, and July, though, as I have indicated, I prefer her version of those incidents to his and do not believe that C. was constantly mentioned. It is, I think, likely that C. was mentioned on July 23 during the altercation; but as to what the husband did I accept the wife's evidence. I am satisfied that he did use violence to her on this occasion, as the wife said. It is perfectly true that, despite the husband's drinking, he is not a violent man. Apart from this occasion and the perhaps not very important occasion when he put his hands on her throat, he never used violence to her except in the course of compelling her to have intercourse. That this incident happened substantially as the wife has described, I have no doubt.

On Sunday, July 25, the wife had arranged to sign a contract in respect of the sale of the house, which the husband had arranged. It had been arranged that the solicitor should meet them at the hotel. The husband proceeded to get very drunk and had to be taken home by the doctor. Subsequently he vomited on the stairs. At tea-time his father and mother arrived. [HIS LORDSHIP referred to the evidence relating to a conversation which then took place, saying he accepted in substance the wife's evidence. She said the husband insisted on getting up and his mother gave him a long lecture saying he was worrying his father and must pull himself together. He said he was drinking because there was another man. The wife said she didn't think C. made any difference to his drink, and she couldn't go on and would have to leave; she added that she had lost all affection for her husband and wanted a divorce; then, perhaps, she might have a chance with life again. The husband asked who would have her and she said C. was a good friend and if she had a chance she would be glad to marry him.

as he was good and understanding, and very kind. His Lordship continued:] The husband says he is a bit vague about what happened. His mother was called, though it was noticeable that his father was not. There is not much difference save in the order of events between the various versions.

The upshot of the discussion was that the wife agreed to try again. This was the husband's last chance, arising out of the first occasion on which their troubles had been discussed in front of his parents. It is true that the wife did not mention violence or the fact that he had been having intercourse against her will. That does not affect my conclusion on this point. The main fault from which all the rest stemmed was his drunkenness and no doubt it was on that that she concentrated. The husband promised his parents that he would drink no more that night, and I find that he said he would carry out his work at Sheffield the next day. As soon as his parents left, out he went to the public house, drinking again. And on the Monday he was too ill to go to work, as he had been on a number of previous Mondays after a week-end debauch. His explanation of his failure to go to work on the Monday was that he was suffering from a delayed nervous attack. His renewed drinking on the Sunday night and his failure to go to work on the Monday were the last straw for the wife. She left on that day, taking the child with her. It was submitted by counsel for the husband that his failure to go to work was an odd " last straw ", an odd culminating reason for her to leave. Had he gone to work that day, she might have stayed. But, after all that she had had to go through, the husband's conduct on the Sunday evening and the Monday must have indicated to her that he was quite unwilling or quite unable to abide by any promises of amendment, and that, if she were to stay, it would be merely to expose herself to treatment similar to that which had been meted out to her in the past.

I am satisfied from the evidence of the doctor that on July 24 the wife was in a very serious nervous state. He described her as being near to a complete nervous breakdown. It is no doubt true that some part of this was due not to his treatment of her but to her belief that there was a prospect of better things with C. As I have indicated, the association with C. was itself caused by the husband's conduct towards her. It is also said that the husband was also near a breakdown, and no doubt it is true; but, as I find, he himself is the cause of this. On the whole of the evidence in the present case I am abundantly satisfied that this charge of cruelty has been made out. The husband caused his wife great mental distress by his persistent drinking, despite warnings both from her and from others that she would not be able to stand it. In the last few months of the marriage, when she had been driven away from him by his conduct, he became worse. He attacked her with words, he insisted on intercourse when he knew that she did not want it. On two occasions he used violence to her, particularly on July 23. Even in 1954 there were three occasions when there was a chance that the marriage might be patched up, namely, on Apr. 1, June 7, and July 25. On each of these occasions sooner or later he destroyed the chance by reverting to drink and treating her in a manner which undoubtedly did injure her and would have caused her further injury had she remained.

On my finding of fact the issue of condonation is really disposed of. I am satisfied that from and after June 18, the wife never voluntarily had intercourse with her husband. The agreement for a reconciliation arrived at on July 25 was inchoate and, owing to the husband's conduct immediately afterwards, never became effective.

There is no doubt that since the wife left, the husband has been trying hard to persuade her to return to him. There is equally no doubt that he has continued drinking and has on more than one occasion been drunk. He has on about a dozen occasions found it desirable to spend the night at the Belgravia Hotel at Wallasey, despite the fact that his home has been with his parents at Birkenhead. And on Sundays when he has taken his daughter aged four out for the day he has not been able to refrain from taking her to this hotel. He is plainly incorrigible. The wife has refused his overtures and has gone so far as to try to induce him to drop his defence to the present suit. It might have been better for all concerned if he had done so. In the result, therefore, the wife has made out the petition and there will be a decree nisi.

Decree nisi.

Solicitors: *Berkson & Berkson*, Birkenhead (for the wife); *H. G. C. Day & Co.*, Liverpool (for the husband).

[*Reported by* K. BUCKLEY EDWARDS, ESQ., *Barrister-at-Law.*]

GREENSLADE AND ANOTHER *v.* SWAFFER AND OTHERS. SAME *v.* WORLD'S PRESS NEWS PUBLISHING CO., LTD. AND ANOTHER.

[COURT OF APPEAL (Jenkins and Morris, L.JJ.), May 25, 26, 1955.]

Libel—Innuendo—Particulars of facts to support secondary meaning—Application to strike out innuendo—R.S.C., Ord. 19, *r.* 6 (2), *r.* 27; *Ord.* 25, *r.* 4.

In the first action the plaintiffs claimed damages for libel in an article in a weekly journal which circulated in journalistic circles. They pleaded that the words complained of meant and were understood to mean " that each of the plaintiffs was an incompetent journalist and/or . . . instrumental in causing the editor of the ' Sunday Chronicle ' to pay a wildly extravagant price for the publication rights of a series of newspaper articles . . . and/or one whose efforts in collecting material for publication in the ' Sunday Chronicle ' merited ironic and derisory comments in journalistic circles ". On request by the defendants the plaintiffs delivered particulars pursuant to R.S.C., Ord. 19, r. 6 (2), of the facts and matters on which they relied in support of the meanings alleged in the innuendo.

In the second action the plaintiffs claimed damages for libel in a headline in a subsequent issue of the same journal, which read: " Webb tells court he arranged for Comer to write for ' S. Chronicle ' ". The plaintiffs pleaded in para. 5 of the statement of claim the same innuendo as they had pleaded in the first action and, as particulars under R.S.C., Ord. 19, r. 6 (2), they referred to the first action, alleged that " Webb " and " Comer " were referred to in the article which was the subject of that action, stated that they would rely on the facts given as particulars in the first action, and alleged: " The plaintiffs contend that such headline is [calculated] to refer readers back to the earlier article and is a further assurance to . . . readers that the words used therein together with the meanings ascribed to them by these plaintiffs, are true and justifiable ".

The defendants applied in both actions to strike out all the words of the innuendoes after " incompetent journalist " under R.S.C., Ord. 19, r. 27, and R.S.C., Ord. 25, r. 4.

Held: (i) (in the first action) if the facts alleged in the particulars were proved, it would be open to a judge or jury to say that the words complained of were defamatory of the plaintiffs because they bore the meanings alleged in the innuendo and accordingly no part of the innuendo in the first action should be struck out.

(ii) (in the second action) if it were assumed that all facts alleged in the particulars given in support of the innuendo were proved, nevertheless the headline would not be calculated to assure a reader of the truth of the words in the previous article in the defamatory sense which they were alleged to bear by the statement of claim in the first action, and accordingly the whole of para. 5 of the statement of claim in the second action disclosed no reasonable cause of action and should be struck out.

Appeal allowed in the first action; dismissed in the second action.

[**Editorial Note.** In the present case the court accepts that the defendants adopted a correct procedure in making their applications under R.S.C., Ord. 19, r. 27, and R.S.C., Ord. 25, r. 4. In *Kemsley* v. *Foot* ([1951] 1 All E.R. at p. 333, letter C), where application was made in a libel action to strike out a paragraph in a defence pleading fair comment, it was said that the rules should only be applied in plain and obvious cases and that if there was a point of law which required serious discussion it should be raised on the pleadings and should be set down for argument under R.S.C., Ord. 25, r. 2. On the other hand, in *Morris* v. *Sandess Universal Products* ([1954] 1 All E.R. 47) the Court of Appeal held that the question whether or not words were capable of bearing a defamatory meaning was not a proper matter to be raised as a preliminary issue under R.S.C., Ord. 25, r. 2. The present case, therefore, may resolve any doubts as to the propriety of proceeding, in cases to which R.S.C., Ord. 19, r. 6 (2), is applicable, under the procedure provided by R.S.C., Ord. 19, r. 27 and R.S.C., Ord. 25, r. 4.

As to striking out pleadings, see 25 HALSBURY'S LAWS (2nd Edn.) 253, note (a), 254, note (b); and for cases on the subject, see DIGEST (Pleading) 61, *506-511*, 71-73, *623-628*.]

Greenslade and Mellor v. *Swaffer, Beverley's, Ltd., World's Press News Publishing Co., Ltd., and Weal.*

In this action the plaintiffs claimed damages for libel against the defendants in respect of an article published in the issue of the "World's Press News and Advertiser's Review" dated Oct. 22, 1954. The plaintiffs were a crime reporter and the news editor on the staff of the "Sunday Chronicle". The defendants were the writer of the article, and the printers, publishers and editor of the Review. By their statement of claim dated Nov. 19, 1954, the plaintiffs set out in para. 4 the words complained of which read as follows:

> "Duncan Webb has made a rod for his own back! As an immediate consequence of the scoop he obtained by persuading Billy Hill to confess that he is the King of the Underworld, he has been inundated with offers of their life-stories from other self-styled underworld kings. All, of course, want money. The trouble is that Webb has, for professional reasons, made friends of these people for years. Failure to please them involves the risk of losing invaluable contacts and sources of information. [Then came a headline "Too Many Crime Scoops" and the article continued:] A few weeks ago the leader of the gang which planned to rob London Airport of £1,000,000 worth of gold bullion came out of Dartmoor after serving six of his nine years' sentence. 'I would like to help you', said Webb, 'but what can I do? How can I run your yarn while we are publishing Billy Hill's, the greatest of all crime stories?' Then another old-timer, Jack Spot, a lieutenant of Billy Hill, reminded Webb that he had promised him his story some years ago. 'If it's time for Billy to tell his', he said, 'it's past time for me to cash in, and get out, while the going is good'. Other offers have pestered Webb so much that he has been obliged to introduce his underworld acquaintances to other newspaper-men. 'If I don't do something for them', he told me, 'they'll probably sell their loyalty elsewhere. And after I've shown them how to treat newspapermen to their own best advantage.' [Then came a headline "Had to Help a Rival" and the article continued:] So Webb has now introduced Jack Spot to an old friend Jack Greenslade of the 'Sunday Chronicle' [the first plaintiff]. And, so pleased is Greenslade's editor to get the life story of anyone in the underworld known to Webb that he has offered Spot the record sum of more than £4,000 for it. The irony of this situation is that Spot has told Webb, 'Sure, I can't

> help accepting that offer. But I'm not going to let you down. I'll have to save enough for you for later on, when you want another underworld story '. Yes, Webb is now so overwhelmed with the life stories of ex-criminals that he has been forced to farm them out to opposition papers in order to hold on to his contacts and the chance of further scoops, he hopes, in the years to come."

The plaintiffs then pleaded:

> " 5. The said words meant and were understood to mean that each of the plaintiffs was an incompetent journalist and/or one who was instrumental in causing the editor of the said ' Sunday Chronicle ' to pay a wildly extravagant price for the publication rights of a series of newspaper articles and/or one who had taken steps to induce the said editor to feature a series of articles which would not contain all the information which it would purport to contain and/or one whose efforts in collecting material for publication in the . . . ' Sunday Chronicle ' merited ironic and derisory comments in journalistic circles."

On Nov. 30, 1954, the defendants requested, among other particulars, particulars of the facts and matters relied on in support of the allegation that the words complained of were used in a defamatory sense other than their ordinary meaning, pursuant to R.S.C., Ord. 19, r. 6 (2). The plaintiffs supplied particulars. On Apr. 1, 1955, the defendants issued a summons to strike out from the statement of claim all the words in para. 5 after the words " incompetent journalist " under R.S.C., Ord. 19, r. 27, and R.S.C., Ord. 25, r. 4. On Apr. 6, 1955, Master DIAMOND dismissed the application. The defendants appealed, and on Apr. 28, 1955, HAVERS, J., allowed the appeal. The plaintiffs now appealed.

Greenslade and Mellor v. *World's Press News Publishing Co., Ltd. and Weal.*

In this action, commenced in December, 1954, the plaintiffs claimed damages for libel against the publishers and editor of the Review in respect of the following words published as a headline to an article in the issue of the Review dated Nov. 26, 1954, namely:

> " Webb tells court he arranged for Comer to write for ' S. Chronicle '."

By their statement of claim dated Feb. 12, 1955, the plaintiffs pleaded, in para. 5, an innuendo in the same terms as those used in para. 5 of the statement of claim in the first action (i.e., in the words set out at letter B, supra), and continued:

> " Particulars of facts relied upon to support the innuendo. (1) In the issue of the . . . Review dated Oct. 22, 1954, the defendants had earlier libelled both the plaintiffs . . . (3) The ' Webb ' referred to in the headline . . . is the Duncan Webb referred to in the earlier article and the ' Comer ' referred to in such headline is the ' Jack Spot ' referred to in the earlier article. (4) The plaintiffs will rely on the facts given as particulars under para. 5 of the statement of claim in the earlier action. (5) The plaintiffs contend that such headline is intended to refer readers back to the earlier article and is a further assurance to such readers that the words used therein together with the meanings ascribed to them by these plaintiffs, are true and justifiable."

On Mar. 7, 1955, the defendants issued a summons to strike out from the statement of claim all the words in para. 5 after the words " incompetent journalist " under R.S.C., Ord. 19, r. 27, and R.S.C., Ord. 25, r. 4. On Mar. 28, 1955, Master DIAMOND made an order in accordance with the summons. The plaintiffs appealed. On Apr. 28, 1955, HAVERS, J., at the hearing of the appeal, allowed the summons to be treated as if amended so as to apply for the whole of para. 5 of the statement of claim to be struck out, dismissed the appeal and ordered that the whole of para. 5 be struck out. The plaintiffs now appealed.

W. A. Fearnley-Whittingstall, Q.C., and *I. C. Baillieu* for the plaintiffs in both actions.

Neville Faulks for the defendants in both actions.

MORRIS, L.J., stated the facts and continued: The two applications were both made under R.S.C., Ord. 19, r. 27, and under R.S.C., Ord. 25, r. 4. It is, I think, well established (as is set out in the Annual Practice (1955 Edn.) at p. 366 in the notes to R.S.C., Ord. 19, r. 27) that

> ". . . the court is not to dictate to parties how they should frame their case . . . But that rule is, of course, subject to this modification and limitation, that the parties must not offend against the rules of pleading which have been laid down by the law; and if a party introduces a pleading which is unnecessary, and it tends to prejudice, embarrass, and delay the trial of the action, it then becomes a pleading which is beyond his right."

R.S.C., Ord. 25, r. 4, provides:

> "The court or a judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the court or a judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just."

In the notes to that rule in the Annual Practice (1955 Edn.) at p. 421 there is a reference to the well established principle that

> "It is only in plain and obvious cases that recourse should be had to the summary process under this rule."

In regard to the first action, I have formed the view that the decision of Master Diamond was correct and that no part of para. 5 of the statement of claim should have been struck out. Having arrived at this view, I think it is undesirable that I should say anything beyond what is essential. No defence has yet been filed. We do not know and we are not concerned in any way with the nature or the merits of the issues which may be raised. The particulars under para. 5 in the first action alleged that certain facts were generally known to the readers of the "World's Press News and Advertiser's Review"; for example:

> "4. That it was the duty of the first-named plaintiff under the direction of the second-named plaintiff to collect [interesting material for publication in the 'Sunday Chronicle' with particular emphasis on exclusive material] . . . 7. That the best news editors and reporters are those who can collect the best material on the best terms . . . 9. That both the plaintiffs had been actively engaged in the search for material for this series of articles [revolving round the activities of . . . Jack Spot] for approximately two years before the publication of the article complained of."

If all, or indeed, some of the facts alleged are proved, I feel unable to say that it would not be open to a judge or jury to say that the words complained of are defamatory of the plaintiffs because they bear the meanings alleged in para. 5 of the statement of claim. All that it is necessary to say is that there is no case for striking out. I may add that even as matters at present stand it would be open to a judge or jury to hold that the words complained of bear the meaning that the plaintiffs are incompetent journalists, and it might be said that the words at present struck out merely denote the type of incompetence said to have been meant. It is not, however, necessary further to consider the question how matters would stand if the words struck out remained excluded. In my judgment, they should not be excluded, and, as to the first action, I would allow the appeal.

In regard to the second action, in order to test the matters raised, I think it is useful to consider what would happen if there were a trial with a jury. If words in their natural and ordinary sense are innocent or meaningless, then a judge must leave it to a jury to say whether they constitute a libel on a plaintiff if there is evidence of facts which would reasonably induce the persons to whom the words were published to understand them in a secondary and defamatory sense. We are not concerned in the present proceedings with any question whether the words in their natural and ordinary sense are capable of a meaning defamatory of the plaintiffs. It may be common ground that they are not. The issue is whether, assuming complete proof of all the facts relied on, it can reasonably be said that any case is or could be set up. The words of the alleged libel are:

> "Webb tells court he arranged for Comer to write for 'S. Chronicle'",

that is to say the "Sunday Chronicle". It certainly seems at first blush a startling suggestion that those words referred to and defamed the plaintiffs. In para. 5 of the statement of claim, it is said that the words bear the meanings therein alleged, and particulars are given which incorporate the particulars in the first action. In particular I think it is necessary to have in mind sub-para. (5), which reads:

> "The plaintiffs contend that such headline is intended to refer readers back to the earlier article and is a further assurance to such readers that the words used therein together with the meanings ascribed to them by these plaintiffs, are true and justifiable."

I think it is common ground that the word "intended" in that passage should be read as "calculated". It is, therefore, said that this headline is calculated to refer readers back to the earlier article. There is no reference to the earlier article, so clearly a reader of the words of the headline who had not read the earlier article would not be referred back. Even if an assiduous reader of the headline of Nov. 26 had his memory stirred in regard to the first article (which, incidentally, had appeared some five weeks earlier), I do not think that the words of that headline are calculated to assure him of the truth of the earlier words with their innuendoes. I cannot accept the view that the words of the headline constitute a confirmation of the earlier published words with their alleged meaning that the plaintiffs were incompetent journalists who had caused their editor to pay an extravagant price for deficient and inadequate material. The words of the headline do not seem even remotely to suggest this. The theory is that there is some sort of relation back and that these words of the headline constitute a kind of repetition or re-affirmation of the first words with their innuendoes. Though I greatly admire the acumen and ingenuity which have inspired that suggestion, I say with the utmost respect that it seems to me to be altogether too far-fetched. I do not think that it is sufficiently acceptable to raise a reasonable case, and I consider, therefore, that HAVERS, J., was correct in ordering that para. 5 of the statement of claim be struck out. I would, therefore, as to the second action, dismiss the appeal.

JENKINS, L.J.: I agree, and I have only to add as regards the second action a word about the course taken by HAVERS, J., in suggesting that the reference in para. 5 to the incompetence of the plaintiffs as journalists should be struck out, although the summons had not asked that those words should be struck out and they had not been struck out before Master DIAMOND. In my view, that departure from strict procedure should not be allowed to affect the result in the present case. The learned judge was, I think, right in the view he took that the whole of the innuendo alleged in para. 5 must stand or fall together, that is to say if the remainder of the paragraph could not be supported the reference to the incompetence of the plaintiffs as journalists could not be supported either. That being so, I think that the course he took, in the presence of both counsel, was properly taken, with a view to saving costs, for it followed from the learned judge's decision that if a fresh summons had been taken out to strike out the opening part of para. 5 it would have been a foregone conclusion that the order would have been made. I have nothing to add apart from that on either case. For the reasons which MORRIS, L.J., has given, I think that the first appeal should be allowed and the second appeal dismissed.

Appeal in first action allowed. Appeal in second action dismissed.

Solicitors: *Galbraith & Best* (for the plaintiffs in both actions); *Swepstone, Walsh & Son* (for the defendants in both actions).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

RICHARDS *v.* HIGHWAY IRONFOUNDERS (WEST BROMWICH), LTD.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Parker, L.JJ.), July 19, 20, 21, 22, 25, 26, 1955.]

Factory—Dust—" All practicable measures " to be taken—Dust likely to be injurious—" Substantial quantity of dust of any kind "—Provision of exhaust appliances " as near as possible to the point of origin of the dust "—Iron moulders' factory—Risk of silicosis known only after disease contracted by workman—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6 *c.* 67), *s.* 47 (1).

Damages—Measure of damages—Personal injury—Breach of statutory duty—Silicosis contracted by workman—Shortened expectation of life—No right to damages for loss of prospect of making provision for dependants.

From 1930 to 1952 the plaintiff was employed as a moulder in the defendants' factory. The operation of moulding required the use of sand and involved a process known as knocking-out, in which the grains of sand had to be knocked out of the moulds. Several moulders were employed in the room where the plaintiff worked, and the moulds were separate loose objects which could be opened at any place on the floor. There was no synchronisation among the moulders in regard to the knocking-out, and whenever this process took place a substantial quantity of dust was given out. Until about 1950 the dust was not thought to be dangerous. By about 1946 the plaintiff was seriously affected with silicosis and by 1948 was incurably ill. In about 1950 it was established that among the dust given off in the knocking-out process were small particles which were liable to produce silicosis after being inhaled over years; according to medical evidence it would take about fifteen years of exposure to the dust in the factory to render a man incurable. The defendants had taken no steps to protect moulders against inhalation of dust, and had not installed exhaust appliances. In 1954 the plaintiff commenced proceedings against the defendants for damages for breach of their statutory duty under

s. 47 (1) of the Factories Act, 1937*, in that they had failed to take all practicable, or any, measures to protect the plaintiff against the inhalation of dust and that they had failed to provide exhaust appliances, although the nature of the process made it practicable so to do. At the trial of the action some evidence was given concerning masks or pads as protection against inhalation of dust and that, out of numerous varieties, only a mask known as " Mark IV ", which had been used in certain industries during the last fifteen years, was effective in preventing the inhalation of small particles of dust, but that, having regard to the nature of the work in the defendants' factory, the workmen would not want to wear such a mask for more than fifteen minutes at a time. The trial judge was of the opinion that the installation of extraction hoods and the supply of " Mark IV " masks were practicable measures. He found that the defendants were in breach of s. 47 (1) of the Act of 1937, and assessed the damages to which the plaintiff was entitled at £9,645 6s. 5d., which included a sum of £1,000 for loss of his prospect, during the period which had been cut off from his life, of making provision for his dependants. On appeal by the defendants,

Held: (i) since at the time when the plaintiff became seriously affected with silicosis the dust emitted in the process of knocking-out was not known to be injurious, that branch of s. 47 (1) of the Factories Act, 1937, which imposes an obligation to take measures to protect employees against dust which is likely to be injurious did not impose a statutory duty on the defendants to protect the plaintiff against this dust, although, as dust was emitted in substantial quantity during the knocking-out, the defendants were under a statutory duty by virtue of a separate branch of the subsection to take all practicable measures against inhalation of this dust; in the circumstances there should be a re-trial on the question whether the defendants committed a breach of the latter statutory duty by failing to provide masks and, if they did, whether and to what extent the damage which the plaintiff suffered was attributable to the breach of this latter statutory duty, in view of the evidence that only one type out of several types of masks against dust existing in the relevant period gave protection against the minute particles which, as later became known, caused silicosis.

(ii) the defendants were not in breach of their obligation under s. 47 (1) of the Factories Act, 1937, to provide exhaust appliances as near as possible to the point of origin of the dust, where the nature of the process made it practicable, because (a) this obligation was directed to the case where the dust was emitted at some fixed point or points on a machine and, therefore, did not apply in the present case where the dust did not originate at fixed points, and (b) on the facts the plaintiff had failed to show that the nature of the process made it practicable to provide exhaust appliances.

(iii) in any event the plaintiff was not entitled to damages in respect of the loss of the prospect of making provision for dependants.

Dictum of VISCOUNT SIMON, L.C., in *Benham* v. *Gambling* ([1941] 1 All E.R. at p. 13) applied.

Order for a new trial.

[**Editorial Note.** In the present case emphasis is laid on the dichotomy apparent in s. 47 (1) of the Factories Act, 1937, which imposes duties in relation to two categories of circumstances, viz., (i) where dust given off is likely to be injurious or offensive, and (ii) where dust of any kind is given off in substantial quantity. In this regard the present case may usefully be compared with *Gregson* v. *Hick Hargreaves & Co., Ltd.* ([1955] 2 All E.R. at pp. 862, 863), which

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* The terms of the sub-section are printed at p. 209, letter D, post.

A also provides an instance where protective measures appear to have been taken in a moulding shop.

For the Factories Act, 1937, s. 47 (1), see 9 HALSBURY'S STATUTES (2nd Edn.) 1038.

As to damages for loss of expectation of life, see 11 HALSBURY'S LAWS (3rd Edn.) 256, para. 428; and as to damages for personal injuries, see Supplement to 23 HALSBURY'S LAWS (2nd Edn.), para. 1016; and for cases on damages B for personal injury where there is loss of expectation of life, see 36 DIGEST (Repl.) 200, *1053-1057*.]

Cases referred to:

(1) *Adsett* v. *K. & L. Steelfounders & Engineers, Ltd.*, [1953] 1 All E.R. 97; C *affd.* C.A., [1953] 2 All E.R. 320; 3rd Digest Supp.

(2) *Ebbs* v. *Whitson (James) & Co., Ltd.*, [1952] 2 All E.R. 192; [1952] 2 Q.B. 877; 3rd Digest Supp.

(3) *Vyner* v. *Waldenberg Bros., Ltd.*, [1945] 2 All E.R. 547; [1946] K.B. 50; 115 L.J.K.B. 119; 173 L.T. 330; 110 J.P. 76; 2nd Digest Supp.

(4) *Mist* v. *Toleman & Sons*, [1946] 1 All E.R. 139; 110 J.P. 149; 38 B.W.C.C. D 150; 2nd Digest Supp.

(5) *Harris* v. *Bright's Asphalt Contractors, Ltd.*, [1953] 1 All E.R. 395; [1953] 1 Q.B. 617; 3rd Digest Supp.

(6) *Rose* v. *Ford*, [1937] 3 All E.R. 359; [1937] A.C. 826; 106 L.J.K.B. 576; 157 L.T. 174; 36 Digest (Repl.) 229, *1210*.

(7) *Benham* v. *Gambling*, [1941] 1 All E.R. 7; [1941] A.C. 157; 110 L.J.K.B. E 49; 164 L.T. 290; 36 Digest (Repl.) 231, *1227*.

(8) *Roach* v. *Yates*, [1937] 3 All E.R. 442; [1938] 1 K.B. 256; 107 L.J.K.B. 170; 36 Digest (Repl.) 200, *1056*.

Appeal.

The defendants appealed from an order of DEVLIN, J., dated Mar. 31, 1955.

The plaintiff was employed by the defendants as a moulder at their factory F from 1930 to 1952. During his employment he contracted silicosis, which became serious in 1946, and in 1954 he brought this action against the defendants claiming damages for breaches of their statutory duty under the Factories Act, 1937, and for negligence. DEVLIN, J., held that the defendants were in breach of their duty under s. 47 (1) of the Act and awarded the sum of £9,645 6s. 5d. to the plaintiff as damages. G

F. W. Beney, Q.C., and *P. M. O'Connor* for the defendants.
Marven Everett, Q.C., and *G. Green* for the plaintiff.

SIR RAYMOND EVERSHED, M.R.: In this extremely difficult case I have felt myself forced to the conclusion that we should order a new trial. I H need not say with what reluctance I have arrived at that conclusion, for it is a principle of our law that there should be an end to litigation and, as a corollary to that principle, that a plaintiff who has failed at a trial to prove his case should not be given a second chance to do so. The present case, however, is remarkable for three difficulties of most unusual character. In the first place, the evidence on which the judge primarily, if not exclusively, acted did not emerge in the I ordinary course but appears to have come out after final speeches had been delivered, and in one vital respect the evidence of the plaintiff's chief witness was in complete contradiction to what he had in terms said at the beginning of the case. In the second place, certain vital matters of fact do not appear to me to be the subject of express findings on the part of the judge, nor, so far as I am able to inform myself from the shorthand notes, was the evidence in every case directed to those points. Thirdly, in so far as evidence was directed to those points, it was, as I have already said, so directed after speeches and would, no doubt, be apprehended in the light of those speeches; so that I have felt myself unable to reach a conclusion on those matters to my own satisfaction. I should add that the judge may have been able in some degree to rely on other cases of a somewhat similar character, for he is a highly experienced judge in these matters; and in those respects I am conscious of having no similar experience myself.

The result then is, on the one hand, that if the appeal were, or were in substance, to fail, it would have to be on the basis that the plaintiff had proved the essential matters of fact which I find it difficult to be satisfied that he did prove. On the other hand, if the appeal were to be allowed, it would be on the strict basis that, to judge from the shorthand notes, the plaintiff had failed to show a sufficient link between his injury and the actionable wrong alleged. I cannot exclude from my mind, first, that the plaintiff was an employee of the defendants and, as such, contracted a deadly disease from which he has suffered the gravest injury; and, secondly, that the subject-matter is one which has been on several occasions before judges who have acquired much greater experience of such matters than I have. To allow the appeal in those circumstances might, to my mind, and in the very special circumstances which I have indicated, involve a real injustice. In view of the course which I think we should take, it would obviously not be desirable for me to say more than is strictly necessary in order to explain my judgment.

The defendants carry on business, as their name implies, as iron moulders. That business involved in the present case that several men in a single room, which was called room " C " in their factory, on a floor of sand (save for a concrete alley-way), filled moulds with molten metal and then, when the moulds had somewhat cooled, opened them and took out the cooling forms. This last process is known as knocking-out and involves, among other things, knocking off by ordinary physical and manual means adherent grains of sand from the forms or castings. This process is, indubitably, very dusty. Clouds of sand are emitted. Moreover, there is no synchronisation among the men employed in the room and it may, therefore, be taken that approximately half of any working shift will be occupied by the process of knocking-out conducted by one or more of the operatives in the room. It follows that, even if a man is not subjected to thick dust clouds emitted from his own moulds, he is more or less involved in the clouds emitted by the operations of some of his fellow workers.

Until somewhere in the region of the year 1950[*] it was not appreciated by any competent person that the process which I have described, however uncomfortable, was dangerous to health in that it was liable to cause silicosis. It is now, and since the date which I have mentioned, established beyond a peradventure that, in the process described, the grains of sand are fractured and that there are then emitted into the atmosphere minute fragments of silicon dioxide, measured in terms of microns or one-thousandth parts of millimetres, which, if inhaled in sufficient quantities, produce, or are liable to produce, the deadly disease of silicosis. When knocking-out is going on, the semi-gaseous and highly volatile fragments are present in quantities which were estimated as being between seven thousand and eight thousand per cubic centimetre. Their density falls fairly rapidly and in the space of, say, fifteen to twenty minutes it is generally reduced to a degree probably below the danger level. A man may be affected, however, by clouds emitted, not by himself, but by his neighbours; clouds which, for a time at any rate, are lethally charged. All these matters of fact have lately become known, but before 1950 or thereabouts it was not at all appreciated that these dust clouds, however distasteful, were thus dangerous.

The plaintiff was a moulder in the defendants' employ from 1930.[†] According to the agreed medical report, by 1946 he had become seriously affected with

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[*] In *Gregson* v. *Hick Hargreaves & Co., Ltd.* ([1955] 2 All E.R. 860) the year was taken to be 1951, but about the beginning of the year.

[†] The plaintiff continued to be in the employment of the defendants until 1952.

A silicosis and by 1948 he was spitting blood. He had then become dangerously and incurably ill from the disease. At the date of the commencement of proceedings in 1954 (the plaintiff then being in the forties) he had not only become largely incapacitated from his ordinary work, but he had also lost the prospect of living the normal span of his life. It was said that he then had about fifteen years of life to which to look forward. It was also proved that this disease, B once contracted, cannot properly be eliminated, though perhaps it may be arrested. The evidence seemed to be that in an ordinary case it would take about fifteen years of exposure to the lethal fragments of sand for a man in this occupation to become dangerously and incurably afflicted.

The plaintiff brought his action claiming damages based both on common law and on s. 47 (1) of the Factories Act, 1937. In the circumstances, and having C regard to the state of knowledge which I have indicated, he made no claim good under the common law and he does not now pursue that claim; but he succeeded on his claim under the Factories Act, 1937, and recovered by way of damages a total sum of £9,645 6s. 5d. made up as I shall later show. The claim under the Factories Act was formulated under several heads, of which two became material at the trial.

D Section 47 (1) of the Factories Act, 1937, is as follows:

> " In every factory in which, in connection with any process carried on, there is given off any dust or fume or other impurity of such a character and to such extent as to be likely to be injurious or offensive to the persons employed, or any substantial quantity of dust of any kind, all practicable E measures shall be taken to protect the persons employed against inhalation of the dust or fume or other impurity . . . and in particular, where the nature of the process makes it practicable, exhaust appliances shall be provided and maintained, as near as possible to the point of origin of the dust or fume or other impurity, so as to prevent it entering the air of any workroom."

F The first thing to notice about that sub-section is the dichotomy, which the learned judge observed, between cases of the emission " of dust or fume . . . of such a character . . . as to be likely to be injurious ", on the one hand, and " substantial quantity of dust of any kind ", on the other hand. In my judgment the dichotomy was correctly noticed by the judge. Having regard to the state of knowledge, it may be taken that the dust with which we are here concerned G was not, at any material date, dust within the first branch of the sub-section,* since it could not fairly be regarded then as likely to cause silicosis. On the other hand, there is no doubt that the dust was emitted in substantial quantities so that it fell within the second branch of the sub-section which I have read. From this it follows that, since the dust was in substantial quantities, there arose an obligation, from the date of the coming into operation of this sub-section (namely, H on July 1, 1938†), to take, as stated by the sub-section, " all practicable measures . . . to protect the persons employed against inhalation of the dust . . . "

It is at this point that the first difficulty arises. What is meant by the phrase " all practicable measures " ? The matter was discussed by PARKER, J., and by this court in *Adsett* v. *K. & L. Steelfounders & Engineers, Ltd.* (1) ([1953] I 1 All E.R. 97, in the court of first instance, and [1953] 2 All E.R. 320, in the Court of Appeal). It will suffice for my purposes to take a short sentence from the judgment given by SINGLETON, L.J. He said ([1953] 2 All E.R. at p. 322):

> " In deciding whether all practicable measures were taken one must have regard to the state of knowledge at the material time, and, particularly, to the knowledge of scientific experts. I find it impossible to say on my view

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* I.e., dust of such a character as to be likely to be injurious.

† See s. 160 (2) of the Factories Act, 1937.

> of this sub-section that the defendants were in breach of their statutory duty."

The nature of the obligation has been epigrammatically expressed as being that the measures taken must be possible in the light of current knowledge and according to known means and resources. It is clear then, in my judgment, that the matter must be judged in the light of the state of the relevant knowledge at the time of the alleged breach. Thus the fact that at some later date some method of protection has been discovered which was not dreamed of at the date of the alleged breach, even though all the individual materials therefor were known and available, will not suffice. On the other hand, I must not be taken to be saying that the state of knowledge, or absence of knowledge, within the limited scope of a particular industry, or branch of an industry, is by any means necessarily conclusive. It must be a question of fact and of the weight of all the material evidence in any particular case to assess what was in truth known, or what ought to have been known, by the employers charged at the relevant dates.

At the relevant dates in the present case (that is to say, when the Act came into force and later, until the time when the plaintiff had become incurably and fatally affected), it was not at all appreciated by any competent persons, or, indeed, by anyone, that the dust emitted in this iron moulding process was liable to produce silicosis. On the other hand, it seems equally clear (although the manner of proof was highly peculiar, as I have already indicated) that there were available and known methods of protecting workers against the inhalation of large quantities of dust as such, namely, various forms of respirators and masks. Of these it is said that there were as many as twenty types. One of them has been called Mark IV and has, indeed, figured in other similar cases in the courts. The fact is now known that of all the masks or respirators that were then available, Mark IV was the only one (although the others might give relief from discomfort) which had any effectiveness whatever against the minute particles which were dangerous in the grains of sand.

The nature of the case now emerges. Although the dust was not thought likely to be injurious, it was, beyond question, given off in substantial quantities. Therefore, it follows that the defendants were bound to take all practicable measures. They took, as the learned judge found, none. The plaintiff then says: "Among these measures which were practicable must, at least, be included the supply of Mark IV masks which would have been of some effectiveness against my injury. The defendants, having taken no steps, must, therefore, be responsible for the ill consequences, which, had they taken measures including the supply of Mark IV masks, would have been at least of some protective quality."

The discussion has involved considerations, amongst other things, of the onus of proof and of causation; and, having regard to the dates which I have already indicated, including the fact that when the Act came into force the plaintiff had been in the service of the defendants for eight years, exposed to this inhalation, there has also arisen the question of aggravation, assuming that at any material date the plaintiff had become, to some degree, afflicted with the disease.

Among the cases to which our attention was drawn were *Ebbs* v. *James Whitson & Co., Ltd.* (2) ([1952] 2 All E.R. 192), in this court, *Vyner* v. *Waldenberg Bros., Ltd.* (3) ([1945] 2 All E.R. 547), and *Mist* v. *Toleman & Sons* (4) ([1946] 1 All E.R. 139). I will not take up time by further references to those cases, for they are not in my judgment directly in point. The problem which arose in those cases was of this nature. If a plaintiff proves that, having been exposed to contact with, for example, fumes, he contracted a disease of the kind against which the relevant sections of the Act were designed to protect him by requiring that measures should be taken against the inhalation of the fumes, then, if the defendants are to escape liability, they must show that the disease did not in fact result from that inhalation. In *Mist's* case (4) the tuberculosis from which the plaintiff suffered was not a disease of the kind against which, through inhalation of dust, the Act was designed to give protection, and was not shown by the plaintiff in fact to have resulted from such inhalation. It might have done so and it might not. It was, accordingly, held in that case that he had failed to make good the first limb of the case which it was incumbent on him to prove. In the present case there is no doubt whatever that the disease of silicosis which afflicted the plaintiff did result from the inhalation of the dust emitted at the defendants' factory. The question, however, is: Did it so result by reason of a failure on the defendants' part to do that which they were by the statute bound to do ?

I have said, first, that the fact that dust caused silicosis was not known until about the year 1950, and, secondly, that of the numerous masks or respirators which were known to give protection against dust as such, only Mark IV was in fact later shown to have been effective against silicosis. Therefore, of all the possible means of protection, only the Mark IV mask would have protected the plaintiff against the particular damage or aggravation of the damage which he has suffered. As counsel for the defendants put it in the course of his reply: Must not the plaintiff show that the defendants' fault was a failure on their part to supply, not any masks, but Mark IV masks ?

The words in s. 47 (1) of the Factories Act, 1937, are " all practicable measures ". It cannot, however, I think, be sensibly supposed that it was the defendants' obligation to render available a sufficient supply of every mask of every known type. Has then the plaintiff shown that at the relevant dates, which I take to be 1938 to 1946, the Mark IV mask was regarded by competent persons, including technicians qualified to speak on these matters, as what I will call the best all-purpose mask; so that in the natural course of events an obligation to take all practicable measures would inevitably involve, or properly and naturally involve, a supply of Mark IV masks ? That seems to me to be the vital question. If the answer to that question is in the negative, then can it not be said that the plaintiff has failed to prove his case ? The learned judge has, as I think, assumed that, at the dates which I have mentioned, the Mark IV mask had the kind of primacy which I have described. It is, however, on this point that I have found the evidence so unsatisfactory that I have been unable, for my part, to reach a satisfactory conclusion.

Before I deal further with this point I can dispose of two other matters. It was also part of the case, made good in the court below by the plaintiff, that the defendants should have provided exhaust appliances in pursuance of the obligation imposed by the last few lines in s. 47 (1). On that matter the evidence, which I have already described as being in its nature unusual, was briefly as follows. On the second day Mr. McKie, an engineer, who was the principal witness for the plaintiff, went so far as to say this in cross-examination. The question was: " Do you think any section of the Factories Act had anything to do with it ? " Mr. McKie boldly answered: " No. I do not. I do not think it is a question of any breach of statutory duty ". Whether or not there was a breach of s. 47 (1) was a matter for the learned judge and not for the witness, but I think that counsel for the defendants at the trial was fairly entitled to assume that by that answer this expert witness whom the plaintiff had called was saying that there were in his view, in his experience, no " practicable measures " which ought to have been taken and that the circumstances which are set out at the end of s. 47 (1), when applied to this case, excluded the practicability or duty of supplying exhaust appliances. Accordingly, when the evidence for the defendants was called, not unnaturally none of it was directed to dealing with these—largely technical—matters of fact.

The learned junior counsel who conducted the case for the plaintiff and defendants at the trial then proceeded to address the judge. At the end—and who finally asked the judge for the necessary indulgence does not seem to me to matter—this same witness, Mr. McKie, was recalled and sang, as will be seen, a song of somewhat different tune. There was also recalled on the defendants' side their own expert, Mr. Ottignon, who, if anything, added, and added considerably in one respect, to the weapons which were put into the plaintiff's hands. On this matter Mr. McKie made the following observations. In examination-in-chief he was asked:

> " Q.—If one used that form of dust removal system, would it necessitate any alteration of the system of work within the foundry itself or could the system go on as it is at the moment ? A.—I think it is practicable to do it and I think it will be done some time although I have not seen it yet.
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> " DEVLIN, J.: Would it involve any alteration in the system of the foundry ? A.—I do not think it would. Q.—Would it involve any cost other than the cost of putting in these devices ? A.—It would involve no main structural alterations at all."

Counsel for the defendants, who might, I suppose, be somewhat surprised when he compared those answers with the earlier answer, then asked questions which gave rise to the following evidence on the same day. He mentioned the size of this shop, or room " C," and said:

> " Of course a system of local exhaustion by forced draught and trunking has been known a good many years. For one thing it has been applied to several things under the abrasive metal legislation that came into force in 1925, but as far as foundries are concerned you have never heard of any such apparatus being used, have you ? A.—Not in this type of foundry. In the non-ferrous foundries they are quite common round about the furnaces. Q.—Not around the moulders ? A.—They are over the moulders as well because the moulders are near the furnaces. They empty very often straight from the furnace into the moulds."

The apparatus having been called a hood or hat, Mr. McKie was asked where he would place it, and he said:

> " It would come down on top of [the workman]. When I say the hood, it would be perhaps a low grid taking the dust sideways. I do not think you could take it down. I think the main dust will fall there, but the main thing is to induce a current of air downwards over the head of the man to the grid and I think that will be done some time. I have never known it to be done but if I had been designing a foundry today I should certainly have put something of that kind in . . . I know what its effect would be, there cannot be any argument about that. It is practicable, it is possible, but it has never been done."

In re-examination Mr. McKie said:

> " I have no doubt whatsoever that a dust exhaust system could be installed which would prevent any, or very much dust at any rate, ninety-nine per cent. of the dust that a man normally inhales from these processes reaching him."

Finally Mr. Ottignon, in answer to a question on this point, said that in a mechanised foundry one could do certain things,

> " but on a jobbing foundry the knock-out takes place over the whole of the foundry floor. The whole of the floor is a working area and it takes place over the whole area. You must have rows of continuous hooding. It can be done, there is no fundamental impossibility for it, but again you would have to have double the space for moulding. You would want space for the moulding and space for the extraction hood. There would be the mould and there would be the extraction hood pulling the dust.

> "DEVLIN, J.: If it ran the full length, you say, you would want the space for the hood and space for the boxes? A.—Yes. Probably rather less in that two moulders could work back to back, but certainly you would need sixty per cent. more floor space."

It will be noticed from those answers, at any rate as I read them, that there seems to be no very clear distinction between a hood over the worker's head which sucked the particles of dust out and some rather different type of apparatus consisting of grids in the floor, or grids in the floor together with some down-draught which would push the dust particles down and sideways out of harm's way. What the finally recommended conclusion was, I am left in grave doubt about.

On this question the learned judge said:

> "The two other measures that have been suggested are, first, that there should be what Mr. McKie called a hood. I do not think I need describe it more than to say that it is a method of extracting air or creating an artificial draught immediately above the place where the workman is employed which will draw out or exhaust the dust very rapidly and remove it. Nobody has ever heard of it being used in foundries, but it is, in fact, a method which has been used a long time elsewhere. It has been used for getting rid of dust in the metal polishing trade. It is in fact, and has been for forty or fifty years, a well-known way of getting rid of dust where it is thought important that dust should be got rid of. It would not involve any structural alterations in this foundry. It would not involve alteration in the system of work except to this extent, that, of course, the hood, which would be a pretty elaborate thing, would require a good deal of space and it would require about fifty or sixty per cent. more floor space if the same amount of work was to be done in the shop in this case as was in fact being done."

Later, having dealt with masks, the learned judge said: "I am satisfied that both measures, including the hood measure, were practicable measures."

As I have said, I feel great difficulty in following the evidence, with its variation between hoods and grids, into the summary in the judge's judgment; but in any case I venture to think, with all respect, that the learned judge has omitted to notice that the added obligation about exhaust appliances, unlike the first obligation for protection against inhalation, is qualified. Let me re-read the material terms of s. 47 (1) of the Act of 1937:

> ". . . and . . . where the nature of the process makes it practicable, exhaust appliances shall be provided and maintained, as near as possible to the point of origin of the dust or fume . . . so as to prevent it entering the air of any workroom."

I think that those words are plainly directed to the case where the dust or fume is emitted at some fixed point or points on a machine and the exhaust appliance is intended, therefore, to be fixed in such a manner that the dust, instead of being emitted into the atmosphere, is drawn off outside or elsewhere. I am not saying that it is necessarily limited to that particular case, but I do say that in my judgment it is inapplicable to a case where, for one thing, there are quite certainly no "points" which are definable and fixed, and which can be said to be the origin of the dust. The moulds are separate, loose objects which may be opened at any place on the floor. I further think that the earlier qualification "where the nature of the process makes it practicable" is such that on the evidence, as I understand it, the plaintiff did clearly fail in this respect to establish any breach on the defendants' part. I, therefore, think on that matter, with all respect to the judge, that the plaintiff failed to make good his claim for a breach based on failure to supply exhaust appliances and that that matter should now be taken to have been finally disposed of against the plaintiff.

I have referred already more than once to the extraordinary course, which, through no fault of anyone—and I must not be taken to be casting blame on anyone—the action took. After Mr. McKie had, on the second day, apparently repudiated any claim on the plaintiff's part to rely on the Factories Act, 1937, he also, on the matter of respirators, said this, on the same day, in answer to the last question by counsel for the defendants in cross-examination:

> " Q.—You did say that masks could have been used. You have never heard of anybody in these foundries using masks, have you ? A.—I have never known of moulders using them. I have heard of fettlers and cupola men, but never a moulder. If you provided them I do not think they would use them."

Notwithstanding that answer, however, I think it may fairly be said that the defendants did not establish that the supply of masks would necessarily have been futile because they would have been cast aside. Such was shown to have been the fact before PARKER, J., in *Adsett's* case (1). In the present case, however, I do not think that the defendants, not having made any attempt by suggestion or exhortation to encourage their use, can be heard to say that the measures were not practicable because the men would not in any circumstances use them.

Notwithstanding that limitation on the answer, however, it seems to me natural enough that counsel for the defendants, on this matter of masks, should also have left the point severely alone in his own later comments, and so, once more, one comes to the speeches and the recall of Mr. McKie and Mr. Ottignon. I am not, of course, seeking to cast aspersions on the integrity of Mr. McKie; but, on the third day, by way of contrast to what he had formerly said, he said this in cross-examination:

> " Q.—You have never heard it recommended from 1930 to 1950 that moulders should wear masks ? A.—I have not seen any recommendation to that effect. Q.—You say that they could have worn a cotton gauze pad. Is that right ? A.—That is the only thing one would normally wear, if they wore anything at all. Q.—Have you any idea whether it would be any good ? A.—Yes. Q.—I suggest that it would not catch any of the dangerous particles ? A.—I believe it would. I am sure it would."

On this matter Mr. Ottignon gave evidence thus:

> " Q.—Now, as to the efficacy of a mask, a cotton gauze pad, would that catch the small particles ? A.—No. The cotton gauze pad is the simplest form of all protection. Better than that there are probably about twenty proprietary brands of that, all with improved efficiency to cotton wool, but only two of those are approved by the Factory Inspector's Department as being satisfactory under the new regulations."

The new regulations to which he referred were the Iron and Steel Foundries Regulations, 1953 (S.I. 1953 No. 1464). There was a discussion about the nature of the requirements. Mr. Ottignon's evidence continued:

> " Q.—How long have those masks been known which can catch small particles ? A.—One of them, the least satisfactory, for a number of years, probably fifteen years, and the other one, the most satisfactory, from 1951 or 1952.
>
> " DEVLIN, J.: One has been satisfactory for fifteen years ? A.—Possibly fifteen years.
>
> " Counsel for the defendants: Where did that originate ? What is it called. 'Mark IV' ? A.—Yes. I do not know its origin. The other is the micro filter.
>
> " DEVLIN, J.: What was it used for in the course of the last fifteen years ? A.—All sorts of dusty operations, in quarrying, odd foundry operations, cement work and pottery work."

During cross-examination on this matter, DEVLIN, J., asked:

> "Q.—When do you say you have seen them worn ? A.—On light bench work. Q.—Counsel for the plaintiff did put, 'For the whole time ?' and did you agree ? A.—For a reasonable time. I have not seen them worn the whole day.
>
> "Counsel for the plaintiff: The men in a foundry like this would not want to wear them more than fifteen minutes at a time ? A.—No; because although the knocking-out process is not continuous with one man there is the man next door who may be. Q.—In other words, there is a hazard coming from the next door neighbour ? A.—Agreed."

Later:

> "Q.—Is he in a position of danger continuously from his neighbour's work ? A.—One neighbour or the other during most of the day. Knocking-out probably takes place four or five times within an eight-hour day."

Cutting this matter short, what it came to, I think, is this. It was conceded that owing to the heavy nature of the work the workman could not wear the mask the whole time, but he could wear it for periods of fifteen or twenty minutes. Thus, at the very end, DEVLIN, J., asked two very pregnant questions:

> "Q.—Then is not the position this; that while you could not guarantee safety unless a man wore a mask the whole time, if he wore a mask when he was actually doing his own operation for a quarter of an hour it would give him a measure of protection over the most dangerous period ? A.—It would undoubtedly. Q.—And would presumably be worth doing ? A.—It would."

After that I turn to the judgment:

> "The fourth method, and perhaps the simplest, is that the men should be equipped with a mask. Mr. McKie said that a cotton gauze pad over the mouth and the nose, such as was used in many industries, would be quite sufficient. It would require to be used only during the actual process, that is, I suppose, during the five, ten, or fifteen minutes in which the knock-out was taking place, and this dust is being given off. The criticism that was made against it was that the cotton gauze would not, in fact, keep out the small particles which were the cause of the damage in this case. Of course, one has to keep the thing rather distinct in one's mind there. Nobody knew that these small particles had, in particular, to be kept out; what had to be done under the Act was to prevent the inhalation of dust. The cotton gauze pad would, it seems to me, certainly have done that, though it might be said that the failure of the defendants to cause it to be used in this case did not really matter since, in fact, it would not have kept out those particles that turned out to be injurious. But there is in fact a mask which would have done that. That is something which has also been known for some time [in the note it says about fifty, but I think it must be about fifteen years] and it is called a Mark IV mask. It is used in cement works where, for example, the cement is being got out of paper sacks. The criticism which has been made by the defendants' experts against masks generally was that the mask was no good unless it restricts breathing and if it restricts breathing it cannot be worn for any prolonged period when any manual work is being done. I think the answer to that in this particular case is that it is not necessary that it should be worn for a long period. It may be desirable but it is not strictly necessary. The defendants' expert thought it could be worn for twenty minutes to half an hour and that would be ample to cover the period of greatest danger. It is perfectly true, of course, that dust may be given off by other moulders, all the knock-out is not done at the same time and to some extent, even though the mask may be worn by the man himself,

> he may be subject to dust while the other knock-out is going on. But it seems to me that with a little adjustment in the manner of doing the knock-out a great measure of assistance could be obtained by wearing masks for a quarter of an hour during the period of knock-out."

Then the learned judge says that the supply of masks (I think he meant Mark IV masks) was a practicable measure which ought to have been taken.

Without going too much into the matter, it seems to me that that finding is open to two criticisms. It seems to me, if I may say so, not fully to appreciate the vital dates and times, that is, the fact that, when these masks became available, the plaintiff had already been in the defendants' employ, exposed to these lethal particles, for ten or more years. Also, it seems to me to neglect to pay sufficient attention (because the evidence does not seem to me to have sufficiently dealt with them) to the questions: In those circumstances and having regard to the nature of the work, would the wearing of a Mark IV mask in any case for about fifteen or twenty minutes, while the man was doing his own knock-out, have been effective at all ? Has its absence, in any event, done more than aggravate to some extent the disease which had already been contracted ? Would it, indeed, have been any good in any event ? And would it have been any good if it was worn only for a limited time ?

The absence of precise findings on those matters and of clear evidence directed to them, as I read the evidence, has caused me to reach the conclusion which I stated at the beginning of my judgment. I have, as I also stated, wondered to what extent the learned judge may have assumed, perhaps from his experience elsewhere, that the Mark IV mask was what I have called the best all-purpose respirator in the years to which he was directing his attention. Unless he so assumed, there is the difficulty: Why is it said that the defendants' breach lay in failing to supply those particular masks ? It is for those reasons that I have reached the conclusion, unsatisfactory as it is, that on this matter of the supply of respirators there should be a new trial.

One other separate question was argued with which it is possible for me to deal finally, and I can do so shortly. The figure of damages, £9,645 6s. 5d., was made up as to £1,645 of special damages; a sum of £200 for loss of expectation of life; a sum of £7,000 for loss of earning capacity during the remainder of his life (subject to a deduction); and, as to the balance of £1,000, for what the learned judge, I think, has regarded, or certainly for what counsel for the plaintiff contended to be, loss of his prospect, during the period which has been cut off from his life, of making some provision for his wife or other dependants. In the course of his speech to us, counsel for the plaintiff made it quite clear that, as regards this £1,000, he was not putting his claim forward as being one of lost earning capacity during the lost years. What the plaintiff has lost, says counsel, is the prospect of making this provision for his family. As will appear in a moment, in that respect the claim differs from a somewhat similar claim made in *Harris* v. *Bright's Asphalt Contractors, Ltd.* (5) ([1953] 1 All E.R. 395), and rejected by SLADE, J. In the present case the matter is put in this way by DEVLIN, J.:

> "I must say a word about the effect of the reduced expectation of life. The defendants rely on that, as I think in law they are entitled to do. They are entitled to say that I must regard him as a man whose prospects of earning will in any case be diminished. I do not think the contrary has been argued by Mr. Green [for the plaintiff], but I think that, if the defendants rely on it, the plaintiff is also entitled to rely on it for another purpose. He is entitled to ask for something more than an ordinary formal estimate of loss under this head. What the plaintiff loses, and it seems to me to be a real loss, is the prospect of making provision for his wife and family. He is a married man. There will be a time, a longer time than there should have been, when they are left without the support of the wage earner. If he had died, of course, they would have been able to make a claim under the Fatal Accidents Act,

> A 1846. I think it is a proper claim to be taken into consideration in a case of this sort under the head of expectation of life."

Then, having dealt with the other heads, including £200 for the loss of expectation of life in the ordinary case, that is, loss of amenities and so forth, the learned judge said:

> B "I shall add to that, for the reasons that I have given already, the figure of £1,000 . . . I wish to make it quite clear that, if I had not taken expectation of life into consideration at all, the sum which I should have awarded would have been higher and not lower, because I should have taken a longer period of loss of earnings for the benefit of the plaintiff. The sum that I have awarded, as it were, in relation to the wife and family is small in comparison C because, of course, the loss of expectation of life takes effect at the time when the earning power would have been diminished anyway—indeed, for a large part of it the earning power might have ceased—and because I think all I have to consider under that head is the provision which he might reasonably have been expected to make, if he had continued to live, for his wife and family . . ."

D As appears elsewhere in the judgment, the sum was arrived at really by considering what the plaintiff might have earned over and above what he might have spent. As regards the claim for lost earning power counsel for the plaintiff conceded that, the judge having accepted the evidence that the expectation of life was x years, the lost earning capacity must be calculated accordingly; but counsel also said that this claim for lost prospects of making provision for E the wife is based on authority, for example, the language used by LORD WRIGHT in *Rose* v. *Ford* (6) ([1937] 3 All E.R. 359). *Rose* v. *Ford* (6) was a case, it will be remembered, in which a young woman was seriously injured and in fact died four days after the injury. LORD WRIGHT, in discussing the various heads of damage, used the phrase (ibid., at p. 375): "... one of the fruits of continued life is, generally, provision for dependants". I am bound to observe here that there F was no evidence at all, so far as I know, as to the circumstances or frugal habits of the plaintiff in the present case. In any case, however, once the suggestion of the figure here discussed being in any sense lost earning capacity is out of the way, it seems to me that one is left with something which is either quite incapable of estimation as a piece of property belonging to the plaintiff, or is necessarily comprehended in the kind of general loss of happiness and amenities which is G covered by the award given, and already given in this case, for loss of expectation of life. After all, if a man is prevented from making provision on his death for someone else, it is that someone else who materially suffers, not the man himself —except to the extent that his conscience and mind may be the less easy when he reflects on his forthcoming incapacity. Where a death takes place soon after the accident, then such a claim might be made by the dependants, for the time which H has elapsed would not bar it. In such cases there would be available a claim under the Fatal Accidents Acts. In this case, however, and in many cases, it is, no doubt, true that the claim on the part of the dependants would have been barred by lapse of time. Still, it does not seem to me to justify the creation of a head of claim which I cannot think has any logical and sensible foundation, at any rate when it comes to estimation of the money's worth to the man himself at the time I of the accident. Not only that, but it seems to me to be in conflict with what was laid down by the House of Lords in *Benham* v. *Gambling* (7) ([1941] 1 All E.R. 7).

I will read one passage from the opinion of VISCOUNT SIMON, L.C. After referring to *Rose* v. *Ford* (6), the noble Lord said ([1941] 1 All E.R. at p. 13):

> "I would further lay it down that, in assessing damages for this purpose [that is, the loss of expectation of life], the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness. The test is not subjective, and the right sum to

> award depends on an objective estimate of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. Of course, no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not of loss of future pecuniary prospects."

As I have indicated, it seems to me that the award of £1,000 under the head which I have mentioned is really not consistent with the principles which were laid down in the speech of VISCOUNT SIMON, L.C.

I should in conclusion mention, and I will do so briefly, *Harris* v. *Bright's Asphalt Contractors, Ltd.* (5), to which I rather think the attention of DEVLIN, J., was not drawn. It suffices to say that in that case SLADE, J., considered fully the possibility of a claim of this character, although it was based somewhat differently from the way in which the present case has been based. In *Harris's* case (5) what was suggested was that the plaintiff ought to be entitled to a sum which would somehow represent the earnings, or the net earnings less expenses, which he would have received and enjoyed had he lived during the years when, because of the accident, he would not be alive at all. SLADE, J., I think rightly in view of *Benham* v. *Gambling* (7), rejected that contention. Counsel for the plaintiff, however, does not base his claim in the present case on parallel grounds, and I need not, therefore, further discuss it, except to acknowledge the care with which SLADE, J., examined the various arguments which were there put forward, including language which fell from members of this court in *Roach* v. *Yates* (8) ([1937] 3 All E.R. 442).

For the reasons which I have stated, I think that that claim for £1,000 damages for loss of prospects of making provision for relatives should not have been included; but I think that in all the circumstances the case should be remitted for re-trial on the one question whether the defendants failed to comply with the statutory obligation under s. 47 (1) of the Factories Act, 1937, by failing to supply masks, and, if so, to what extent the damage which the plaintiff suffered is properly attributable thereto, including under that head the question whether, in the event, the absence of masks merely aggravated rather than caused the injury.

JENKINS, L.J.: I agree and find nothing I can usefully add to what my Lord has said.

PARKER, L.J.: I also agree.

Appeal allowed on certain points. Order for a new trial on the question of the defendants' liability under the Factories Act, 1937, *s.* 47 (1), *in regard to their not having supplied* " *Mark IV* " *masks.*

Solicitors: *Clifford-Turner & Co.* (for the defendants); *Beckingsales*, agents for *Wm. Bache & Sons*, West Bromwich (for the plaintiff).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

Re NANWA GOLD MINES, LTD. BALLANTYNE *v.* NANWA GOLD MINES, LTD. AND ANOTHER.

[Chancery Division (Harman, J.), July 28, 29, 1955.]

Company—Shares—Issue of new shares—Application moneys to be kept in separate account and refunded on failure of specified conditions—Failure of conditions—Whether moneys subscribed are repayable to applicants or comprised in debenture—Companies Act, 1948 (11 *&* 12 *Geo.* 6 *c.* 38), *s.* 51.

On July 28, 1953, the defendant company, having reached the end of its financial resources, evolved a scheme whereby its capital was to be reduced and one million 1s. shares were to be issued in order to obtain fresh capital to resume its activities. On that date three documents were sent to the shareholders, first a notice of reduction of capital, second, a circular letter from the chairman explaining the policy and intentions of the board, and third, a form of application which contained the following: "It will be noted that this issue is conditional on the passing of the resolutions at the extraordinary general meeting of the company to be held on Aug. 20, 1953, and the subsequent sanction of the court to the reduction of the company's capital. Should either of these conditions not be fulfilled, application moneys will be refunded and meanwhile will be retained in a separate account . . ." The sum of £3,472 18s. only was subscribed and that money was duly paid into a separate account in the joint names of the company and its registrars. In September, 1953, the writ in a debenture-holders' action was issued and a receiver was appointed. The scheme was formally abandoned by a resolution of the board in January, 1954. On a summons by the plaintiff on behalf of all the debenture-holders to determine whether the sum of £3,472 18s. was the property of the company or was repayable to those who had subscribed for shares in response to the board's circular letter,

Held: the money was repayable to the persons who had subscribed in answer to the circular letter dated July 28, 1953, because they subscribed the money on faith of a promise not only to refund the money if, as happened, certain conditions were not fulfilled, but also to retain the money in a separate account meanwhile, and thereby they became entitled to a lien or equity on the fund so subscribed.

Moseley v. *Cressey's Co.* (1865) (L.R. 1 Eq. 405) and *Lister & Co.* v. *Stubbs* (1890) (45 Ch.D. 1) distinguished.

Observations on the effect of the statutory obligations under s. 51 of the Companies Act, 1948 (see pp. 223, 224, post).

[**Editorial Note.** The money which had been subscribed had been paid into a separate bank account. It had thus been replaced by the chose in action, the banker's debt to his customers on that account. Notwithstanding this change an equity to the moneys would, however, attach to the benefit of the banker's debt; see per Lord Greene, M.R., in *Re Diplock's Estate* ([1948] 2 All E.R. at p. 346).

Harman, J., comments at p. 223, letter H, post, on the treatment of this subject in the books. Cases on money in separate accounts have arisen often where there has been some fiduciary relation, such as that of principal and agent or solicitor and client, and where the money so separated has been paid for a particular purpose and in that sense is regarded as trust money; for examples of such cases reference may be made to the judgment of Roxburgh, J., in *Re A Solicitor* ([1952] 1 All E.R. at p. 136) and the cases there cited.

As regards equitable liens generally, see 20 Halsbury's Laws (2nd Edn.) 567, para. 714; and for cases on the subject, see 32 Digest 254, 255, *398-405*.

For the Companies Act, 1948, s. 51, see 3 Halsbury's Statutes (2nd Edn.) 503.]

Cases referred to:

(1) *Moseley* v. *Cressey's Co.*, (1865), L.R. 1 Eq. 405; 35 L.J.Ch. 360; 14 L.T. 99; 9 Digest 103, *444*.

(2) *Lister & Co.* v. *Stubbs*, (1890), 45 Ch.D. 1; 59 L.J.Ch. 570; 63 L.T. 75; 1 Digest 482, *1623*.

(3) *Mears* v. *Western Canada Pulp & Paper Co., Ltd.*, [1905] 2 Ch. 353; 74 L.J.Ch. 581; 93 L.T. 150; 9 Digest 266, *1650*.

(4) *Stewart* v. *Austin*, (1866), L.R. 3 Eq. 299; 36 L.J.Ch. 162; 15 L.T. 407; 1 Digest 663, *2781*.

Adjourned Summons.

The plaintiff in a debenture-holders' action issued a summons for the determination of the question whether the sum of £3,472 18s. then standing to the credit of the joint account of the first defendant, Nanwa Gold Mines, Ltd. and Buckley Hall Devin & Co., with Barclays Bank, Ltd., ought to be treated as the property of the first defendant company and could, therefore, be validly claimed by its debenture-holders, or whether it was properly to be treated as the property of those persons who respectively subscribed the moneys to the defendant company in response to a circular letter dated July 28, 1953. The facts appear in the judgment.

Arthur Bagnall for the debenture-holder, the plaintiff.

R. A. K. Wright for the company, the first defendant.

J. G. Monroe for the second defendant, a person who had subscribed money in response to the circular dated July 28, 1953.

HARMAN, J.: This is a summons taken out in a debenture-holders' action in order to enable the master to certify, in answer to the inquiry directed by an order of Dec. 8, 1953, of what the property comprised in and charged by the secured convertible notes, that is to say, the debentures in question, consists and in whom the same is vested. The subject-matter of the summons is a sum of £3,472 18s. now standing to the credit of a joint account with Barclays Bank, Ltd., the joint names being those of the company and Messrs. Buckley Hall Devin & Co., their registrars. The question which I have to determine is whether this money is the property of the company and therefore can be validly claimed by the debenture-holders' receiver who has been appointed, or whether it is the property of those who paid it to the company.

The circumstances are a little unusual, for there appears to be very little guidance as to the answer which should be made to the question. I should have wished, in ordinary circumstances, to reserve my judgment.

The Nanwa Gold Mines, Ltd., was an old-established company. By 1953 it had come to the end of its resources and had abandoned for the time being its workings, but it still had considerable concessions on the Gold Coast which looked as if they might promise a return and the directors were minded to make a last effort to turn these assets to profitable account. They realised that they had lost the greater part of the company's capital and therefore proposed drastically to write it down; but that alone would be insufficient. They concluded, therefore, that they would need some fresh money to be able to embark again on the operation of extracting gold. Consequently, on July 28, 1953, there were sent out to the shareholders (there being a comparatively large number of shareholders of 1s. shares) three documents, one of them a notice for a

A reduction of capital, combined with the usual increase to follow immediately on it, one of them a circular letter containing the views of the board, and the third a form of application for new shares. The circular letter was signed by the chairman. In it he explained to the shareholders that the company proposed to resume operation and must have money for that purpose and added this:

> B "We have therefore decided to resume surface mining as soon as possible and propose to raise the £50,000 needed by issuing one million shares of 1s. each at par. I and my co-directors feel that we would not be justified in proceeding with our proposals unless we have that sum behind us and everything depends upon our being able to raise it at once. We must warn you therefore that unless this issue is fully supported we shall be unable to C prevent the return of the mine to the jungle. A form of application for shares is enclosed. You will note that your application is conditional upon the passing of the resolutions at the extraordinary general meeting and the sanction of the court to the scheme because such resolutions do not take effect legally until approved by the court . . . We have been advised that the likelihood of the court's refusing to sanction the reduction . . . is D very slight . . . Should the above conditions not be satisfied your money will, of course, be refunded."

There accompanies that the form of application which shareholders were urged to fill up. On the front of the form of application are these words:

> "The accompanying circular letter of the chairman should be read in E conjunction with this application form. It will be noted that this issue is conditional on the passing of the resolutions at the extraordinary general meeting of the company to be held on Aug. 20, 1953, and the subsequent sanction of the court to the reduction of the company's capital. Should either of these conditions not be fulfilled, application moneys will be refunded and meanwhile will be retained in a separate account. As soon as F the above conditions are satisfied, the shares now offered will be allotted and issued and will then be converted into stock . . . Application will be made to the Council of the Stock Exchange, London, for permission to deal in and for quotation for the stock, into which the shares now being offered will be converted."

G On the back is a form of application to be filled in by a shareholder, and the shareholder who filled it in had to send with it payment in full for the shares which he desired to obtain. There was in fact a very poor answer to that proposal, and far less than a million shares were applied for, although the lists were held open for a month longer than had been originally advertised. But some people did apply, and it is the money which they sent with their application forms which is the subject-matter of the present dispute. Every person who sent H money to the company on this offer received a document in this form:

> "We have received with thanks your cheque for the sum of £x, together with your application for shares in accordance with the terms of the form of application and circular to members dated July 28, 1953."

I Before they sent out their circular and form of application the board took the precaution of consulting the Stock Exchange Council about the issue and was told by that body that it was their advice (and of course they were, in fact, in a position to have that advice accepted) that the money sent with the forms of application should be put into an account in two names: that is to say, should not only be put into what the company called "a separate account", but that the separate account should have a name attached to it other than that of the company. That in fact was done, because no doubt if the company had not done it they would never have been able to obtain the permission to deal which it was essential they should have. That is how it comes about that this money is in the two names. The writ in the debenture-holders' action was issued on Sept. 17, 1953, and the receiver was then appointed. The scheme was formally abandoned by resolution of the board on Jan. 7, 1954, because it was clear that the £50,000 was not forthcoming and having regard to the appointment of the receiver the thing was beyond all hope. No permission was ever obtained from the Stock Exchange, and in short the conditions of the offer were not fulfilled and, in accordance with the express terms on which the moneys were sent, they were refundable. Nobody doubts that the second defendant (who is a representative of the class of persons who did send these shillings and whom I will call " the subscriber ") is entitled to have his money back if he can. The only question is whether those persons are entitled to have their money back out of this fund or whether they are mere creditors of the company.

The point is a short one: Is the relationship of the subscriber and the company that of creditor and debtor, or has the subscriber a lien on this fund or an equity against it so as to be able to attach it for the payment of his debt without allowing other creditors of the company to share with him ? That depends, as I say, on whether the relationship is that of debtor and creditor or of bailor and bailee; and in effect it all turns on these words in the form of application,

> " and meanwhile will be retained in a separate account."

It was argued for the plaintiff (who is representative of the debenture-holders) that there was not enough here to create a bailment and there was no earmark on this account. It is clear enough, I think, that if that is so the document is a very deceptive document. It occurred to me quite early in the argument that if the persons who sent their money on the faith of this document had no lien on the separate account there was something very wrong with the law on this subject. Counsel for the plaintiff, who said with great eloquence everything that he was bound to say, said that, however startling it might be, there was nothing here to put these particular creditors ahead of any other creditors of the company; they were all people who had trusted the company and given them credit, and they must all share alike. He relied first for that proposition on *Moseley* v. *Cressey's Co.* (1) (1865) (L.R. 1 Eq. 405). In that case the promoters of a company invited applications for shares by means of a prospectus which stated that deposits would be returned if no allotment of shares was made. (Similar words appear in the present case —" Should either of these conditions not be fulfilled, application moneys will be refunded ".) It was held (ibid.) that such a statement

> " did not bind moneys, consisting mainly of these deposits, standing in a bank to the credit of the company, with a trust or lien in favour of the depositors, as against creditors of the company."

SIR WILLIAM PAGE WOOD, V.-C., said (ibid., at p. 409):

> " The plaintiffs say not only that these promoters are liable as for money had and received, but that they have no authority to deal with it otherwise than upon the trust by which it was to be returned to the depositors. But if the object had been to create a lien of this kind, the obvious way of doing so would have been to have said in the prospectus that there would be a lien on the deposits until the company was established, or that it was to be set apart as a trust fund in the names of trustees, to be returned in the event of the company not being established. Nothing of that kind was done; nor was that the contract. The contract was—' You are to pay so much per share when you apply for shares, and your deposits will be returned if no allotment is made ' not that the actual thing so deposited was to be paid back; for payment to the company's bankers to the account of the company made the moneys ipso facto part of the company's assets."

Counsel for the plaintiff says that here was a payment to the company, and it was a simple payment to them and to no one else and that made it part of the company's assets ipso facto.

The Vice-Chancellor also says this (ibid., at p. 410):

> "But, says [counsel] these moneys were not the moneys of the company until the plaintiffs got their shares. But that is not so; they were not retained by the promoters, they were paid in to the credit of the company at their bankers. What was intended to have been done seems to have been done; and there was no trust created, it was merely a debt."

Therefore if the words in this form of application had been merely a promise to refund, *Moseley's* case (1) would (supposing it to be right) have been an authority that no lien was created by such a transaction. Here, however, I have not only the words "Should the above conditions not be satisfied, [your money] will . . . be refunded", but also the promise to "retain [the money] in a separate account". What is the point of making such a promise? It seems to me quite clearly to be a representation that the money will be put apart, not in the company's ordinary coffers, but in a separate account. It is not a promise to put it in joint names, although that was in fact done. There is no evidence that any of these subscribers knew that there was any arrangement to put it into joint names: all they knew was that there was a promise to pay it into a separate account; and I cannot but think that the whole object of making such a promise was to say that it would be kept aside separately, not mixed up with the company's moneys, until they saw whether the conditions were fulfilled. It seems to me that that does distinguish the present case from *Moseley's* case (1), the promise being to keep the money "in a separate account". It is perfectly true (and I think this is conceded) that the mere fact that the money was in a separate account, so that one could point to it and say "there it is", would not of itself create a trust retrospectively. That appears from *Lister & Co.* v. *Stubbs* (2) (1890) (45 Ch.D. 1) and shows that from the mere fact that A can point to some money in the hands of B and say "that is where my money went to" it does not follow that the position between them is not merely that of debtor and creditor. The proceedings there were by way of a motion for interim relief in order to obtain an injunction to protect the investments in question pending the trial of the action, and that could only be done if the plaintiffs had an equity and were not merely creditors. It was held that they were merely creditors. But here it is not the fact of the money being in the joint account which is relied on, but the promise made in the document on the faith of which the application was made. There appears to have been one case in which it was assumed that money paid on a void allotment was impressed with a trust and could be the subject-matter of an interim injunction. The case is *Mears* v. *Western Canada Pulp & Paper Co., Ltd.* (3) ([1905] 2 Ch. 353); but it does not help me at all because the point was not argued, and I do not think it is an authority for the proposition which counsel for the company was at pains to establish. There are some strangely conflicting observations on this subject in the books. In STIEBEL'S COMPANY LAW AND PRECEDENTS (3rd Edn.), vol. 1, at p. 166, the learned author refers to the subject and makes some rather ex cathedra observations, which he supports by *Stewart* v. *Austin* (4) (1866) (L.R. 3 Eq. 299) which, with every respect to that most learned and painstaking author, does not really support his proposition. The matter is mentioned in PALMER'S COMPANY PRECEDENTS (16th Edn.), vol. 1, pp. 11, 144; but I have not been able to derive help from these passages.

In my judgment it is not a matter that really involves anything more than a question of construing the application form; but I ought not to leave the matter without mentioning the fact that there is a statutory provision covering this kind of ground. Section 51 of the Companies Act, 1948, deals with "Allotment of shares and debentures to be dealt in on stock exchange ", and with statements in prospectuses about applications for leave to deal with shares proposed to be allotted and it provides that the company shall repay the money where permission is refused. Sub-section (3) deals with money sent in on a provisional application in this way: A

> " All money received as aforesaid shall be kept in a separate banking account so long as the company may become liable to repay it under the last foregoing sub-section; and, if default is made in complying with this sub-section, the company and every officer of the company who is in default shall be liable to a fine not exceeding £500." B

That looks to me as though there had been an attempt to erect by statute a kind of trust for applicants in a case of this sort. It is irrelevant, I think, for me to C discuss it here, because the directors in this case made the promise to do this very thing. No doubt that was only a compliance with the statute: they were bound by statute to do it. But they did promise to do it, and I think that their promise is of contractual effect, so I need not consider whether, if there was no promise but only the statutory obligation, the position would be the same. I must confess that I incline to think it would, and that the very object of s. 51 (3) D was to provide the protection for persons who pay money on the faith of promises of this kind—whether effectual or not I do not know, but my inclination is to suppose that it would be.

I am accordingly of opinion that the subscriber succeeds and that the right answer to the summons is that the money in question is repayable to the persons who subscribed in answer to the circular dated July 28, 1953. E

Declaration accordingly.

Solicitors: *Ballantynes* (for the plaintiff); *Frere, Cholmeley & Nicholsons* (for the company, the first defendant); *Corbin, Greener & Cook* (for the second defendant).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

WILLIAMS *v.* SYKES AND HARRISON, LTD.

[COURT OF APPEAL (Singleton, Hodson and Morris, L.JJ.), March 1, 2, 25, 1955.]

Factory—Dangerous machinery—Unfenced nip between conveyor belt and roller—Employee cleaning machine in motion—Contributory negligence—Causation—Apportionment of liability—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6 *c.* 67), *s.* 14 (1)—*Law Reform (Contributory Negligence) Act,* 1945 (8 *&* 9 *Geo.* 6 *c.* 28), *s.* 1 (1).

The plaintiff was employed by the defendants in their foundry to operate and clean a sand preparation plant. Part of the plant, which was driven by electric power, consisted of a conveyor belt which carried the sand up to and over a head-roller to a suction fan. This part of the plant, which was unfenced, was cleaned daily. The cleaning was done when the plant was stationary, and had never been done when the plant was in motion. One day, when work on the plant had ceased, the plaintiff switched on the power and started to clean the head-roller while it was revolving. His hand was caught in the nip between the roller and the belt and he suffered injuries. It was impossible on the evidence to tell what might have happened if the machinery had been securely fenced, whether, e.g., the presence of a guard would have deterred the plaintiff from acting as he did or whether he would have removed a guard. In an action for damages for breach of statutory duty under s. 14 (1) of the Factories Act, 1937,*

Held: (i) the roller was a dangerous part of machinery because danger might reasonably be anticipated from use of the machinery while the roller was unfenced (dictum of WILLS, J., in *Hindle* v. *Birtwistle,* [1897] 1 Q.B. at p. 195 applied), and the defendants were, therefore, in breach of their duty under s. 14 (1) of the Factories Act, 1937.

(ii) as it was not shown that, if the machinery had been securely fenced, the accident would not have happened and as the plaintiff's injury was of a kind which s. 14 of the Factories Act, 1937, was designed to prevent, the defendants' breach of statutory duty was in part the cause of the accident, and accordingly they were liable to the plaintiff in damages; but, since the plaintiff's negligence was also a cause of the accident, the responsibility for the accident would be apportioned, the fair apportionment being in the circumstances one-fifth to the defendants and four-fifths to the plaintiff, and the damages recoverable by the plaintiff would be reduced accordingly.

Dictum of LORD GODDARD, C.J., in *Roberts* v. *Dorman Long & Co., Ltd.* ([1953] 2 All E.R. at p. 432) applied; *Stapley* v. *Gypsum Mines, Ltd.* ([1953] 2 All E.R. 478) followed.

Appeal allowed on the apportionment of responsibility; decision of OLIVER, J., affirmed on the question of liability for breach of statutory duty.

[**Editorial Note.** The speeches in the House of Lords in the case of *Stapley* v. *Gypsum Mines, Ltd.* ([1953] 2 All E.R. 478) afford authority for the view that, where several factors contribute to the causation of an accident, the court either may discard all save one and decide that that one is " the " cause (i.e., the sole or effective cause) or may conclude that two, or perhaps more, factors were each in part the true cause (see particularly per LORD REID, [1953] 2 All E.R. at p. 486). In the present case the accident was attributable in part to at any rate two causes, viz., the defendants' breach of statutory duty and the plaintiff's negligence. Although it was argued that the accident would still have happened even if the machinery had been securely fenced, yet on the evidence the court considered that to be a matter of speculation. If, however, a sufficiently high degree of probability that an accident would have happened even though a statutory duty had been fulfilled is in fact shown, it may be that such a defence would succeed (see per LORD REID at the passage cited above).

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* The sub-section is printed at p. 227, letter B, post.

The present case may be compared with the decision in *Hodkinson* v. *Henry Wallwork & Co., Ltd.* (post, p. 236).

As to causation of loss or damage, see 11 HALSBURY'S LAWS (3rd Edn.) 271, para. 449.

For the Factories Act, 1937, s. 14 (1), see 9 HALSBURY'S STATUTES (2nd Edn.) 1009; and for the Law Reform (Contributory Negligence) Act, 1945, s. 1 (1), see 17 HALSBURY'S STATUTES (2nd Edn.) 12.]

Cases referred to:

(1) *Hindle* v. *Birtwistle*, [1897] 1 Q.B. 192; 76 L.T. 159; 61 J.P. 70; sub nom. *Birtwistle* v. *Hindle*, 66 L.J.Q.B. 173; 24 Digest 909, *71*.

(2) *Roberts* v. *Dorman Long & Co., Ltd.*, [1953] 2 All E.R. 428; 3rd Digest Supp.

(3) *Underwood (A. L.), Ltd.* v. *Bank of Liverpool. Same* v. *Barclays Bank*, [1924] 1 K.B. 775; 93 L.J.K.B. 690; 131 L.T. 271; Digest Supp.

(4) *Yorkshire Dale S.S. Co., Ltd.* v. *Minister of War Transport*, [1942] 2 All E.R. 6; [1942] A.C. 691; 111 L.J.K.B. 512; 167 L.T. 349; 2nd Digest Supp.

(5) *Stapley* v. *Gypsum Mines, Ltd.*, [1952] 1 All E.R. 1092; [1952] 2 Q.B. 575; *revsd.* H.L., [1953] 2 All E.R. 478; [1953] A.C. 663; 3rd Digest Supp.

(6) *Admiralty Comrs.* v. *S.S. Volute*, [1922] 1 A.C. 129; 91 L.J.P. 38; 126 L.T. 425; 41 Digest 780, *6417*.

(7) *National Coal Board* v. *England*, [1954] 1 All E.R. 546; [1954] A.C. 403; 3rd Digest Supp.

(8) *Smithwick* v. *National Coal Board*, [1950] 2 K.B. 335; 2nd Digest Supp.

(9) *Summers (John) & Sons, Ltd.* v. *Frost*, [1955] 1 All E.R. 870.

(10) *Mitchell* v. *North British Rubber Co.*, 1945 S.C. (J.) 69; 2nd Digest Supp.

(11) *Nicholls* v. *Austin (Leyton), Ltd.*, [1946] 2 All E.R. 92; [1946] A.C. 493; 115 L.J.K.B. 329; 175 L.T. 5; 2nd Digest Supp.

(12) *Lee* v. *Nursery Furnishings, Ltd.*, [1945] 1 All E.R. 387; 172 L.T. 285; 2nd Digest Supp.

Appeal.

The defendants appealed from an order of OLIVER, J., at Chester Assizes, dated Nov. 2, 1954, whereby he held the defendants to be in breach of their statutory duty towards the plaintiff and the plaintiff to be guilty of contributory negligence and apportioned the damages equally between them, awarding to the plaintiff £1,782 15s. (half the total amount which he would have awarded if there had not been contributory negligence) in respect of injuries sustained to the plaintiff's right hand and arm.

The facts appear in the judgment of SINGLETON, L.J.

F. W. Beney, Q.C., and *Andrew Rankin* for the defendants.

John Thompson, Q.C., and *R. Geraint Rees* for the plaintiff.

Cur. adv. vult.

Mar. 25. The following judgments were read.

SINGLETON, L.J.: The plaintiff, Robert David Williams, was employed by the defendants, Sykes and Harrison, Ltd., at their iron foundry at Port Penrhyn, near Bangor. He was a labourer, and, along with his foreman, Mr. Jones, he worked on, and cleaned, a sand preparation plant at the foundry, which is a factory within the meaning of the Factories Act, 1937. On Aug. 15, 1952, his right hand was caught in a nip between the belt and the head-roller of an electrically driven belt conveyor on the plant, and he sustained severe injuries to his hand and arm. He brought this action against his employers alleging that his injuries were caused through breach of statutory duty or negligence on the part of the employers. The action was heard by OLIVER, J., at the assizes at Chester on Nov. 1 and 2, 1954. The learned judge held that the defendants were in breach of their statutory duty, and that they were responsible in damages to the

A plaintiff, and, further, that the plaintiff himself was negligent. He found that they were equally to blame, and he awarded £1,782 15s. damages to the plaintiff, one-half of the amount the plaintiff would have recovered if he had not been guilty of negligence. The defendants appeal to this court.

The finding against the defendants is that they were in breach of s. 14 (1) of the Factories Act, 1937, in that the place on the machine at which the plaintiff's B hand was caught was a dangerous part of machinery and was not fenced as is required. Section 14 (1) of the Act reads:

> " Every dangerous part of any machinery, other than prime movers and transmission machinery, shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced."

C I should draw attention to s. 16:

> " All fencing or other safeguards provided in pursuance of the foregoing provisions of this Part of this Act shall be of substantial construction, and constantly maintained and kept in position while the parts required to be fenced or safeguarded are in motion or in use . . ."

D Counsel for the defendants raised three points: (i) that this was not a dangerous part of machinery, (ii) that the absence of a guard did not cause, or contribute to, the accident which was due to the deliberate act of the plaintiff himself, and (iii) that on the judge's findings the fault on the part of the defendants was very much less than that on the part of the plaintiff, and the proportionate liability ought to be materially altered.

E In an iron foundry much use is made of sand, and the plant on which the accident happened was used for the purpose of reconditioning sand so that the same sand can be used again and again. The plant is in two parts. The first part crushes and cleans the sand, which is then delivered on to a conveyor belt of the second part which, gradually rising, carries the sand up to and over the head-roller where there is a suction fan. The fan draws the sand into a disintegrator F where the cleaning process is completed. The fan was fenced, but there was no fencing of the nip between the conveyor belt and the roller; when the plant was working the movement of roller and belt was slow, and it would appear that it had not been thought to be a dangerous part of machinery; it was about three feet six inches above floor level. The set-up is shown by the various photographs which are before the court. A certain amount of sand adhered G to the roller and belt, and in order to keep the movement even the plant was cleaned by the foreman and the plaintiff each evening when work on it ended. There was a switch near the plant and a main switch a little further away, by which electric power was put on or off. On Aug. 15 work on the plant finished somewhat earlier than usual; the plant was cleaned, and the foreman left about 4.50 p.m. A little later the plaintiff determined to do some more cleaning and H to do it when the plant was in motion. Accordingly he turned on both switches; he then used a steel brush on the head-roller which was moving round, and his hand was caught between the roller and the belt. The judge described his course of conduct as " hopelessly dangerous ".

The plaintiff's case as pleaded was that he was cleaning away sand from the head-roller by means of a wire brush whilst the conveyor was in motion. I Particulars were asked for, and these were the particulars given:

> " As the defendants their servants or agents well knew sand frequently accumulated on the head-roller of the conveyor causing tension on the conveyor belt. This frequently occurred while the plaintiff was working on the disintegrator on dates which the plaintiff cannot specify. On such occasions the plaintiff cleared away the accumulated sand while the power was switched on. This practice was known to the senior man working on the machine and must have been seen by employees of the defendants whom

> the plaintiff cannot identify. Nevertheless the plaintiff was at no time warned that it was dangerous so to remove sand and was never instructed not to do so or prohibited from so doing. Accordingly, in the premises, the plaintiff says that the defendants impliedly acquiesced in the said practice and/or must be deemed so to have acquiesced."

That case was supported by the evidence-in-chief of the plaintiff and by that of some other witnesses, but on cross-examination it disappeared, and the judge found that it was wholly untrue. He said:

> " Now I have no hesitation in coming to the conclusion that that allegation is false. There is no substratum of truth to support it."

His reference to the plaintiff's evidence is helpful:

> " Now one turns to his evidence. ' I cleaned this roller twice or three times in all during the six months that I had been working at the machine. I haven't cleaned it in any other way. I cleaned it by wire brush '—and he describes the way—' and I was successful when I did it.' Then he describes how on this particular occasion the foreman went away and then he says this: ' This roller, owing to sand on it, had not been working satisfactorily for about a week.' That, of course, is a ridiculous statement. The roller was cleaned, and had to be cleaned, at least once a day, and as he later admitted in his evidence that was so and that it had been cleaned earlier that evening. ' So I switched on the machine ', he said, ' and continued my cleaning method.' It was his hand that let the tiger out of the cage, and I am quite satisfied that he knew the proper way to do it; he had seen it done over and over again. He had helped it to be done over and over again, and it was a piece of sheer folly to have turned on this machine that day—of that much I am quite satisfied. He had never seen it done in this way, and I am quite satisfied he had never before done it in this way himself. He was then cross-examined. He said: ' Jones and I had cleaned this machine many times.' He was asked over and over again, both by learned counsel for the defendants and by me, whether it was not cleaned every day, and he would not answer the question. He never has answered it, and that remains unanswered. ' When Jones was there the machinery was stopped when the work was done. That is the proper way of doing it. The roller would, of course, tend to draw the brush under the belt. We used to stop the machine ', and he then described what was the most proper process of cleaning the machine which was to stop it and continue cleaning part of the surface of the roller in the position in which it was stopped. Then by manipulating the switch they ' inched ' the thing round, by just touching the switch now and again the belt moved a foot at a time, and that was the proper way of doing it. That was how he described the way he had always seen it done. That evidence comes from him. He is then pressed about whether that roller had not been cleaned that very evening before Jones went away and eventually he said this: ' It is true that before Jones went away he and I had been cleaning the roller and the belt.' And he admits that he went off and switched off not only this machine but also the main check switch. That was how the evidence stood when he went out of the witness-box. He had never seen Jones do it otherwise than when the machine was stationary, that the correct method was the one described, that the roller had been cleaned that very evening by him and Jones. I hold in reserve, for the moment, the question of whether I believe he had ever done that himself at all before with the roller running."

The learned judge, having referred to the evidence of other witnesses, much of which he found to be entirely unsatisfactory, said:

> " I find as a fact that this plaintiff, so far from having made a practice of doing what he said he did on this occasion, never did it at all, and the

A only guide he had as to how to clean it was the guide he had had every day of the six months or more when he was operating with Jones. He knew."

(i) On the first point raised on the appeal counsel for the defendants submitted that the part of the plant at which the plaintiff's hand was caught was not a dangerous part of machinery within the meaning of s. 14 of the Factories Act, 1937. The belt, he said, moved very slowly, and the roller was close to a wall B and in a position in which no one would anticipate danger; and, moreover, at the time the plaintiff went to the plant there was no danger, for it had been cleaned, and in the normal course it would not have been touched again until the next day. He drew our attention to s. 16, from which it could be said that the obligation to fence only continued when a machine such as this was in motion for there was no danger at any other time. The opinion of OLIVER, J., on this C point is:

> "Now to what conclusions does one come? First of all, this machine was unfenced. It was strenuously argued for the defendants that although unfenced it was not the dangerous part of the machine, but one does not want experts' evidence on that. One's own experience tells one that any- D body who is moving about working near that belt when it is unfenced may get caught, as the plaintiff got caught. I say no more than probably get caught, but I do not think you can imagine a more obvious result than this. It is not without importance to observe that Mr. Jones, in spite of the way he ended up his evidence, began by saying in effect, that it would be madness to try to clean that thing with the roller running. You could not E do it, and if you tried to do it you were almost sure to get caught. Now that statement was in contradiction to the way in which he treated the back roller, which was in all respects the same, which equally could not be done this way without someone getting caught, so I come to the conclusion therefore that that was a dangerous piece of unfenced machinery."

I agree with the learned judge's conclusion. There will never be a more helpful F guide on this than the judgment of WILLS, J., in *Hindle* v. *Birtwistle* (1). The learned judge said there ([1897] 1 Q.B. at p. 195):

> "It seems to me that machinery or parts of machinery is and are dangerous if in the ordinary course of human affairs danger may be reasonably anticipated from the use of them without protection. No doubt it would be impossible to say that because an accident had happened once therefore G the machinery was dangerous. On the other hand, it is equally out of the question to say that machinery cannot be dangerous unless it is so in the course of careful working. In considering whether machinery is dangerous, the contingency of carelessness on the part of the workman in charge of it, and the frequency with which that contingency is likely to arise, are matters that must be taken into consideration. It is entirely a question of degree."

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I believe it is unnecessary to look in a case of this kind further than the test laid down by WILLS, J., so many years ago. Applying the test there given, I consider that this was a dangerous part of machinery when the plant was working.

(ii) The question of causation presents much more difficulty. On the defendants' side it is claimed that the injuries to the plaintiff were not caused by I a breach of s. 14 (if there was one), but were due to the deliberate act of the plaintiff himself. He turned on both switches and commenced to clean the plant when it was in motion. He had not done that before, so the judge found. If there had been a guard he would have moved it if he had decided to clean the plant. Moreover, there was no reason why there should have been a guard on it at night time when it was not, and was not intended to be put, in motion. Thus it was argued that the absence of a guard did not contribute to the accident in any sense. On the other hand, it was pointed out by counsel for the plaintiff that the accident could not have happened if the terms of s. 14 had been complied with; the dangerous part of machinery had never been securely fenced; an accident happened of a kind which is likely to happen if the statutory duty is not fulfilled, and it is the very thing which the section is designed to prevent happening. Reliance was placed on what was said by LORD GODDARD, C.J., in *Roberts* v. *Dorman Long & Co., Ltd.* (2) ([1953] 2 All E.R. 428). That was a case in which it was said there was a breach of a statutory duty in not supplying belts for people who had to work at a height, and an argument was raised to the effect that the workmen would not have used them if they had been provided. The Lord Chief Justice said (ibid., at p. 432):

> "It may well be that the learned judge could form the opinion on the evidence that it was unlikely that if safety belts had been available the deceased would have used one, but, in my opinion, once it is proved that the defendants had not got these belts available for them to say: 'Well, even if we had them available the deceased would not have used them' is no answer. The fact that they were not available gave him no opportunity of exercising his election, and, had one been available and had he elected to use it, while it might not have prevented his meeting with some injury, it would certainly have prevented his falling to his death. Some actions for negligence are based on the failure of a person to make inquiries when the circumstances are such as to show that he was put on inquiry. If he is put on inquiry and makes none, it is no answer to say: 'Well, if I had made the inquiry it would have led to no result.' That is well established, and I need only refer to the judgment of BANKES, L.J., in *A. L. Underwood, Ltd.* v. *Bank of Liverpool. Same* v. *Barclays Bank* (3) ([1924] 1 K.B. at p. 789), and it seems to me that the two things are closely analogous. If a person who had to make an inquiry fails to do so he cannot be heard to say: 'But even if I had it would have led to no useful result.' So I think that, if a person is under a duty to provide safety belts or other appliances and fails to do so, he cannot be heard to say: 'Well, if I had done so, they would not have been worn'."

In the same case BIRKETT, L.J., said ([1953] 2 All E.R. at p. 435):

> "I am of opinion that the breach of statutory duty was proved, and I do not think that it is any answer to a breach of that duty to say that had it been fulfilled the result would have been the same. The deceased man had no right of election given to him such as the regulations provide, and the defendants were guilty of a breach of the regulations which occasioned or contributed to the death of the deceased man."

HODSON, L.J., said (ibid., at p. 437):

> "I would, accordingly, find that safety belts were not available for such persons who elected to use them. If this is so, I think it cannot lie in the mouth of the defendants to say that this was not the cause of the accident on the ground that the probabilities are that the deceased would never have elected to use a belt. The man having been killed, there is no possibility of finding out whether he would have exercised his election one way or the other, and I must decline to assume that he would not have elected to use a safety belt if one had been available."

OLIVER, J., dealt with the matter in this way:

> "The third doctrine was a rather ingenious one. It was this, that any reliable fence, which completely screened all the spinning roller from possible contact with a human hand, must be such as to prevent cleaning unless and until you took it off, and in order to take it off you would have to stop the machine, and therefore this accident would not have happened. But I do not quite understand that. Having stopped the machine and taken off the fence, there is nothing to prevent you starting the machine again with the

> fence off. It would not be doing anything silly. On this occasion he thought running it again would eventually save him trouble. Therefore, I have the argument that the damage does not flow from the absence of the fence, but I think it is not a sound argument because it is impossible to tell what might have happened had there been an effective fence. I have come to the conclusion that this accident must be shared, or at least the pecuniary consequences of it must be shared. I always find it extremely difficult to say who is more to blame. In the event, there was no fence on this machine, and a man would be a great fool to do what he did, but if there had been a fence there, a proper fence, there would* not have been an accident, and so I say that each is equally to blame."

I find this an extraordinarily difficult problem. It would be easy to say that it was a matter for the decision of the judge of first instance and that this court ought not to interfere, but the parties are entitled to have the decision of this court on it. It is not a pure question of fact; no question was raised on the judge's findings of fact. LORD WRIGHT in *Yorkshire Dale S.S. Co., Ltd.* v. *Minister of War Transport* (4), said ([1942] 2 All E.R. at p. 15):

> "Causation is to be understood as the man in the street, and not as either the scientist or the metaphysician, would understand it."†

Some might say that the cause of the accident was the plaintiff's own act, and that the lack of fencing had nothing to do with it. There was, as I have said, no statutory requirement that the machine should be fenced that night after work had ceased and it had been cleaned; it was not a dangerous part of machinery until power was switched on again. The plaintiff knew the plant well, and on the judge's finding he knew that he was doing something which he ought not to have done. He turned on both the immediate switch and the main switch and commenced to do something which was "complete folly", "sheer folly", "most stupid", and "hopelessly dangerous", to repeat expressions used by OLIVER, J., though the judge thought that the plaintiff meant to do something useful, and that he probably thought it would save him a lot of trouble. At the same time one must not overlook the fact that a guard or fence not only gives protection, but also may be valuable as a warning. If there is a guard a workman may hesitate before removing it. It may act as a deterrent, or the removal of it may be difficult. Left to myself, and without the help of the authorities, I am inclined to think that I should come to the conclusion that the defendants' failure to comply with their statutory duty ought not to be regarded as one of, or as part of, the causes of this accident.

In *Stapley* v. *Gypsum Mines, Ltd.* (5) ([1952] 1 All E.R. 1092), the Court of Appeal had held that any negligence and breach of the regulations by Mr. Dale did not cause or contribute to the death of Mr. Stapley. The House of Lords (by a majority) ([1953] 2 All E.R. 478) reversed that finding and held that Mr. Dale's fault, for which his employers were liable, was a contributory cause of the accident which resulted in the death of Mr. Stapley. In the speeches of each of their Lordships who formed the majority, reference is made to a passage from the speech of VISCOUNT BIRKENHEAD, L.C., in *Admiralty Comrs.* v. *S.S. Volute* (6) ([1922] 1 A.C. at p. 144). This is the passage:

> ". . . the question of contributory negligence must be dealt with somewhat broadly and upon common-sense principles as a jury would probably deal with it. And while no doubt, where a clear line can be drawn, the subsequent negligence is the only one to look to, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the party secondly negligent . . . might, on the other hand, invoke

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* See the comment on this passage at p. 233, letter D, post.

† Compare p. 240, post, where SINGLETON, L.J., quotes this passage.

> the prior negligence as being part of the cause of the collision so as to make it a case of contribution."

Indeed, it may be said that this formed the basis of their decision. Now, it is difficult to say that the lack of a guard on the machine in the present case and the act of the plaintiff were not so closely "mixed up" that the lack of guard could be regarded as not being part of the cause of the accident, especially when one remembers the principle stated by Lord Goddard, C.J., in *Roberts* v. *Dorman Long & Co., Ltd.* (2). These considerations lead me to the conclusion that the decision of Oliver, J., that the accident was in part due to the defendants' failure to perform their statutory duty ought not to be disturbed.

(iii) As to the degree or measure of responsibility, I would say that much the greater responsibility rests on the plaintiff than on the defendants. The defendants were in breach of their statutory duty, but their failure to comply with the statute was in respect of a part of machinery which they did not consider dangerous, and which no one appears to have thought to be dangerous before this accident; its position was such that many people might well not think of an accident happening. The plaintiff, on the other hand, knew just what he was doing, and, as the judge said, "It was his hand that let the tiger out of the cage."

Having regard to the opinion I have formed as to the fault on the part of each, I would scarcely attribute as much as twenty per cent. of the responsibility for the damages to the defendants, but as both my brethren think that is a fair proportion I am prepared to agree, and I consider that it is proper for the court to make such an alteration, having regard to the course taken by the House of Lords in *National Coal Board* v. *England* (7) ([1954] 1 All E.R. 546), following on *Stapley's* case (5).

I would allow the appeal to the extent I have indicated.

HODSON, L.J., stated the facts and continued: The defendants contend, in the first instance, that no fencing was necessary, since the part was not a dangerous part. They rely on the fact that there had been no previous accident, although the machine had been working for a long time, and no factory inspector had required fencing to be erected, and said that, applying the correct test, namely, the objective test of foreseeability, that is to say, posing the question "Ought the employer to anticipate danger?" rather than the question "Does the event show the part was dangerous?", the court should hold that the part was not a dangerous part. In my view the learned judge directed himself correctly on this point. He said:

> "One's own experience tells one that anybody who is moving about working near that belt when it is unfenced may get caught, as the plaintiff got caught."

In answering the question "Was it foreseeable?", he said, in effect, that he did not think he could exclude from consideration a negligent act such as the foolish action of the plaintiff in switching on the machine and trying to clean it when in motion. He considered the function of the machine and its working and the normal method of cleaning, and had before him the photographs which give a good idea of its height from the ground and accessibility to workmen employed at the factory together with the position of the controlling switches. On consideration of the evidence he held that the part was clearly dangerous. In so doing, I am of opinion that he came to the right conclusion and that such conclusion is fully in line with the authorities beginning with *Hindle* v. *Birtwistle* (1), the principle of which is summarised in Redgrave's Factories, Truck and Shops Acts (18th Edn.), p. 32, in the passage:

> "The behaviour of human beings that has to be regarded is such behaviour as is reasonably foreseeable which is not necessarily confined to such behaviour as is reasonable behaviour."

This passage has received judicial approval in the judgment of TUCKER, L.J., in *Smithwick* v. *National Coal Board* (8) ([1950] 2 K.B. at p. 347).

The defendants have argued that even if they are in breach of the section by reason of the dangerous part of the machine being unfenced when the power was switched on, nevertheless, the effective cause of the accident was not the breach but the foolish conduct of the plaintiff in switching on the current and then trying to clean the machine. This argument is an attractive one for it is said, fence or no fence, in order to clean the machine the fence would have to be removed for cleaning, and the plaintiff would have been injured in any event if he switched on the power before cleaning. The plaintiff's expert agreed that when the man was employed in the work of cleaning the roller there would not then be a guard on the machine, because the machine could not be cleaned with the guard on. Hence it is argued that there is no nexus between the breach and the accident, which was caused by the turning on of the current when no guard was there. I think the answer to that argument is, as OLIVER, J., said, that it is impossible to tell what might have happened had there been an effective guard. The plaintiff's injury was certainly of the kind which compliance with the statute was designed to prevent. If the guard had been there it might have acted as a deterrent indicating the danger of that part of the machine, so that he would not have entered on the foolhardy operation of switching on the power if and when he had removed the guard. The absence of the guard would tend to lull him into a false sense of security. The next sentence of the judgment, if correctly transcribed, is a little difficult to follow; but it appears that OLIVER, J., must have intended to say that if there had been a proper fence there might (not would) have been no accident. In my opinion the breach of s. 14 is to be regarded as one of the causes of the accident.

Finally, I share with the learned judge the difficulty of making a fair apportionment in a case such as this. On the one hand, the plaintiff acted, though zealously on his employers' behalf, yet in a foolhardy and reckless manner going far beyond that excusable inadvertence which may fall short of contributory negligence. This was the immediate cause of the accident. On the other hand, there was a static breach of the Factories Act, 1937, in failing to fence securely a dangerous part of a machine, which failure resulted in an injury. When one finds a combination of a static breach of the statute with, as an immediate cause, the negligent act of the injured man operating at the same time, it is, I think, peculiarly difficult to assess the proportion of the fault. It is urged that far the greater proportion of blame should be attached to the plaintiff, and in the light of the recent decisions of the House of Lords in *Stapley's* case (5) and *England's* case (7) this court can, and should, interfere. Not without hesitation I have accepted this submission and agree that twenty per cent. only of the blame should be attributed to the defendants, and accordingly I would allow the appeal to this extent.

MORRIS, L.J., stated the facts and continued: The defendants advance three submissions: (a) That the roller need not have been fenced, and that there was no foreseeable risk of injury; (b) alternatively, that the omission to fence the roller was not a cause of the plaintiff's injury; (c) alternatively, that the defendants' share of responsibility should have been adjudged to have been much less than one-half.

In regard to the first of these submissions, I consider that the "roller" was a "dangerous part" of the machinery, and that the roller should have been securely fenced, and that the fencing should have been of substantial construction and constantly maintained and kept in position while the roller was in motion or in use (see the Factories Act, 1937, ss. 14 and 16; and as to the meaning of the phrase "securely fenced" see *John Summers & Sons, Ltd.* v. *Frost* (9), [1955] 1 All E.R. 870). The evidence as to the siting and location and height from the ground of the roller gave ample warrant for the view which the learned judge entertained. The fact that no complaint was forthcoming from visiting factory inspectors does not deflect the conclusion to which the evidence pointed. In my judgment, the unfenced roller was dangerous for the reason that " in the ordinary course of human affairs " (see *Hindle* v. *Birtwistle* (1) ([1897] 1 Q.B. at p. 195) and *Mitchell* v. *North British Rubber Co.* (10), 1945 S.C. (J.) 69) danger might reasonably be anticipated from the use of the machinery while the roller was unfenced. It could be added that in the ordinary course of judicial affairs knowledge of the danger which lurks where someone may be caught in the nip between a moving belt and a moving roller becomes cumulative.

The second submission raises questions of no little difficulty. It is presented in two ways. It is said that when the foreman went away the machinery was not in motion or use, but had been stopped with the current switched off; that while such state of affairs existed there was no breach of statutory duty; and that the plaintiff was himself solely responsible for his injuries in that of his own volition he put the machinery in motion and then proceeded to clean it by a method never previously employed. In regard to this matter the position appears to have been that when the foreman went away the plaintiff was left to do other work which included sweeping up round the machine. He was about forty-six years old, and had been employed by the defendants for about six years. He and the foreman were due to operate the machinery the next morning. Accordingly, in the desire, as the learned judge held, to do " something useful ", he decided to clean the roller. He proceeded to switch on the machinery. He did this because, hoping to employ his time profitably, he conceived the idea of cleaning the roller with a wire brush while the roller was revolving. This method had not been adopted before, and was described by the learned judge as " complete folly ". But in the mere switching on of the machinery he was not doing something beyond the scope of his authority. He was perfectly entitled to decide to clean the machine, and he certainly did not intend to injure himself. Though he knew that it had always been the practice to clean the roller while it was stationary, he could not have realised that his method of cleaning would so inevitably be fraught with peril. When he put the machinery in motion the defendants became in breach of their statutory duty just as they had been, in my judgment, during the day and during all the preceding periods when, with the roller unfenced, the machinery had been in motion or in use. After putting the machinery in motion, which, for any legitimate purpose, the plaintiff was entitled to do, the plaintiff was injured. There was not, and had never been, any fencing provided for the roller, and the machinery was in such a state that when it was switched on the defendants would inevitably be and become in breach of duty. It could not be switched on without effecting this result. The machinery in that state was left in the charge of the plaintiff or left so that he might put it in motion if he thought fit. In those circumstances it seems to me that the fact that the machinery was unfenced when put in motion and that the defendants became in breach of statutory duty cannot be excluded as having some causal connection with the plaintiff's injuries. The purpose of having fencing is to prevent contact with a dangerous part. As LORD SIMONDS said in *Nicholls* v. *Austin* (*Leyton*), *Ltd.* (11) ([1946] 2 All E.R. at p. 98): " The fence is intended to keep the worker out . . ." He pointed out that s. 14 (1), aims at security from unintentional and even intentional contact with a dangerous part. Other authority shows that the security must be from contact which may result from careless or ill-advised conduct. (See *Smithwick* v. *National Coal Board* (8)). In further support of the second submission it was said that even if the roller had been fenced it would have been necessary to remove the fencing before the surface of the roller could have been cleaned, and that therefore the absence of fencing could not be regarded as a cause of the plaintiff's injuries. The evidence as recorded is in some respects not entirely clear, but was, I think, to the effect that a fence would have to be removed in order to allow the cleaning of the

A roller. The evidence further showed that, to have a safe method of cleaning, the roller should be stationary.

In approaching this submission it is relevant to have in mind the words of LORD GODDARD in his judgment in the Court of Appeal in *Lee* v. *Nursery Furnishings, Ltd.* (12) ([1945] 1 All E.R. at p. 390):

> B "... where you find that there has been a breach of one of these safety regulations and where you find that the accident complained of is the very class of accident that the regulations are designed to prevent, a court should certainly not be astute to find that the breach of the regulation was not connected with the accident, was not the cause of the accident."

In my judgment, the defendants cannot successfully assert that the plaintiff C would have been injured even had there been fencing. I am not prepared to make so great an assumption in their favour. I agree with the learned judge when he said that

> "It is impossible to tell what might have happened had there been an effective fence."

It may be that an effective fence could not be removed in a short period of time, D and had there been fencing the plaintiff might not have entertained his purpose or put it into execution, in view of the time available for him. He might not have possessed the knowledge how to remove it. He might have been caused to reflect that a fence betokens danger, and so he might have been diverted from any plan of cleaning the roller while it was moving. The consulting engineer (Mr. Martin) who was called on behalf of the plaintiff expressed the view that E the fencing of the roller which was later installed, and which is in the form of a hood, is not adequate. The question whether the fencing is, or is not, adequate was not an issue before the learned judge. But if it is being urged by the defendants that the accident would equally have happened even if the roller had been fenced, it can effectively be said on behalf of the plaintiff that if there had been secure fencing on the day of the accident it might have been of a kind F which incorporated an interlocking device which would have prevented power being switched on while the fencing was not in position. I do not think that the defendants can rely on mere surmise as to what might have resulted if they had done what they ought to have done. If speculations are being indulged in, they ought not to be those most favourable to a party in default. For these reasons I consider that there was a breach of statutory duty which operated as one of G the causes of the plaintiff's injuries.

The plaintiff himself was held by the learned judge to have been negligent. When it comes to considering how responsibility is to be shared the approach is different from that which is apposite when causation is being decided. The Law Reform (Contributory Negligence) Act, 1945, s. 1 (1), directs that the damages

> H "... shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."

In *Stapley* v. *Gypsum Mines, Ltd.* (5), LORD REID said ([1953] 2 All E.R. at p. 486):

> I "A court must deal broadly with the problem of apportionment, and, in considering what is just and equitable, must have regard to the blameworthiness of each party, but 'the claimant's share in the responsibility for the damage' cannot, I think, be assessed without considering the relative importance of his acts in causing the damage apart from his blameworthiness."

The learned judge held that the plaintiff, though well intentioned, acted in a most foolish manner. The plaintiff set the machinery in motion. Though doing so for the legitimate purpose of cleaning the machine, he conceived and put into execution a method of cleaning which on the learned judge's findings must be regarded as negligent. In the light of all the circumstances, I consider that the plaintiff's share in the responsibility for the damage should be rated very much higher than that of the defendants; I would assess the defendants' share in the responsibility as one-fifth, and that of the plaintiff as four-fifths. I would therefore vary the award of the learned judge accordingly.

Appeal allowed.

Solicitors: *Cardew-Smith & Ross*, agents for *Geoffrey Warhurst & Co.*, Manchester (for the defendants); *W. H. Thompson* (for the plaintiff).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

HODKINSON *v.* HENRY WALLWORK & CO., LTD.

[COURT OF APPEAL (Singleton, Jenkins and Parker, L.JJ.), October 4, 5, 1955.]

Factory—Dangerous machinery—Transmission machinery—Machinery nine feet above ground—Duty to fence—Contributory negligence—Employee performing act in defiance of established practice—Apportionment of liability—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6 *c.* 67), *s.* 13 (1).

The plaintiff was employed by the defendants in their factory to operate a machine driven by electric power known as a wheelabrator. On one side of the machine was a bucket which the plaintiff filled with metal castings; when he had switched on the power, the bucket was lifted and conveyed along wire ropes running over pulleys. These ropes and pulleys were nine feet above ground level and were not fenced. Occasionally the wire ropes came off the pulleys and the machine stopped. The established practice of the factory was that such a stoppage was reported to the foreman and the matter was remedied by the fitter-mechanics; it was no part of the plaintiff's duty to remedy the matter himself. The plaintiff knew the established practice. One day such a stoppage occurred and the plaintiff duly reported it, but in defiance of the practice himself endeavoured to remedy the matter in the brief interval before the fitter-mechanics arrived. He did not switch off the electric power but climbed to the machine and, while he was trying to replace the ropes on the pulleys, the machine began to move and his hand was caught and seriously injured. In an action for damages for breach of statutory duty under s. 13 (1) of the Factories Act, 1937,* which provides that every part of transmission machinery shall be "securely fenced unless it is in such a position . . . as to be as safe to every person . . . working on the premises as it would be if securely fenced",

Held: (i) the position of the transmission machinery nine feet above the ground did not make it as safe as it would have been if securely fenced; the defendants were, therefore, in breach of their duty under s. 13 (1) of the Factories Act, 1937, and since, if the machinery had been fenced, the accident would not have happened (see p. 240, letter I, post), the defendants were liable in damages for breach of statutory duty.

(ii) although the defendants were in breach of their statutory duty yet, since the plaintiff had acted negligently and in defiance of the established practice of the factory, doing something which he knew it was not his business to do, he should bear ninety per cent. of the responsibility for the accident and the defendants should bear only ten per cent., and the damages recoverable by the plaintiff would be reduced accordingly.

Williams v. *Sykes and Harrison, Ltd.* (ante, p. 225) considered.

Appeal allowed on the apportionment of responsibility for the accident; decision of HAVERS, J., on the question of liability for breach of statutory duty affirmed.

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* The terms of the sub-section are printed at p. 239, letter C, post.

[**Editorial Note.** The present case should be compared with *Williams* v. *Sykes and Harrison, Ltd.* (ante, p. 225). As originally brought the action in the present case was based on contravention of s. 14 of the Factories Act, 1937, which relates to dangerous parts of machinery and corresponds (except as regards transmission machinery to which s. 13 now applies) to the former s. 10 (1) (c) of the Factory and Workshop Act, 1901. Under that enactment shafts thirteen feet and twelve and a half feet above the ground have been held not to be equally safe as they would be if they were securely fenced; see *Atkinson* v. *London & North Eastern Ry. Co.*, [1926] 1 K.B. 313, and *Findlay* v. *Newman, Hender & Co., Ltd.*, [1937] 4 All E.R. 58.

On the subject of causation, see 11 HALSBURY'S LAWS (3rd Edn.) 271, para. 449.

For the Factories Act, 1937, s. 13, see 9 HALSBURY'S STATUTES (2nd Edn.) 1008.]

Cases referred to:

(1) *Burns* v. *Joseph Terry & Sons, Ltd.*, [1950] 2 All E.R. 987; [1951] 1 K.B. 454; 114 J.P. 613; 2nd Digest Supp.

(2) *Cork* v. *Kirby Maclean, Ltd.*, [1952] 2 All E.R. 402; 3rd Digest Supp.

(3) *Williams* v. *Sykes and Harrison, Ltd.*, ante, p. 225.

(4) *Yorkshire Dale S.S. Co., Ltd.* v. *Minister of War Transport*, [1942] 2 All E.R. 6; [1942] A.C. 691; 111 L.J.K.B. 512; 167 L.T. 349; 2nd Digest Supp.

Appeal.

The defendants appealed from an order of HAVERS, J., made on Mar. 22, 1955, at Manchester Assizes, whereby he held that they were in breach of their statutory duty towards the plaintiff, that the plaintiff himself was guilty of negligence and apportioned the liability for the accident equally between them. The grounds of appeal included the ground that the general damages assessed for the loss of two middle fingers of the plaintiff's left hand, viz. £2,500, were too high. The plaintiff had previously lost the thumb of his right hand. The appeal against the amount of the assessed damages failed (see p. 238, letter I, post).

The facts appear in the judgment of SINGLETON, L.J.

D. J. Brabin, Q.C., and *C. M. W. Elliott* for the defendants.

Fenton Atkinson, Q.C., and *P. Curtis* for the plaintiff.

SINGLETON, L.J.: The plaintiff, Mr. George Hodkinson, was injured on Dec. 10, 1952, when he was working for the defendant company at their factory in Manchester. He was the operator of a machine driven by electric power called a wheelabrator, a machine which cleans castings and forgings. During the course of the afternoon the machine stopped and when the plaintiff looked up he saw that the ropes above the machine had come off the pulley wheels, which was something that happened occasionally. There was a recognised practice in the factory that, if anything went wrong with the machine, it was the duty of the operator to communicate that fact to the charge-hand or to the foreman, who would summon the fitter-mechanics. The fitter-mechanics alone were entrusted with the duty of putting the machine in order. It was no part of the operator's duty to interfere once a fault of that kind had occurred. As a rule, the fitter-mechanics would be there fairly quickly, although if they were engaged on some other duty at the time it might be that a quarter of an hour or so would elapse before they could attend to the machine. On the afternoon in question, when the plaintiff saw that the ropes were off the pulley wheels, he told the charge-hand what had happened; the charge-hand reported to the foreman, who sent for the fitter-mechanics, and they were by the machine within two or three minutes of receiving the report. However, for some reason which was never explained, the plaintiff did not wait for them. There was near-by a short ladder for the use of the fitter-mechanics; the plaintiff took this ladder, put it against the machine, climbed on top of the machine and tried to pull the ropes back into position. As he was putting the second rope over the pulley wheel the machine started to move because the power had not been cut off. The plaintiff's left hand was caught between the rope and the pulley wheel, and he lost two of his middle fingers. The fitter-mechanics arrived on the scene just at the time that the plaintiff's hand was caught. There was no sort of guard over the ropes and pulley wheels and they could be seen from the ground although they were in fact nine feet above floor level. In due course the plaintiff brought an action against his employers claiming damages for negligence and for breach of statutory duty. The breach of statutory duty alleged in the statement of claim was failure to fence dangerous machinery as required by s. 14 of the Factories Act, 1937. At the trial that was not put forward as a ground of action, but the plaintiff's claim in respect of breach of statutory duty was that the ropes and pulleys were transmission machinery, and that there was a breach of s. 13 of the Act.

The claim of the plaintiff was heard by HAVERS, J., at Manchester and on Mar. 22, 1955, he gave a considered judgment in which he found that the plaintiff was entitled to damages against the defendants in respect of their breach of duty under s. 13 of the Act. He further found that the plaintiff himself was guilty of negligence. He assessed the degrees of fault at fifty per cent. on either side, so that he divided the damages which the plaintiff would have recovered by two, and he awarded the plaintiff the sum of £1,376 17s. as damages. There was some out-of-pocket loss, and the learned judge considered that the injury to the plaintiff's hand would have entitled him to an award of £2,500 general damages if he had not been at fault himself.

The learned judge decided in favour of the defendants on the claim based on negligence at common law, and he rejected wholly, or almost wholly, the plaintiff's evidence on that part of the case. The plaintiff had given evidence to the effect that when the stoppage took place he approached the foreman, Mr. Oulton, and, after having had a word with the foreman, he offered to put the trouble right, and that the foreman said: " You'll help me very much if you will do so "; that was the reason, the plaintiff said, why he went up to put the ropes over the pulley wheels. That was denied by the charge-hand and by the foreman. HAVERS, J., rejected the plaintiff's evidence; indeed, it may be said that counsel for the plaintiff during the course of the defendants' witnesses' evidence said he could not pursue that point. Thus HAVERS, J., found himself unable to accept the plaintiff's account of the accident; he accepted the evidence of the defendants' witnesses, particularly that of the charge-hand and the foreman, and there was left unexplained the reason why the plaintiff had gone up on to the machine himself, when he knew that the fitter-mechanics had been sent for and when he knew that it was no part of his duty to attend to the machine which had stopped.

The defendants appeal against the award of damages to the plaintiff, and counsel on their behalf raises four points. The first is that there was no breach of the provisions of s. 13 of the Factories Act as they have been construed in this court and elsewhere; the second is that if there was a breach by the defendants of s. 13 that breach was not a cause of the accident; the third is that in any event the proportion of responsibility as assessed by the judge is wholly wrong in view of the facts found by him, and that the defendants ought not to be held responsible to the extent of fifty per cent. or anything like it: and the fourth is that the damages are too high. Counsel did not pursue this last point in view of an intimation given to him by the court. It would be difficult for this court to say that the judge was wrong in assessing the general damages for the injuries to the plaintiff's left hand at the sum of £2,500. It was a serious injury that he sustained. It may be that the amount awarded is higher than is sometimes given for an injury of that kind to the left hand, but it must be remembered that this was a man who had some years earlier sustained an injury to his right hand— the loss of his right thumb— so that his left hand would be more valuable to him after the earlier injury. I propose to say nothing more about that fourth and last point.

[His Lordship then read that part of the judgment of Havers, J., in which he described the machine and the accident, and continued:] The learned judge found that the action of the plaintiff was not merely inadvertence or an error of judgment;

> "he knew the established practice and he knew that it was not his business to deal with this breakdown, and, in defiance of the established practice, he did something which he knew it was not his business to do."

The first question arises on s. 13 of the Factories Act, 1937. The judgment of Havers, J., is based entirely on the allegation that there was a breach of s. 13 (1) which reads:

> "Every part of the transmission machinery shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced."

Counsel for the defendants submits that there was no breach of s. 13, for it has been held in this court that when a question of this kind is under consideration the question of foreseeability, which arises under both s. 14 and s. 13, must be kept in mind. Counsel agreed that the part of the machinery with which we are concerned was transmission machinery, but his submission was that there was no breach because it was at a height of nine feet above the ground. Therefore, he submitted that although it was not securely fenced it was in such a position as to be as safe to every person employed or working on the premises as it would be if fenced. What the submission amounts to is that neither s. 13 nor s. 14 would apply to machinery placed nine feet above the ground. Counsel cited a number of authorities including *Burns* v. *Joseph Terry & Sons, Ltd.* (1) ([1950] 2 All E.R. 987) which I do not propose to consider. It is sufficient for this purpose to look at the words of the section itself and to ask whether this part of the transmission machinery, nine feet above the ground, was in such a position as to be as safe to every person employed or working on the premises as it would be if securely fenced? I do not think it is possible to say that it was. I accept readily that the risk is much less if the part of the machinery is nine feet above the ground than if it is five feet above the ground, but I do not think it can be said that transmission machinery nine feet above the ground is, by reason of that fact,

> "in such a position . . . as to be safe to every person employed or working on the premises as it would be if securely fenced."

There was a ladder near-by which one witness spoke of as "a temptation". Sometimes maintenance fitters might have to go up to do a repair or make an adjustment, according to the ordinary working arrangements. (I bear in mind the provisions of s. 15 of the Act.) Everyone who is asked whether persons who might have to go up to the place where the ropes and pulley wheels are were safe, must surely answer "No". It is not only maintenance fitters who might go up there; someone else might think it desirable so to do for some particular purpose; if, for example, there was something on the machine, a hat or cap perchance, someone might go up for it, and anyone who happened to be standing on something which brought him within reach of the transmission machinery, nine feet above the ground, would be in some danger. The question depends not on the construction of the section, but on a plain question of fact: was the transmission machinery nine feet above the ground in such a position as to be as safe to every person employed as it would be if securely fenced? As I have said, I do not think it was, and, in spite of the argument of counsel for the defendants, and the authorities he cited, I am satisfied that his first submission fails.

His second point, that, assuming there was a breach of s. 13, that breach was not a cause of the accident, presents more difficulty. Again we have been referred to various authorities, which I do not propose to go into at length.

Reliance is placed by counsel for the plaintiff on the judgment of DENNING, L.J., in *Cork* v. *Kirby Maclean, Ltd.* (2) where he said ([1952] 2 All E.R. at p. 407):

> " Subject to the question of remoteness, causation is, I think, a question of fact. If you can say that the damage would not have happened but for a particular fault, then that fault is in fact a cause of the damage; but if you can say that the damage would have happened just the same, fault or no fault, then the fault is not a cause of the damage. It often happens that each of the parties at fault can truly say to the other: ' But for your fault, it would not have happened '. In such a case both faults are in fact causes of the damage."

I am not sure that that passage carries one much further in the determination of the question before this court today. Some time ago there was a somewhat similar question before this court on an appeal from a decision of OLIVER, J., in *Williams* v. *Sykes and Harrison, Ltd.* (3) (ante, p. 225). In that case judgment was given by this court on Mar. 25 of this year. Dealing with the question of causation in that case, I said (ante, at p. 231, letter C):

> " I find this an extraordinarily difficult problem. It would be easy to say that it was a matter for the decision of the judge of first instance and that this court ought not to interfere, but the parties are entitled to have the decision of this court on it. It is not a pure question of fact; no question was raised on the judge's findings of fact. LORD WRIGHT in *Yorkshire Dale S.S. Co., Ltd.* v. *Minister of War Transport* (4) said ([1942] 2 All E.R. at p. 15): ' Causation is to be understood as the man in the street, and not as either the scientist or the metaphysician, would understand it '."

In the present case the plaintiff went to a place to which he had no right to go. According to the judge's view, he determined to put right himself that which he saw to be wrong, and at the same time he knew he ought not to have done it and that it was not part of the established practice for him to do it. He went to a position which he knew was dangerous. He was asked in cross-examination:

> " Q.—It stands to reason, of course, once you get these ropes back on the pulley, if you have not locked the machine, going into the reversing position the machine is going to move, is not it ? A.—Yes. Q.—If you are putting the rope over a pulley on something that is going to move, you are going to get your fingers trapped ? A.—Yes."

It was said that there ought to have been a guard on each of the ropes and pulleys, and the kind of guard mentioned by the expert witness for the plaintiff was a guard over the whole of the rope, or where the rope and wheel came together, fastened down by four screws or nuts. HAVERS, J., asked the expert witness whether the guard would have to be taken off before the rope could be put over the pulleys; and was told that it would. None the less, it has been said more than once that a guard is a kind of warning or deterrent. If there had been a guard there and the plaintiff had gone up to it and had seen the guard, with its bolts and nuts, he might well have decided to leave the adjustment of the machine to the fitter-mechanics. Again, if there had been any sort of guard over these pulley wheels, it is clear that before the plaintiff could have reached the second of them, the one on which the accident occurred, the fitter-mechanics would in fact have been there. I find it difficult to accept counsel's argument that the breach of the statute was not a cause of the accident. I think that if there had been a guard this accident would not have happened—and it is important to remember that the accident is of the very kind which the statutory requirement is intended to avoid. Moreover, if there is a breach of statutory duty and an accident of a kind which is likely to happen if the statutory duty is not fulfilled takes place, the court ought to be slow to say that the failure to perform that statutory duty has nothing to do with the accident. I think counsel's second point fails.

The third point deals with the division of responsibility between the plaintiff

A and the defendants. The learned judge in the course of his judgment did not deal specifically with the question of causation, but he may be said to have covered that question and the question of apportionment in the following passage:

> "A further question which I have to consider is this: Was the plaintiff guilty of negligence which contributed to this accident? His counsel B conceded that there was considerable negligence, which he suggested was about fifty per cent. I am satisfied that the plaintiff's conduct was not merely inadvertence or an error of judgment; he knew the established practice, and knew that it was not his business to deal with this breakdown; and in defiance of the established practice he did something which he knew that it was not his business to do. He sought to make Mr. Oulton [the C foreman] the author of his act, and I think the reason why he did that was because he knew that he really had not got any answer unless he succeeded in seeing that the company was saddled with a degree of blame. In those circumstances, I must hold that he was fifty per cent. to blame, and the defendants share the degree of culpability and responsibility."

D In my opinion, there are other considerations beyond those mentioned by the learned judge. This plaintiff, as the judge said, had put forward a false case. He had sought to throw the blame for this accident on the foreman; and to say that the foreman negligently and improperly told him to do something which he ought not to have told him. The natural conclusion from that is that the plaintiff said it because he knew that he had done something which he ought not to have done. When the plaintiff was in the witness-box he contradicted himself E so much that the judge reminded him he was on his oath. The judge did not accept his evidence but accepted that of the foreman and the charge-hand, and said expressly that the plaintiff knew the established practice, knew that it was not his business to deal with the breakdown, and in defiance of the established practice he did something which he knew it was not his business to do.

Although I have reached the conclusion that it is impossible to say that the F defendants were not in breach of duty or that their breach was not a cause of the accident, it ought to be remembered that an accident of this kind was unlikely to happen and that it would not have happened but for the plaintiff's acting in a way which the judge described as "in defiance" of the established practice. His own answers show that a moment's thought would have told him of the amazing risk he was running in doing what he did; he knew power was on; he G did not stop to turn it off; nor did he wedge the bucket; he went to a place to which his duties did not call him and to which he knew he ought not to have gone. The fault of the employers is their breach of a statutory duty; but it was a breach which no employer would think would lead to the plaintiff's accident so long as he remained in the place where he was expected to work and did not go somewhere in defiance of the accepted practice. When these considerations H are borne in mind, it appears to me that the proportion of blame to be attached to the plaintiff is much higher than that which ought to be attached to the defendants. In my judgment, the plaintiff should bear ninety per cent. and the defendants should bear ten per cent. of the responsibility, and I would allow the appeal to that extent.

I **JENKINS, L.J.:** I agree that this appeal should be allowed to the extent of increasing the plaintiff's proportion of blame from fifty per cent. to ninety per cent. Beyond saying that, I cannot add anything.

PARKER, L.J.: I agree. There is nothing which I can usefully add.

Appeal allowed.

Solicitors: *James Chapman & Co.*, Manchester (for the defendants); *Cecil Ellison*, Manchester (for the plaintiff).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

NOTE.

MOTTURE *v.* MOTTURE.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), July 19, 1955.]

Divorce—Evidence—Foreign marriage—Proof by certificate—Certificate issued more than twelve months before date on which it was sought to be used as evidence—Livre de famille—Evidence (Foreign, Dominion and Colonial Documents) Act, 1933 (23 *&* 24 *Geo.* 5 *c.* 4), *s.* 1—*Evidence (France) Order in Council,* 1937 (*S.R. & O.* 1937 *No.* 515), *art.* 3, *Sch.* 1.

[As to proof of foreign law, see 7 HALSBURY'S LAWS (3rd Edn.) 176, paras. 313, 315, and 13 HALSBURY'S LAWS (2nd Edn.) 613, para. 685; and for cases on the subject, see 22 DIGEST (Repl.) 619, 620, *7124-7139*.

For the Evidence (Foreign, Dominion and Colonial Documents) Act, 1933, s. 1, see 9 HALSBURY'S STATUTES (2nd Edn.) 624.

For the Evidence (France) Order in Council, 1937, art. 3, see 7 HALSBURY'S STATUTORY INSTRUMENTS 217.]

Petition.

The parties were married in 1949 in France according to French law.

On Apr. 30, 1954, the husband filed a petition for divorce on the ground of the wife's desertion. By her answer the wife denied desertion and prayed for a decree for restitution of conjugal rights. The husband filed a reply. On June 16, 1955, it was ordered that the prayer of the petition be stayed and the reply struck out. The wife now proceeded on her answer.

B. L. A. O'Malley for the husband.

H. S. Law for the wife.

KARMINSKI, J., asked counsel for the wife what evidence he proposed to adduce as to the validity of the French marriage.

H. S. Law: An official certified copy of the entry of the marriage in the appropriate public register has been filed and I have available an expert in French law, who will say that the certificate would be accepted by the French courts as prima facie evidence of the validity of the marriage.

KARMINSKI, J., said that the evidence of an expert, though not always required, was necessary in the present case. The certificate of marriage, having been issued more than twelve months before, was expressly excluded from the provisions of the Evidence (France) Order in Council, 1937* made under the Evidence (Foreign, Dominion and Colonial Documents) Act, 1933, and was not, therefore, in itself prima facie evidence of a valid marriage.

Counsel, when seeking to prove the validity of foreign marriages according to the Practice Direction of May 16, 1955†, should not overlook the limitations of the order or that the livre de famille was not a document referred to in Sch. 1 to the order and, therefore, was never in itself prima facie evidence of a valid marriage.

[The validity of the marriage having been proved and the evidence heard, HIS LORDSHIP made an order for restitution of conjugal rights within fourteen days.]

Solicitors: *G. Howard & Co.* (for the husband); *Rowe & Maw* (for the wife).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

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* S.R. & O. 1937 No. 515: see 7 HALSBURY'S STATUTORY INSTRUMENTS 216.

† [1955] 2 All E.R. 465.

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NOTE.

PERRY *v.* THOMAS WRIGLEY, LTD. AND OTHERS.

[MANCHESTER ASSIZES (Oliver, J.), June 30, July 1, 25, 1955.]

B *Child Negligence—Allurement—Nature of an allurement—Hole in the ground not of itself an allurement—Child trespasser injured by falling into pit.*

[As to the standard of care required in relation to children, see 23 HALSBURY'S LAWS (2nd Edn.) 584, para. 836; and for cases on the subject, see 36 DIGEST (Repl.) 114-122, *565-619.*]

C Cases referred to:

(1) *Excelsior Wire Rope Co., Ltd.* v. *Callan*, [1930] A.C. 404; 99 L.J.K.B. 380; 142 L.T. 531; 94 J.P. 174; 36 Digest (Repl.) 118, *592.*

(2) *Lowery* v. *Walker*, [1911] A.C. 10; 80 L.J.K.B. 138; 103 L.T. 674; 13 Digest 507, *571.*

(3) *Addie (R.) & Sons (Collieries)* v. *Dumbreck*, [1929] A.C. 358; 98 L.J.P.C. D 119; 140 L.T. 650; 36 Digest (Repl.) 120, *604.*

(4) *Cooke* v. *Midland Great Western Ry. of Ireland*, [1909] A.C. 229; 78 L.J.P.C. 76; 100 L.T. 626; 36 Digest (Repl.) 118, *590.*

(5) *Edwards* v. *Railway Executive*, [1952] 2 All E.R. 430; [1952] A.C. 737; 36 Digest (Repl.) 121, *611.*

(6) *Davis* v. *St. Mary's Demolition & Excavation Co., Ltd.*, [1954] 1 All E.R. E 578; 3rd Digest Supp.

Action.

The plaintiff, an infant suing by his next friend, claimed damages against the defendants, Thomas Wrigley, Ltd. and Ashton-under-Lyne Corporation, for injury to the plaintiff caused by the negligence of the defendants.

F In 1951 the first defendants, Thomas Wrigley, Ltd., who carried on business as contractors, were employed by the second defendants, Ashton-under-Lyne Corporation, to do road works in Trafalgar Street, Ashton-under-Lyne. In the course of the work the contractors dug a trench, some twenty-two yards long, along one side of the road, fairly near the pavement on that side, and at one end of the trench they dug a pit some twenty feet deep. The road was closed to vehicular traffic, but pedestrian traffic was allowed. A solid fence, some G five feet high, was erected between the pavement and the excavation, and on the other side of the excavation there was a fence, from one foot to three feet in height, round which were drainpipes, two and a half feet high, with planks across them. Only the workmen were allowed to go beyond this barrier, the public being forbidden to do so. Children frequently came near the excavation, but the watchman on duty chased them away whenever he saw them. On H May 18, 1951, in broad daylight, the plaintiff, who was then eight years of age, fell into the pit and was injured. In his evidence he said that he knew he was not supposed to go beyond the barrier.

A. D. Karmel, Q.C., and *P. Curtis* for the plaintiff.

Fenton Atkinson, Q.C., and *J. D. Cantley, Q.C.*, for the defendants.

I *Cur. adv. vult.*

July 25. **OLIVER, J.**, having stated the facts and found that all reasonable steps were taken to keep the children away from the excavation and that the plaintiff had no licence to go near the pit, continued: In the first place, it seems to me to be perfectly clear that there is no case against the corporation. The corporation was the occupier of the road for the time being. If a child is a trespasser, having no licence, actual or implied, to go on the premises, there is no liability on the occupier of the premises, whatever the allurement, except

where the occupier has acted with complete recklessness.* [HIS LORDSHIP A
referred to *Excelsior Wire Rope Co., Ltd.* v. *Callan* (1) ([1930] A.C. 404), *Lowery* v. *Walker* (2) ([1911] A.C. 10), *R. Addie & Sons* (*Collieries*) v. *Dumbreck* (3) ([1929] A.C. 358), *Cooke* v. *Midland Great Western Ry. of Ireland* (4) ([1909] A.C. 229), and *Edwards* v. *Railway Executive* (5) ([1952] 2 All E.R. 430), and continued:] Accordingly, there must be judgment for the corporation.

I must now consider the position of the contractors. Is their position worse B
than that of the corporation? [HIS LORDSHIP referred to *Davis* v. *St. Mary's Demolition & Excavation Co., Ltd.* (6) ([1954] 1 All E.R. 578), as supporting a distinction between the duty of an occupier towards a trespasser and the duty of a contractor who was not the occupier, and continued:] In *Davis's* case (6), ORMEROD, J., held that the contractors, a demolition company, were liable in
negligence to the plaintiff because they had put an allurement on land of which C
they were not the occupiers. The contractors, therefore, were not protected by the principle in *R. Addie & Sons* (*Collieries*) v. *Dumbreck* (3). On the facts of the present case I should not have thought that the duty of the contractors was any higher than that of the corporation, but I am prepared to assume that it was. I have, therefore, to consider the question whether the contractors
put an allurement on the road. D

What is an allurement? I suppose that it is something attractive but dangerous, although not apparently so—something insidious. The capacity of an object to attract will, of course, vary with the age and experience of the person concerned—take, for example, the turntable in *Cooke* v. *Midland Great Western Ry. of Ireland* (4) and the colliery wheel in *R. Addie & Sons* (*Collieries*)
v. *Dumbreck* (3). Such objects would present neither attraction nor deception E
to adults, who would probably avoid them as being both dirty and dangerous. Children, on the other hand, would not mind the dirt and would be ignorant of the danger. Can a hole in the ground be an allurement? I think not. There is nothing insidious about a hole in the ground; its danger is not concealed. It was broad daylight at the time of the accident, the hole was quite obvious
to a child, and the plaintiff knew that he ought not to go beyond the barrier. F
If a hole in a road is an allurement, what about dozens of objects met with in the daily life of children? What about a canal, an unfastened window, a flight of stairs? They are all dangers, but children know it. I cannot see anything alluring about a hole in the ground, and, therefore, even on the footing that contractors are liable if they place an allurement on the land, the case fails against
the contractors, as well as against the corporation, and, therefore, there must be G
judgment for the defendants.

Judgment for the defendants.

Solicitors: *Bostock, Yates & Chronnell*, Ashton-under-Lyne (for the plaintiff); *A. W. Mawer & Co.*, Manchester (for the defendants).

[*Reported by* M. DENISE CHORLTON, *Barrister-at-Law*.]

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* On the liability of an occupier to a trespasser where the occupier has acted with recklessness, see per HUMPHREYS, J., in *Walder* v. *Hammersmith Borough Council* ([1944] 1 All E.R. at p. 494, letters G, H).

ADAMS *v.* THE WAR OFFICE.

[QUEEN'S BENCH DIVISION (Glyn-Jones, J.), October 7, 1955.]

Crown—Tort—Act of member of armed forces on duty causing death of another such member—Exemption of Crown from liability—Crown Proceedings Act, 1947 (10 *&* 11 *Geo.* 6 *c.* 44), *s.* 10 (1).

The plaintiff's son, while on duty as a member of the armed forces of the Crown, viz., a Class Z reservist attached to a territorial battalion, and while taking part in a military exercise, was killed by the bursting of a shell fired by other members of the armed forces who were also on duty. The plaintiff, as administrator of the son's estate, brought an action under the Fatal Accidents Acts, 1846 and 1908 and the Law Reform (Miscellaneous Provisions) Act, 1934, against the War Office claiming damages for negligence causing the death of his son. The Minister of Pensions issued a certificate certifying that the son's death would be treated as attributable to service for the purposes of entitlement to an award under the Royal Warrant*. Subsequently the Minister decided that no award of pension or compensation should be made to the plaintiff. The defendants relied on the Crown Proceedings Act, 1947, s. 10 (1)†, which provided in effect that nothing done by a member of the armed forces on duty should subject the Crown to liability in tort for causing the death of another member of the armed forces, also on duty, if the Minister of Pensions certified that the injury suffered would be treated as attributable to service for the purposes of entitlement to an award under the Royal Warrant.

Held: although the issue of the certificate by the Minister had been followed by the refusal of any award under the Royal Warrant the conditions of s. 10 (1) of the Crown Proceedings Act, 1947, were satisfied, and the defendants were exempt from liability in tort.

[As to the general liability of the Crown in tort, see 7 HALSBURY'S LAWS (3rd Edn.) 250, 251, paras. 545, 546; and as to legal proceedings against the Crown, see 11 HALSBURY'S LAWS (3rd Edn.) 8 et seq.

For the Crown Proceedings Act, 1947, s. 10 (1), see 6 HALSBURY'S STATUTES (2nd Edn.) 55.]

Preliminary Point of Law.

The plaintiff was the father and administrator of the estate of Albert George Adams who was killed while serving in the armed forces of the Crown as a Class Z reservist. The plaintiff brought this action against the War Office claiming damages for the benefit of himself and his wife and the estate of the deceased, alleging negligence causing the death of his son. The deceased was on duty as a member of the armed forces of the Crown at the time when he was killed and the Minister of Pensions certified that the deceased's suffering the accident which had caused his death had been or would be treated as attributable to service for the purposes of entitlement to an award under the Royal Warrant. The defendants relied on s. 10 of the Crown Proceedings Act, 1947, and contended that they were not liable in law. The Minister having refused the plaintiff an award under the Royal Warrant the plaintiff contended that his claim could not be defeated by a certificate of the Minister which was followed by a refusal to grant any award or compensation to him. The point of law so raised was set down for hearing before trial of any issues of fact. The facts appear in the judgment.

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* I.e., the Royal Warrant concerning retired pay, pensions and other grants for members of the military forces, Cmd. 7699, since amended by Cmds. 7826, 8253, 8533, 8621 and 8864.

† The terms of the sub-section are printed at p. 246, letter D, post.

R. F. Levy, Q.C., and *J. E. S. Ricardo* for the plaintiff.
Rodger Winn for the War Office.

GLYN-JONES, J.: The plaintiff in this action sues the War Office in his capacity as the administrator of the estate of his deceased son. He sues the War Office for damages suffered by the estate, being damages for the benefit of himself and his wife by way of compensation to them for the financial loss they have suffered by the death of their son, who, most unhappily, was killed when he was serving as a Class Z reservist in a territorial battalion which was engaged in an exercise on the ranges at Bulford. A shell burst among troops taking part in that exercise and the son was killed. The plaintiff claims that his son's death was caused by the negligence of somebody who allowed that shell to be fired among troops taking part in the exercise. It is quite obvious, I think, that there must have been negligence.

The War Office rely in their defence on the provisions of the Crown Proceedings Act, 1947, s. 10, as excusing them from liability to pay damages in such an action as this. A question of law is raised by the plea of the War Office that the Crown Proceedings Act, 1947, s. 10, protects them and it is properly set down as a preliminary point because if the point is decided in favour of the War Office it obviously brings this action to an end. The Crown Proceedings Act, 1947, s. 10 (1), provides:

> " Nothing done . . . by a member of the armed forces of the Crown while on duty as such shall subject . . . the Crown to liability in tort for causing the death of another person, or for causing personal injury to another person, in so far as the death or personal injury is due to anything suffered by that other person while he is a member of the armed forces of the Crown if—(a) at the time when that thing is suffered by that other person, he is either on duty as a member of the armed forces of the Crown or is, though not on duty as such, on any land, premises, ship, aircraft or vehicle for the time being used for the purposes of the armed forces of the Crown; and (b) the Minister of Pensions certifies that his suffering that thing has been or will be treated as attributable to service for the purposes of entitlement to an award under the Royal Warrant, Order in Council or Order of His Majesty relating to the disablement or death of members of the force of which he is a member."

By sub-s. (3) the Secretary of State may certify

> " (a) that a person was or was not on any particular occasion on duty as a member of the armed forces of the Crown."

In this case the Secretary of State for War has certified that all persons taking part in the exercise in which the plaintiff's son was killed " were on duty as members of the armed forces of the Crown ". That certificate is not challenged in any way; and it could not be challenged, for by sub-s. (3) the certificate is " conclusive as to the fact which it certifies ".

The Minister of Pensions has issued a certificate dated Aug. 25, 1953, that is, shortly after the writ in this action. The certificate is in the following terms:

> " In so far as the death of Private Albert George Adams . . . is due to anything suffered by him as a result of the accident on Aug. 7, 1952, I hereby certify, on behalf of the Minister of Pensions, that his suffering that thing has been or will be treated as attributable to service for the purposes of entitlement to an award under the Royal Warrant relating to the disablement or death of members of the force of which he was a member."

That certificate is signed by an officer authorised by the Minister of Pensions. No point is taken, or, as I understand it, could be taken, on the fact that the certificate is signed by an authorised officer rather than by the Minister himself. The War Office say that the provisions of s. 10 are satisfied and that, therefore, A the act or negligence which caused the death of the plaintiff's son does not subject either the negligent soldier or soldiers or the War Office or the Crown as the superiors of those soldiers to liability in tort for causing the death of the plaintiff's son. Counsel for the plaintiff says that that is not so, because, notwithstanding the certificate, the Minister of Pensions has in fact refused to award any pension to the mother or father of the soldier, that is to say, the B plaintiff in this action or his wife, and he says that the only certificate that would satisfy the meaning of s. 10 (1) (b) of the Act is a certificate which is bound to lead to a decision that the parents should be paid some pension, however small. He says, therefore, that since the certificate which was issued is not a certificate which binds the Minister to make a payment of some pension it is not a certificate that declares that the parents or one or other of them are or is entitled to be paid C something by way of pension and it is not a valid certificate under para. (b). Notwithstanding counsel's very careful and clear argument, I have come to the conclusion that my judgment on this point of law must be in favour of the War Office. The issue by the Minister of Pensions of a certificate the effect of which is to certify that the death of the son of the plaintiff is attributable to war service has in my opinion the effect of entitling the plaintiff or his wife to D make their claim under the Royal Warrant and entitling them, if on that claim they satisfy or either of them satisfies the conditions, to be paid a pension. The Minister of Pensions is the sole judge under art. 65 of the Royal Warrant whether or not the plaintiff or his wife satisfies the conditions of the warrant, and he has decided apparently that neither of them does so. I do not think that this means that the certificate which was issued by the Minister was not a certificate within E the meaning of para. (b) of s. 10 (1) of the Crown Proceedings Act, 1947, since the Minister has certified that for the purpose of entitlement to an award under the Royal Warrant the death of the plaintiff's son would be treated as attributable to service. From this it follows as a matter of law that one or other or both of the parents would become entitled to a pension if the conditions of art. 37 of the warrant were satisfied.

F That disposes of this point of law. I do not think that I should serve a useful purpose if I were to continue to discuss either the arguments that have been addressed to me or my reasons for coming to the conclusion at which I have arrived. It seems to me that it is a pure matter of construction of the language of these sub-sections, and I have said what I think that they mean.

Point of law decided in favour of the defendants.

Solicitors: *Gouldens* (for the plaintiff); *Treasury Solicitor* (for the War Office).

[*Reported by* A. P. PRINGLE, ESQ., *Barrister-at-Law.*]

Re ANDREWS (*deceased*).
ANDREWS *v.* SMORFITT AND ANOTHER.

[CHANCERY DIVISION (Wynn-Parry, J.), October 4, 1955.]

Family Provision—Unmarried daughter—Daughter living with married man—Physically incapable of maintaining herself—Whether father under moral obligation towards her—Inheritance (Family Provision) Act, 1938 (1 *&* 2 *Geo.* 6 *c.* 45), *s.* 1 (1) (*b*).

The applicant, who was a daughter of the testator and was now sixty-nine years of age and by reason of physical disability was incapable of maintaining herself, had lived with him at his home until 1911 when she left to set up a permanent home with P. who was, at all material times, a married man. The applicant never married. After she left home she and the testator were estranged, but subsequently a reconciliation was effected and on occasions she went to stay with him and looked after him when he was ill. The testator, having made a will dated May 2, 1951, in which he made no provision for the applicant, died on Aug. 24, 1953. The applicant applied to the court for reasonable provision to be made for her maintenance under s. 1 (1) (b) of the Inheritance (Family Provision) Act, 1938.*

Held: from the time when the applicant left her father's home to set up a permanent home with P. the testator ceased to be under any moral obligation to maintain her or to provide for her by will notwithstanding that she and P. were never married; the court therefore refused her application.

[For the Inheritance (Family Provision) Act, 1938, as amended by the Intestates' Estates Act, 1952, see 32 HALSBURY'S STATUTES (2nd Edn.) 139.]

Adjourned Summons.

The applicant, Alice Harriet Andrews, applied by originating summons under the Inheritance (Family Provision) Act, 1938, as amended by the Intestates' Estates Act, 1952, that such reasonable provision as the court thought fit might be ordered to be made out of the estate of the deceased, Edward Andrews, for her maintenance.

The applicant, the daughter of the deceased, was born on Aug. 29, 1886, and lived at her father's house until May, 1911. At that time she became unhappy at home and left in order to join a Mr. Phillips, who was at all material times a married man and with whom she lived thereafter. Six children were born of that union. The applicant never married.

After she left home, the applicant and her father were estranged but were reconciled subsequently and she paid occasional visits to her father's house taking with her two of her children. On occasions between 1917 and 1951 the applicant went to nurse her father at his house when he was ill. In February, 1951, she was again asked to go and nurse her father who was seriously ill and, although she was herself ill, she went and looked after him for six weeks. During that visit her eldest son, Ronald Phillips, also went to spend ten days at his grandfather's house and helped the applicant to look after him. The deceased

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* Section 1 (1) of the Inheritance (Family Provision) Act, 1938, as amended by the Intestates' Estates Act, 1952, provides, so far as is material, as follows—" Where, after the commencement of this Act, a person dies domiciled in England leaving . . . (b) a daughter who has not been married, or who is, by reason of some mental or physical disability, incapable of maintaining herself . . . then, if the court on application by or on behalf of any such . . . daughter . . . as aforesaid (in this Act referred to as a 'dependant' of the deceased) is of opinion that the disposition of the deceased's estate effected by his will . . . is not such as to make reasonable provision for the maintenance of that dependant, the court may order that such reasonable provision as the court thinks fit shall . . . be made out of the deceased's net estate for the maintenance of that dependant." The Act as amended applies in relation to persons dying on or after Jan. 1, 1953; see ss. 8, 9 of the Intestates' Estates Act, 1952, 32 HALSBURY'S STATUTES (2nd Edn.) 123.

A gave the applicant presents of a sewing machine and a gold safety pin at this time, as she alleged, and showed her a will in which he had divided his estate equally between the applicant and her two surviving sisters, of whom Elsie Smorfitt, the first defendant, was one.

Subsequently the deceased accused the applicant and her son of having stolen certain chattels, which the applicant averred that he had given to them, and B demanded their return. The applicant and her son denied the allegation of theft and returned some of the articles. In the meantime the deceased was removed to hospital.

The deceased died on Aug. 24, 1953, and by his will dated May 2, 1951, which appointed the second defendant to be executor, he made no provision for the applicant. At the date of these proceedings, the applicant was sixty-nine C years of age and receiving constant medical attention. She still lived with Mr. Phillips but neither of them had any means of support other than national assistance.

E. Grayson for the plaintiff, the applicant.
C. A. Settle for the first defendant.
N. Lermon for the second defendant.

D

WYNN-PARRY, J.: Prior to the passing of the Inheritance (Family Provision) Act, 1938, a testator under English law had an unqualified right to dispose of his property by will, and unless his disposition was so capricious as to lead to the conclusion that he could not be treated as being of sound testamentary capacity, there was no means of qualifying or in any way frustrating the pro- E visions of the will. The Inheritance (Family Provision) Act, 1938, as amended by the Intestates' Estates Act, 1952, constitutes an invasion of that unqualified right of disposition and it is, therefore, but natural that in exercising the jurisdiction conferred on them by that Act as amended, the courts have on numerous occasions been careful to point out that the jurisdiction is one which should be exercised only with great circumspection and only to a limited extent. F It is clear, partly from the decided cases and also from a perusal of s. 1 of the Act of 1938, that a most important, if not the most important, consideration which the court should have in mind is the extent to which, if at all, the testator was under a moral obligation to the person claiming relief.

In the present case the applicant, who is sixty-nine years of age, is a daughter of the testator. She has not in fact been married and, therefore, on the strict G words of s. 1 (1) (b) of the Act of 1938 she is a person who is entitled to bring such an application as this. According to the evidence, she is now suffering from physical disability and is incapable of maintaining herself and, therefore, on an equally strict reading of s. 1 (1) (b) she is, for that reason, in a position to invoke the jurisdiction of the court; but she cannot be successful in an application rested on either of the two grounds in para. (b) unless it is demonstrated H that in all the circumstances the testator was under some moral obligation to her with the result that by excluding her entirely from his will, as he did in this case, he has failed to make reasonable provision for her maintenance.

The relevant facts in this case lie within a very narrow compass. The applicant left the parental home as long ago as 1911. She left in order to set up house with a Mr. Phillips, and, but for the circumstance that he was then and I has ever since remained a married man, she would have married him. She quite clearly left the parental home to set up a permanent home with Mr. Phillips, no doubt relying on him to provide her with the companionship and the protection, financial and otherwise, which she would have had a right to expect from him if they could have been and had been joined in wedlock. In my view, it necessarily follows that from the time when it could be postulated that she had set up this permanent relationship and home with Mr. Phillips then, notwithstanding that she was not legally married to him, her father ceased to have any moral obligation with regard to her maintenance and ceased to have any moral obligation to provide for her by his will. To my mind, the same reasoning must apply to a consideration of the second part of s. 1 (1) (b) of the Act of 1938, and I approach a consideration of the events to which I am about to refer on the basis that, as I find, the testator had long ceased to have any moral obligation for either of the reasons mentioned in s. 1 (1) (b) to provide for this daughter.

The evidence shows that after some lapse of time a reconciliation was effected between the father and the daughter, and on a number of occasions she stayed with him and looked after him; and it is clear that, at any rate, in the early part of 1951, the then intention of the testator was to leave his estate, at any rate so far as the residue was concerned, equally among his three daughters of whom the applicant was one. His position then, so far as this Act was concerned, was, as I find it, one in which he was completely free either to give effect to that intention or to alter it. In the spring of 1951 very strong differences arose between the testator on the one hand and the applicant and her son on the other. As a result of a visit which the applicant and her son paid to the testator it was said and maintained by the testator for the rest of his life that the applicant and her son had removed from his home a number of chattels without his authority or consent and refused to return them, and he made the serious charge against them of having deliberately stolen them. The applicant and her son, both of whom have given evidence in this case, strenuously deny that, and say that such items as they admit having removed from the testator's home were given to them by him, and that in effect they would have been willing to return them had he modified his attitude by withdrawing the very serious suggestion that they had stolen them. I think it is only fair to the applicant and her son to say that whether or not (on which I make no observation) they were well advised to take up the attitude which they did take, it appears to me that there was a considerable amount of exaggeration on the part of the testator and I certainly do not take the view that the applicant and her son, as the testator suggested, deliberately robbed him while he was ill in bed thinking that he would not recover and that, therefore, they might safely get in first. It seems to me, on the view which I have already expressed of the testator's moral obligations towards the applicant in 1951, that none of those matters really is relevant to the case before me. If they are at all relevant, they only serve to show why the testator was of that mind. Taking the view, as I do, that at the time he made his will he was in fact under no moral obligation to the applicant, he was entitled, however mistaken may have been his view as to what they had done, to order his testamentary disposition exactly as he pleased.

It, therefore, comes to this, that in my opinion I have no right in this case to interfere with the testator's will and to re-make that will, as I should have to do if I did interfere, by including something in the nature of a legacy for the applicant.

For those short reasons, in my judgment this summons fails and must be dismissed.

Summons dismissed.

Solicitors: *Victor Mishcon & Co.* (for the applicant); *Cunliffe & Airy*, agents for *Kirby, Son & Atkinson*, Harrogate (for the first and second defendants).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

G. H. RENTON & CO., LTD. *v.* PALMYRA TRADING CORPORATION OF PANAMA.

[QUEEN'S BENCH DIVISION (McNair, J.), June 30, July 1, October 7, 1955.]

Shipping—Carriage by sea—Bill of lading incorporating Hague Rules—Clause for discharge of cargo in the event of strike—Strike at port of delivery—Delivery at port other than that named in bill of lading—Carriage of Goods by Sea Act, 1924 (14 *&* 15 *Geo.* 5 *c.* 22), *Schedule, art.* III, *r.* 2, *r.* 8, *art.* IV, *r.* 4—*Water Carriage of Goods Act*, 1936 (1 *Edw.* 8 *c.* 49), (*R.S.C., c.* 207), *Schedule, art.* III, *r.* 2, *r.* 8, *art.* IV, *r.* 4.

The defendants, who were shipowners, entered into four contracts for the carriage of timber by sea, evidenced by bills of lading in substantially similar form, from ports in British Columbia to London, and in one case to Hull, in England.

By condition 2 of the bills of lading the Hague Rules* were applied to the contracts of carriage, but were in fact inapplicable in relation to the timber subject to one of the contracts for carriage to London as the timber was stated to be and was carried on deck. By condition 3, cl. 14 of the bills of lading it was provided among other provisions that: " (c) Should it appear that . . . strikes, lockouts . . . on board or on shore . . . would prevent the vessel from leaving the port of loading or . . . entering the port of discharge or there discharging in the usual manner and leaving again, all of which safely and without delay, the master may discharge the cargo at port of loading or any other safe and convenient port. (f) The discharge of any cargo under the provisions of this clause shall be deemed due fulfilment of the contract. If in connection with the exercise of any liberty under this clause any extra expenses are incurred, they shall be paid by the merchant in addition to the freight, together with return freight if any and a reasonable compensation for any extra services rendered to the goods." While the vessel was at sea a strike started in the Port of London, where she was due to dock on Oct. 14, 1954. The strike spread to Hull and principal United Kingdom ports and continued until Nov. 1, 1954. Certain continental ports were not able to unload ships diverted from England during the strike. On instructions from the defendants the vessel was eventually diverted to Hamburg, where the London cargoes were unloaded during the period of the strike. The Hull cargo could not have been unloaded before the London cargoes. Before the London cargoes were unloaded the strike had spread to Hull and on the instructions of the defendants the Hull cargo was unloaded at Hamburg during the continuance of the strike. After discharging the cargoes at Hamburg the defendants took no steps to forward the cargoes to London and Hull nor did they pay for the costs of storage or transhipment. By reason of the discharge of the cargoes at Hamburg the plaintiffs, who were indorsees and holders of the four bills of lading and owners of the timber, suffered damage. The plaintiffs brought an action against the defendants for breach of contract by failing to deliver the timber at the named ports of discharge, but did not dispute that, if delivery could be made under the contracts at ports other than London

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* The Hague Rules thus incorporated in the bills of lading were those enacted in the country of shipment, i.e., those enacted in the Water Carriage of Goods Act, 1936 (1 Edw. 8 c. 49), enacted by the Senate and House of Commons of Canada. They are in terms similar to those of the Hague Rules set out in the Schedule to the Carriage of Goods by Sea Act, 1924 (14 & 15 Geo. 5 c. 22). The terms of the relevant rules enacted in the Schedule to the latter Act are set out in the footnotes at p. 258, post. By virtue of the terms of the bill of lading and the definition of " goods " in art. 1 (c) of the Schedule to the Carriage of Goods by Sea Act, 1924, the Hague Rules did not apply to timber subject to one of the contracts for carriage to London, since the bill of lading stated that the timber was carried on deck and the timber was in fact so carried (see p. 255, letter I, post).

and Hull, the port of Hamburg was the least inconvenient port available A
at the time.

Held: (i) on their true construction the contracts were not contracts
providing for alternative ports of discharge, and, their main object and
intent being the carriage of the cargoes to London and Hull, cl. 14, para. (f),
which purported in effect to provide that delivery at Hamburg "shall be
deemed due fulfilment of the contract", was so inconsistent with and B
repugnant to the unqualified promise to deliver at London and Hull that it
was ineffective.

(ii) even if, contrary to the decision expressed in (i) above, delivery at
Hamburg was, on the true construction of the contracts, due performance of
them at common law, yet the words " properly and carefully . . . discharge
the cargo carried " in r. 2 of art. III of the Hague Rules imposed an obligation C
(except in the case of a contract for carriage on deck) to discharge the cargo
at the proper port of discharge which, for the purpose of the rules, was
London (or Hull) but not Hamburg, and the effect of r. 8 of art. III was to
avoid the whole of para. (c) of cl. 14 under which any right to discharge the
cargo at Hamburg would otherwise arise, and was not merely to avoid part
of that paragraph. D

Dictum of Pilcher, J., in *Svenska Traktor Aktiebolaget* v. *Maritime
Agencies (Southampton), Ltd.* ([1953] 2 All E.R. at p. 573) not followed;
dicta of Wright, J., in *Gosse Millerd, Ltd.* v. *Canadian Government Merchant
Marine, Ltd.* ([1927] 2 K.B. at p. 434), and *W. Angliss & Co. (Australia)
Proprietary* v. *Peninsular & Oriental Steam Navigation Co.* ([1927] 2 K.B.
at p. 460) applied. E

[**Editorial Note.** It should be noted that McNair, J., was prepared to
hold on the facts of this case that the shipowners were justified at common law
under cl. 14, para. (c) in discharging the cargo at Hamburg with a view to
forwarding the timber to London at their own expense (see p. 260, letter I, post).
Although he subsequently intimates that para. (c) of cl. 14 was in these bills of
lading rendered void by the Hague Rules, yet the ground for this is that the F
paragraph in terms would permit the shipowners to discharge the goods at the
loading port in the circumstances stated in the paragraph and claim full freight
for doing so. The question may thus still be open what the effect of a clause
similar to para. (c) would be if it did not make delivery at a port other than a main
port of destination to be due performance of the contract, but left on the shipowner
an obligation to pay the expenses of transhipment to a port of destination. G

As to the effect of the Carriage of Goods by Sea Act, 1924, on the common
law rights and liabilities of shipowners, see 30 Halsbury's Laws (2nd Edn.)
607, para. 767; and for the obligation of a carrier under art. III, r. 2 of the
Schedule to the Act in relation to properly discharging the goods, see 30 Halsbury's
Laws (2nd Edn.) 612, para. 771 note (b).

For the Carriage of Goods by Sea Act, 1924, Schedule, art. III and art. IV, H
see 23 Halsbury's Statutes (2nd Edn.) 887-892.]

Cases referred to:

(1) *Glynn* v. *Margetson & Co.*, [1893] A.C. 351; 62 L.J.Q.B. 466; 69 L.T. 1;
41 Digest 311, *1715*.

(2) *Frenkel* v. *MacAndrews & Co., Ltd.*, [1929] A.C. 545; 98 L.J.K.B. 389; I
141 L.T. 33; Digest Supp.

(3) *Connolly Shaw, Ltd.* v. *Nordenfjeldske S.S. Co.*, (1934), 49 Lloyd's Rep. 183.

(4) *Hadji Ali Akbar & Sons, Ltd.* v. *Anglo-Arabian & Persian S.S. Co., Ltd.*,
(1906), 95 L.T. 610; 11 Com. Cas. 219; 41 Digest 500, *3286*.

(5) *Gosse Millerd, Ltd.* v. *Canadian Government Merchant Marine, Ltd.*, [1927]
2 K.B. 432; *revsd.* C.A., [1928] 1 K.B. 717; 97 L.J.K.B. 193; 138 L.T.
421; *revsd.* H.L., [1929] A.C. 223; 98 L.J.K.B. 181; 140 L.T. 202;
Digest Supp.

(6) *Svenska Traktor Aktiebolaget* v. *Maritime Agencies* (*Southampton*), *Ltd.*, [1953] 2 All E.R. 570; [1953] 2 Q.B. 295; 3rd Digest Supp.

(7) *Angliss* (*W.*) *& Co.* (*Australia*) *Proprietary* v. *Peninsular & Oriental Steam Navigation Co.*, [1927] 2 K.B. 456; 96 L.J.K.B. 1084; 137 L.T. 727; 41 Digest 474, *3054*.

Action.

The plaintiffs as indorsees and holders of four bills of lading covering shipment of cargoes of timber from ports in British Columbia to London and Hull in England claimed damages from the defendants, owners of the ship Caspiana (called " the vessel "), for breach of the contracts of carriage by failing to deliver the cargoes at those ports. For the purposes of the trial an agreed statement of facts was prepared from which the following paragraphs are extracted.

In pursuance of the contracts of carriage contained in or evidenced by the bills of lading the defendants in or about August, 1954, loaded on board the vessel quantities of timber at the ports of Vancouver and Nanaimo, British Columbia. On or about Sept. 3, 1954, the vessel having completed loading at Nanaimo aforesaid, her last port of loading on the Pacific coast, sailed for the United Kingdom with the timber on board.

At the time of sailing from Nanaimo labour relations were tranquil at United Kingdom ports generally, including London and Hull. Vessels were being loaded and discharged at all these ports in the normal way, unhindered by any strike or stoppage of work by dock labour. At that time there was no special indication that any such strike or stoppage might shortly arise.

The vessel passed through the Panama Canal on Sept. 22, 1954, and proceeded on her voyage across the Atlantic. On Sept. 28, 1954, following a dispute between certain London dockers and their employers, the work of unloading the motor vessel Haparangi at the Royal Albert Docks was stopped. On Sept. 30, 1954, workmen in the Royal Group of London Docks struck in sympathy with the workmen involved in this dispute. During the ensuing days the strike spread to other London docks and, by Oct. 13, 1954, the Port of London was virtually at a standstill. At this date there was no similar strike at other United Kingdom ports, though at all major United Kingdom ports (including Hull) and at some Continental ports, dockers, while freely unloading cargo originally destined to the port in question, were refusing to unload cargo diverted to that port from London. Representatives of the London strikers were urging dockers at other ports to strike in their support; the men at other ports had not at this stage either gone on strike or agreed to do so, but were refusing to handle diverted cargo. On Oct. 12, 1954, a meeting of London dockers voted to continue the strike. The vessel was due to arrive off Dungeness at 4 p.m. on Oct. 13, 1954, and to dock in London on Oct. 14. The defendants ordered the vessel, by cable dispatched at 1 p.m. on Oct. 12, to proceed to Antwerp to discharge the London cargo there. On that afternoon they learnt that the dockers there would not unload cargo diverted from London and at 5.30 p.m. they cabled the master not to proceed to Antwerp. They made inquiries what other ports would discharge diverted cargo, but it was not until about noon on Oct. 13 that they learnt that it would be possible to discharge the London cargo at Hamburg, and at 12.15 p.m. the defendants by radio cablegram instructed the master to proceed to Hamburg and to discharge there the London cargo. The vessel proceeded accordingly. The defendants did not consult the plaintiffs before giving the order, but as soon as the arrangements for Hamburg were made the defendants instructed the ship's agents to notify the receivers of the cargo and by letter dated Oct. 13, 1954, the defendants' agents informed the plaintiffs that they were diverting the vessel to Hamburg to discharge the London portion of her cargo, relying on the rights allegedly conferred on them by cl. 14 (c) of the bills of lading. The vessel arrived at Hamburg on Oct. 15, 1954, and began to discharge the cargo originally destined for London on Oct. 16, 1954.

The stowage of the cargo was such that it was not practicable to begin the discharge of the cargo destined for Hull and Immingham without first discharging the greater part of the cargo destined for London. On Oct. 19, 1954, the defendants' agents sent a circular letter to the plaintiffs and other receivers of the cargo originally destined for Hull and Immingham in these terms:

> " We beg to advise you that this vessel is discharging her London cargo in Hamburg and is expected to leave Hamburg on the 21st instant.
>
> " As you are aware, efforts are being made to spread the dock strike to Hull and Immingham. If this should eventuate, the carriers have asked us to inform you that they may elect to exercise their rights under cl. 14 of the bill of lading and discharge the Hull and Immingham cargo at Hamburg."

The plaintiffs replied on Oct. 21, 1954—

> " With reference to your letter of the 19th instant, addressed to our Hull office and notifying them of the owners' intention in the event of the strike spreading to Hull and Immingham, as it has done, to divert the above vessel from Hull to Hamburg, we give you formal notice we do not admit the owners' rights so to divert the vessel.
>
> "The acceptance or reception of goods at any port other than the port named in our bill of lading and the payment of any freight or charges in respect of our goods shall not be deemed to be a waiver of any of our rights whatsoever but shall be entirely without prejudice and in reserve of all our rights to recover from the owners any damages that we may sustain as a result of their action."

The discharge of the cargo originally destined for London was not in fact completed until Oct. 26, 1954. This was not due to any voluntary delay in unloading on the part of the defendants.

While the vessel was discharging cargo at Hamburg, the strike in the London docks continued. By Oct. 20, 1954, the strike had spread to certain other ports and on that date the strike affected Hull. On Oct. 25, 1954, the dockers at both Hull and London still being on strike and there being no information as to the probable duration of the strike, the defendants' agents, by letter dated Oct. 25, 1954, informed the plaintiffs that the Hull cargo would be discharged at Hamburg. The discharge of this cargo was begun on Oct. 26, and completed at 6.45 a.m. on Nov. 1, 1954.

On Oct. 30, 1954, dockers at the eight United Kingdom ports then affected by the strike, viz., London, Liverpool, Birkenhead, Garston, Manchester, Hull, Southampton and Rochester, voted to return to work on Nov. 1, 1954. On Nov. 1, 1954, work was accordingly resumed at these ports. On the same day a further, though smaller, strike broke out in London, but by Nov. 4, 1954, there was a full resumption of work in London. After completing discharge of the Hull cargo at 6.45 a.m. on Nov. 1, the vessel sailed for Immingham where she arrived on Nov. 2 to discharge the cargo for that port.

After the discharge in Hamburg as aforesaid of the quantities of timber destined for London and Hull, the defendants took no steps to forward or tranship the timber to the relevant ports of destination nor did they pay the cost of transhipment or forwarding or of storage at Hamburg during the period between discharge and transhipment or forwarding. The cost of the forwarding and storage was borne by the plaintiffs. The plaintiffs, without prejudice and under reserve of all rights against the defendants in respect of the above matters, paid the freight due under each of the bills of lading.

By reason of the defendants' discharging the plaintiffs' cargo destined for London and Hull at Hamburg instead of at London and Hull and of the defendants' taking no step to tranship the cargo to the ports of destination, the plaintiffs suffered damage.

A If the defendants were entitled to discharge the cargo originally destined for London or Hull at some other port, it was not alleged that Hamburg was not a safe port, nor that it was not a port at which it was convenient to the defendants to discharge. It was, however, a port which was not convenient to the plaintiffs to the extent that they had bought the goods under contracts made on "c.i.f. London" and "c.i.f. Hull" terms respectively, that it was their intention and B that of their sellers (the shippers) to have the goods discharged at London and Hull only, that the voyage to and delivery at Hamburg necessitated their paying an extra insurance premium of £1 11s. 8d. to cargo underwriters, that such delivery resulted in their ultimately receiving the goods at London and Hull at varying times and between approximately nine to thirteen weeks later than would have been the case had the vessel been able to discharge at London C and Hull on sailing direct to those ports from her position at about 1 p.m. on Oct. 12, 1954, and that such delivery resulted in their being put to further expense in respect of the storage of the goods at Hamburg and their subsequent carriage to and delivery at London and Hull by other vessels. If, notwithstanding the foregoing, it should be held that the vessel could be discharged and delivery made at ports other than London and Hull, it could not be contended D tended that there was available (at the date when the vessel discharged) any port more convenient (or less inconvenient) to the defendants than Hamburg.

In the events which occurred (a) a vessel arriving at London on or after Oct. 13, 1954, could not have begun discharge until at least the end of the main strike on Nov. 1, 1954; and (b) cargo originally destined for London could not have been discharged at Hull or Immingham during the period of the London E dock strike and the cargo destined for Hull could not have been discharged during the period of the strike there (Oct. 20 to Nov. 1).

It was agreed that the court should be at liberty to draw all requisite inferences of fact.

A. A. Mocatta, Q.C., and *R. A. MacCrindle* for the plaintiffs.

F *T. G. Roche, Q.C.*, and *A. J. Bateson* for the defendants.

Cur. adv. vult.

Oct. 7. **McNAIR, J.**, read the following judgment: This case raises some interesting questions as to the extent to which a shipowner who issues a bill of lading for a named port of discharge is entitled, either at common law or under the Hague Rules incorporated in the bill of lading, to modify his prima facie G obligation to deliver the goods at that named port of discharge by appropriate deviation or liberty clauses in the bill of lading and to claim that, when discharge at the named port becomes, for example, by reason of strikes difficult or impracticable without undue delay, delivery at some other destination is due performance of his contract.

The defendants are the owners of the Caspiana (hereinafter referred to as "the H vessel"). The plaintiffs were at all material times the indorsees and holders of four bills of lading acknowledging shipment on board the vessel at ports in British Columbia for delivery at London or Hull of certain quantities of timber, the property in which passed to the plaintiffs on or by reason of the indorsement of the bills of lading to them. Two bills of lading, LN 4 and LN 5, covered 2,702 pieces of Douglas fir timber shipped at Vancouver for London. One bill I of lading, LN 78, covered 574 pieces of Douglas fir timber shipped at Nanaimo for London. The timber covered by this bill of lading was stated to be and was in fact carried on deck and so is outside the ambit of the rules. The fourth bill of lading, H 60, covered 6,192 pieces of Douglas fir hemlock and balsam timber shipped at Nanaimo for Hull. All the timber covered by the bills of lading LN 4, LN 5 and H 60 was carried under deck. While the vessel was on passage, strikes, as more particularly described later, broke out in the Port of London and later at Hull and the defendants caused the whole of the timber to be discharged at Hamburg and made available to the plaintiffs at Hamburg on payment of full freight.

In this action the defendants contend that by discharging at Hamburg they effected due delivery under each of these bills of lading.

Save that the bill LN 78 stated, as was the fact, that the timber was " all on deck " the bills of lading were all in the same form. For the purposes of this judgment I take bill of lading LN 4 as typical. It provides so far as is material as follows:

> " Shipped at Vancouver B.C. in apparent good order and condition . . . by A. Sereth Lumber Co., Ltd. on board the good vessel called the Caspiana for carriage to London, England or so near thereunto as the vessel may safely get always afloat, the following goods: ASL/K 619 Canada 1333 pcs. Douglas fir lumber . . . loaded on board s.s. Caspiana . . . subject to Chamber of Shipping War Risk Clauses Nos. 1 and 2 . . . which are to be delivered in the like good order and condition at the aforesaid port unto order of shipper (Notify: Lloyd Duncan & Co., Ltd., Cross Keys House, 56 Moorgate, London) . . . or his or their assigns he or they paying freight plus other charges incurred in accordance with the provisions contained in this bill of lading: Freight: collect at destination: £247 9s. 7d. In accepting this bill of lading the merchant expressly accepts and agrees to all its stipulations, whether written, printed, stamped or otherwise incorporated, as fully as if they were all signed by the merchant."

The bill of lading was signed by the master at Vancouver on Aug. 23, 1954. In addition, the bill of lading contains an elaborate series of printed conditions and stipulations of which the following are material:

> " II. Paramount Clause. The Hague Rules contained in the International Convention for the Unification of certain rules relating to bills of Lading dated Brussels, Aug. 25, 1924, as enacted in the country of shipment shall apply to this contract . . . With respect to goods loaded at a Canadian port, the Water Carriage of Goods Act, 1936, of the Dominion of Canada, shall be effective . . ."

So far as is material for the purpose of this case, the Canadian Water Carriage of Goods Act, 1936, is in the same terms as the Carriage of Goods by Sea Act, 1924. Then we come to condition III.

> " 2. The scope of voyage: The voyage herein undertaken shall include usual or customary or advertised ports of call whether named in this contract or not, also ports in or out of the advertised, geographical, usual or ordinary route or order, even though in proceeding thereto the vessel may sail beyond the port of discharge or in a direction contrary thereto, or depart from the direct or customary route. The vessel may call at any port for the purpose of the current voyage or of a prior or subsequent voyage. The vessel may omit calling at any port or ports whether scheduled or not, and may call at the same port more than once; may, either with or without the goods on board, and before or after proceeding towards the port of discharge, adjust compasses, dry-dock, go on ways or to repair yards, shift berths, undergo degaussing, wiping or similar measures, take fuel or stores, land stowaways, remain in port, sail without pilots, tow and be towed, and save or attempt to save life or property, and all of the foregoing are included in the contract voyage.
>
> " 3. Forwarding, substitute of vessel, through cargo and transhipment: Whether expressly arranged beforehand or otherwise, the carrier shall be at liberty to carry the goods to their port of destination by the said or other vessel or vessels either belonging to the carrier or others, or by other means of transport, proceeding either directly or indirectly to such port and to carry the goods or part of them beyond their port of destination and

to tranship, land and store the goods either on shore or afloat and reship and forward the same at carriers' expense but at merchants' risk. When the ultimate destination at which the carrier may have engaged to deliver the goods is other than the vessel's port of discharge, the carrier acts as forwarding agent only . . .

"14. Government directions, war, epidemics, ice, strikes, etc.: (a) The ship shall have liberty to comply with any orders or directions as to departure, arrival, routes, ports of call; stoppages, destination, delivery or otherwise howsoever given by the government of the nation under whose flag the vessel sails or any department thereof, or by any other government or any department thereof, or any person acting or purporting to act with the authority of such government or of any department thereof or by any committee or person having, under the terms of the war risk insurance on the ship, the right to give such orders or directions and if by reason of and in compliance with any such orders or directions anything is done or is not done, the same shall not be deemed a deviation, and delivery in accordance with such orders or directions shall be a fulfilment of the contract voyage and the freight shall be payable accordingly.

"(b) Should it appear that the performance of the transport would expose the vessel or any goods on board to the risk of seizure or damage or delay resulting from war, warlike operations, blockage, riots, civil commotions, or piracy, or any person on board to the risk of loss of life or freedom, or that any such risk has increased, the master may discharge the cargo at port of loading or any other safe and convenient port."

Clause 14 (a) I understand to be the clause generally referred to as the Chamber of Shipping War Clause No. 1. The two paragraphs most material for present purposes follow cl. 14 (b).

"(c) Should it appear that epidemics, quarantine, ice,—labour troubles, labour obstructions, strikes, lockouts, any of which on board or on shore—difficulties in loading or discharging would prevent the vessel from leaving the port of loading or reaching or entering the port of discharge or there discharging in the usual manner and leaving again, all of which safely and without delay, the master may discharge the cargo at port of loading or any other safe and convenient port.

"(f) The discharge of any cargo under the provisions of this clause shall be deemed due fulfilment of the contract. If in connection with the exercise of any liberty under this clause any extra expenses are incurred, they shall be paid by the merchant in addition to the freight, together with return freight if any and a reasonable compensation for any extra services rendered to the goods."

[His Lordship summarised the facts from the agreed statement, to which he said reference might be made for further details. The agreed statement is accordingly set out at pp. 253-255, ante. After saying that the only issue which he had to determine was the issue of liability, His Lordship continued:]

I accordingly hold that, if under the bills of lading the defendants were in law entitled in any event to discharge their contractual obligations by delivery in Hamburg, the existing strike situation was at all material times such that the defendants cannot be said to have acted unreasonably in deciding to deliver both the London and the Hull cargo at Hamburg.

On this state of facts, counsel for the plaintiffs, emphasising that (as is apparently the fact) under no reported decision has the shipowner been held entitled to deliver elsewhere than at the destination named in the bill of lading, summarised his submissions as follows:

A. Under the Hague Rules*: (1) That inasmuch as the bills of lading state the contract voyage to be from Vancouver or Nanaimo to London or Hull, the provision in art. III, r. 2 that " the carrier shall properly and carefully . . . carry . . . and discharge the goods " involves an obligation to discharge at London or Hull and that any clause or stipulation in the bills of lading which purports to entitle the carrier in any circumstances to deliver elsewhere is avoided by art. III, r. 8, as being a clause which relieves the carrier from liability for failure to perform this obligation ;

(2) That, if and in so far as the clauses in the bills of lading purport to allow deviation in terms wider than art. IV, r. 4, they are similarly avoided ;

(3) That, if it is possible to draft clauses in a bill of lading so as to include within the definition of the contract voyage action taken pursuant to liberty or deviation clauses, the particular clauses relied on by the shipowner in this case do not achieve that object; and

(4) That the particular clauses relied on, namely, cl. 14, paras. (c) and (f), if given their literal meaning, would permit the shipowner to discharge the goods at Vancouver, the port of loading, and claim full freight: such provision would clearly be avoided by the rules and, if part of the clause is bad, the whole clause is avoided.

B. Apart from the Hague Rules: That cl. 14, paras. (c) and (f) of the bill of lading (which alone in terms give the defendants the protection they claim) must as a matter of construction be disregarded as being inconsistent with the express promise to deliver at London or Hull or on the ground that to give effect to it would be to defeat the main object and intent of the contract.

Counsel for the defendants on the other hand, on behalf of the shipowners, took his stand primarily on the following submissions: (1) that the bills of lading in question as a matter of construction expressly provided that in certain events (for example, strikes) there should be an alternative port of discharge to London or Hull, and that no principle of the common law prevented such construction being adopted; (2) that the words " properly and carefully " in art. III, r. 2, of the rules mean only " in proper manner and with due care " and do not relate to the place of discharge.

In my judgment the logical and proper mode of approach to the problems raised in this case is first to consider whether apart from the Act and rules the bills of lading properly construed justify the defendants' action. If they do not, the defendants' position cannot be improved under the Act and rules; if they do, I must next consider how far, if at all, the Act and the rules cut down the defendants' rights.

I turn, therefore, to the position at common law. On this aspect of the problem no question of public policy arises. The question is merely one of the construction of a written document such as a bill of lading according to the settled principles which guide the court in that task.

In *Glynn* v. *Margetson & Co.* (1) ([1893] A.C. 351) oranges were shipped on

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* The terms of the relevant rules are as follows:—

Art. III, r. 2. " Subject to the provisions of art. IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried."

Art. IV, r. 4. " Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of these rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom."

Art. III, r. 8. " Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these rules, shall be null and void and of no effect.

"A benefit of insurance or similar clause shall be deemed to be a clause relieving the carrier from liability."

A board a steamship under a printed bill of lading which stated that the ship was then

> " lying in the port of Malaga, and bound for Liverpool [the name of this port being filled in in writing] with liberty to proceed to and stay at any port or ports in any station in the Mediterranean, Levant, Black Sea, or Adriatic, or on the coasts of Africa, Spain, Portugal, France, Great Britain B and Ireland, for the purpose of delivering coals, cargo, or passengers, or for any other purpose whatsoever."

The ship left Malaga for a port on the east coast of Spain and out of her course for Liverpool, then returned and made for Liverpool where the oranges were delivered in a damaged condition owing to the delay. The House of Lords C held that the printed clause must not be construed so as to defeat the main object and intent of the contract which was to carry the oranges from Malaga to Liverpool and that the liberty must be restricted to ports which were in a commercial sense on the course of the voyage. In that case it is to be observed that, as in the other cases to which I shall refer, delivery was ultimately made at the named port of destination. Further it is to be noted that in the case in D question the House did not in fact reject any of the printed words but merely applied to them a restrictive interpretation. But Lord Halsbury, L.C., used this language ([1893] A.C. at p. 357):

> " Looking at the whole of the instrument, and seeing what one must regard . . . as its main purpose, one must reject words, indeed whole provisions, if they are inconsistent with what one assumes to be the main purpose E of the contract. The main purpose of the contract was to take on board at one port and deliver at another port a perishable cargo."

A somewhat similar question arose in *Frenkel* v. *MacAndrews & Co., Ltd.* (2) ([1929] A.C. 545) where in the bill of lading issued at Malaga it was stated that the goods were shipped

> F " in the steamship Cervantes with destination to Liverpool, with liberty to touch at any ports whatsoever, although they may be outside the route, without it being considered a deviation . . ."

It was proved that the defendants' ship called at Malaga in some cases (as in the case in question) on the outward voyage before proceeding up the east coast of Spain and in others on the return journey. In the former case the voyage of the G vessel was advertised as " via Levante "; in the latter case as " directo ". The goods were in fact lost after leaving Malaga and proceeding via Levante. The House of Lords held that in the absence of any express statement in the bill of lading of the ship's contract voyage parol evidence was admissible to prove what the voyage was and that in the circumstances the route via Levante was a usual commercial route for the ships to follow. Accordingly no resort need H be had to the liberty clause. Viscount Sumner, however ([1929] A.C. at p. 562), in distinguishing *Glynn* v. *Margetson & Co.* (1) as being a case " where the termini of the bill of lading voyage were expressly stated ", deduced from that case the principle that the two parts of the bill of lading, the described voyage and the liberty to deviate, must be read together and reconciled and that a liberty, however generally worded, could not frustrate but must be subordinate to the I described voyage. He added (ibid., at p. 564):

> " . . . that, if, as I suppose is the case, parties may, if they can find apt words to do so, contract themselves even out of *Glynn* v. *Margetson & Co.* (1) and make the liberty to deviate control the terms of the described voyage, the words used here—namely ' at any ports whatsoever, although they may be outside the route ', seem to go far, and possibly far enough, to achieve this object."

This opinion, as Branson, J., observed in the next case to which I now refer, namely, *Connolly Shaw, Ltd.* v. *Nordenfjeldske S.S. Co.* (3) (1934) (49 Lloyd's Rep. at p. 188), was not necessary to the decision of the case before the House but was nevertheless worthy of the greatest respect. In *Connolly's* case (3) the bill of lading acknowledged shipment of cases of lemons on board the vessel "now lying in the port of Palermo and bound for London" and contained the following printed clause (ibid., at p. 185):

> "Nothing in this bill of lading (whether printed or written) is to be read as an engagement that the said carriage shall be performed directly or without delays, the ship is to be at liberty either before or after proceeding towards the port of delivery of the said goods, to proceed to or return to and stay at any ports or places whatsoever (although in a contrary direction to or out of or beyond the route of the said port of delivery) once or oftener in any order, backwards or forwards, for loading or discharging cargo, passengers, coals, or stores, or for any purpose whatsoever, whether in relation to her homeward voyage, or to her outward voyage, or to any intermediate voyage, and all such ports, places and sailings shall be deemed included within the intended voyage of the said goods."

It is legitimate to infer that the draftsman of this clause had been encouraged by the opinion of LORD SUMNER above referred to ([1929] A.C. at p. 562). Nevertheless BRANSON, J., felt constrained (49 Lloyd's Rep. at p. 191) to restrict the operation of the clause to such acts as would not frustrate

> ". . . the object of the voyage, that is to say, the safe carriage of the cargo subject to the exceptions which are provided by the bill of lading . . ."

The only case to which I have been referred in which the destination of the ship was changed after the goods had been shipped is the decision of BIGHAM, J., in *Hadji Ali Akbar & Sons, Ltd.* v. *Anglo-Arabian & Persian S.S. Co., Ltd.* (4) (1906) (95 L.T. 610). In that case the bill of lading after reciting the shipment of the goods on board the vessel "bound subject to the liberties hereafter mentioned for London", provided by cl. 16 as follows:

> "Should the ship for any cause whatever not call at the port for which the goods have been shipped, the owners . . . of the ship are at liberty to forward the goods from any port at which they may call to their port of destination by any steamer or steamers, either of their own or any other line . . ."

In fact whilst the vessel was on passage she was directed by her owners to Cardiff where the goods were transhipped to another vessel chartered by the defendants and delivered in London. BIGHAM, J., holding that the shipowners were protected, said (95 L.T. at p. 613):

> "No doubt the object of the bill of lading contract is that the plaintiffs shall have their goods carried to London, and if the liberties were of such a kind that if put into operation they would defeat the object, it might be possible to disregard them in construing the document . . ."

With this guidance I now approach the question of the construction of the particular bills of lading with which I am concerned. It is plain that the main object and intent of the contract is the carriage of the timber to London or Hull as the case may be. It is equally plain that this object and intent is frustrated if for any reason the shipowner purports to fulfil his contractual obligations by delivery elsewhere and in particular by delivery at a port in another country and disclaims any intention to complete delivery by forwarding the goods at his own expense to the contract destination. This object is none the less frustrated though the goods' owners themselves are free at their own expense to bring the goods undamaged to London. I am prepared to hold on the facts agreed that the shipowners were at common law justified under cl. 14, para. (e) in discharging the cargo at Hamburg with a view to forwarding them to London at their own expense. But in my judgment para. (f) of that clause which purports to provide that delivery at Hamburg "shall be deemed due fulfilment of the contract" is so inconsistent with and repugnant to the primary and unqualified promise to deliver at London that it must be rejected. This bill of lading does not in my judgment provide for alternative ports of discharge.

It was strongly urged by counsel for the defendants that the adoption of this conclusion would have the result that delivery at a port other than the named port of discharge pursuant to the Chamber of Shipping War Clauses would also be a breach of contract. I prefer to express no concluded opinion on this question as it does not strictly arise. It may well be, however, that by appropriate language qualifying the obligation to deliver at the named port, possibly in the manner in which these clauses are referred to in the bill of lading before me, this result could be avoided or that different considerations might arise in relation to a type of clause in which national interests rather than the private interest of the shipowner are predominant.

The conclusion at which I have arrived is sufficient to decide the issue of liability in favour of the plaintiffs. But in view of the elaborate arguments that I have heard on the effect of the Act and rules it is probably desirable that I should express my view on some at least of the points argued.

For the purpose of this part of my judgment the assumption must be that (contrary to the view I have formed) under the bill of lading as properly construed at common law discharge at Hamburg amounted to due performance of the contract by reason of cl. 14, paras. (c) and (f).

Two points have to be distinguished (1) the act of taking the goods to Hamburg which may or may not have been a wrongful deviation under the rules; and (2) the act of delivery at Hamburg in purported performance of the contract which may or may not have been a wrongful delivery under the rules. Inasmuch as the defendants must fail unless the latter point is decided in their favour it is sufficient that I should confine my judgment to this latter point.

The Act and rules nowhere deal in express terms with the place of delivery. It is, however, argued on behalf of the plaintiffs that the obligation to deliver at the proper port is covered by art. III, r. 2, by the words

> "Subject to the provisions of art. IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried."

For the defendants it was argued that the words "properly and carefully" relate only to the manner and method of carriage, for example the carriage of perishable cargo in a refrigerated hold and at proper temperatures. That they include such matter is not disputed; but do they not go further? In *Gosse Millerd, Ltd.* v. *Canadian Government Merchant Marine, Ltd.* (5) ([1927] 2 K.B. at p. 434) Wright, J., expressed the view that

> "The words 'properly discharge' in art. III, r. 2, mean, I think, 'deliver from the ship's tackle in the same apparent order and condition as on shipment', unless the carrier can excuse himself under art. IV."

In my judgment it is implicit in this that the discharge should take place at the proper port. The Act and rules nowhere define what is the proper port but I am satisfied that in this case Hamburg was not a proper port for two reasons. First inasmuch as the right to discharge at Hamburg only arises if at all under cl. 14, para. (c), the right so to discharge lapses if the effect of art. III, r. 8 is to avoid that paragraph as a whole. In my judgment it has that effect. Paragraph (c), in terms would permit the shipowner to discharge the goods at the loading port in the circumstances stated in the paragraph and so claim full freight. I cannot believe that such a discharge would be a due compliance with art. III, r. 2. But there still remains the question whether it is permissible in order to save the clause to use the blue pencil and delete only the offending provision. The words of art. III, r. 8 "any clause, covenant or agreement" are quite precise and do not as I think permit of any such process of revision in a case where the Act and rules apply as a matter of law; and, where as in this case the Act and rules apply as a matter of contract and the parties have not in the incorporation clause used language such as "if and to the extent that any terms of this bill of lading are repugnant to or inconsistent with the Act or rules such term is to be void", I see no method of construction by means of which such process of revision can take place. In expressing this view I am conscious that I may be differing from the tentative view expressed by PILCHER, J., in *Svenska Traktor Aktiebolaget* v. *Maritime Agencies (Southampton), Ltd.* (6) ([1953] 2 All E.R. at p. 573). In that case, however, the incorporation clause (though not strictly relevant as the shipment in question was an outward shipment from the United Kingdom so that the Act and rules applied as a matter of law) was different and the clause itself fell into two distinct parts and did not require substantial revision.

Secondly (even if I am wrong in concluding that the whole paragraph is avoided if part is objectionable), I consider that the particular provision in para. (c), that in the circumstances stated in the paragraph the carrier shall be at liberty to discharge at any safe and convenient port other than the port of loading is itself avoided by art. III, r. 8 as relieving the carrier from his obligation under art. III, r. 2. As WRIGHT, J., observed in *W. Angliss & Co. (Australia) Proprietary* v. *Peninsular & Oriental Steam Navigation Co.* (7) ([1927] 2 K.B. at p. 460):

> "The Carriage of Goods by Sea Acts have introduced a new and obligatory code of responsibilities and immunities as affecting carriers under bills of lading in place of the former rule that carriers by sea, while generally under the liability of common carriers, were free by contract to vary and limit their liabilities."

The same learned judge a few days earlier had said in *Gosse Millerd, Ltd.* v. *Canadian Government Merchant Marine, Ltd.* (5) ([1927] 2 K.B. at p. 434):

> "These rules, which now have statutory force, have radically changed the legal status of sea carriers under bills of lading. According to the previous law, shipowners were generally common carriers, or were liable to the obligations of common carriers, but they were entitled to the utmost freedom to restrict and limit their liabilities, which they did by elaborate and mostly illegible exceptions and conditions. Under the Act and the rules, which cannot be varied in favour of the carrier by any bill of lading, their liabilities are precisely determined, and so also are their rights and immunities."

Now inasmuch as art. IV, r. 4, dealing with deviation is one of the provisions to which art. III, r. 2 is subject, it is reasonable to suppose that the legislature in providing certain permissible deviations had in mind that proper carriage and discharge involved proceeding (subject to the permitted deviations) to and discharging at a port of which it could be predicated that it was proper. In my judgment, taking the view that I do that as a matter of construction this bill of lading does not provide for alternative ports of discharge, the proper port implicitly assumed in art. III, r. 2 on the facts of this case can only be London or Hull as the case may be. Since there is nothing in art. IV, r. 4 which permits discharge at any port to which the vessel may have deviated, I am satisfied that in so far as cl. 14, para. (c) purports to permit discharge at Hamburg it is avoided by the rules. In these circumstances I do not think that it would be useful or desirable that I should express any view as to the extent, if any, to which it is permissible under the Act and rules to provide for alternative ports of discharge or for extensive definitions of the contract voyage.

I accordingly determine the issue of liability in favour of the plaintiffs.

Judgment for the plaintiffs, damages to be assessed.

Solicitors: *William A. Crump & Son* (for the plaintiffs); *Richards, Butler & Co.* (for the defendants).

[*Reported by* A. P. PRINGLE, ESQ., *Barrister-at-Law.*]

A

R. *v.* MITCHELL.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Ormerod and Gorman, JJ.), February 21, 1955.]

Criminal Law—Obtaining credit by fraud—Hire-purchase—Motor cycle under hire-purchase given in part exchange on hire-purchase of another motor B *cycle—No credit obtained since no debt created—Debtors Act,* 1869 (32 *&* 33 *Vict. c.* 62), *s.* 13 (1).

The appellant obtained a motor cycle on hire-purchase terms from suppliers, giving in part exchange another motor cycle which he represented to be his own, but of which he had possession on hire-purchase terms under which payments still remained to be made. The suppliers allowed him £65 C in respect of the motor cycle which he gave in part exchange against the price of the motor cycle which they supplied. The appellant pleaded guilty to a charge of larceny and a charge of obtaining credit to the amount of £65 under false pretences or by means of other fraud contrary to s. 13 (1) of the Debtors Act, 1869.

Held: the appellant had not obtained credit, because in " crediting " D him with £65 in respect of the motor cycle taken in part exchange no debt was created; and, therefore, the plea of guilty to the charge of obtaining credit by fraud should not have been accepted and the conviction on that charge would be quashed.

[**Editorial Note.** The three essentials of the offence constituted by s. 13 (1) E of the Debtors Act, 1869, are (i) the incurring of a debt or liability, (ii) the obtaining of credit, and (iii) fraud (see *R.* v. *Jones*, [1898] 1 Q.B. at p. 124 per LORD RUSSELL, C.J.). In the present case the second element was absent; there was no obtaining of credit, although in common parlance the purchaser in such a transaction is said to be " credited " with the sum allowed on the vehicle given in part exchange (see p. 264, letter C, post).

As to the offence of obtaining credit by fraud, see 2 HALSBURY'S LAWS (3rd F Edn.) 632, para. 1254.

For the Debtors Act, 1869, s. 13 (1), see 2 HALSBURY'S STATUTES (2nd Edn.) 298.]

Appeal.

The appellant was indicted before Dudley Quarter Sessions on Dec. 9, 1954, G on two counts, viz., (i) larceny of a motor cycle, and (ii) obtaining credit of £65 under false pretences or by means of other fraud contrary to s. 13 (1) of the Debtors Act, 1869. The appellant pleaded guilty to both charges. On appeal against sentence the court considered, among other points, the validity of the conviction on the second count, with which point alone this report is concerned. The facts are stated in the judgment.

H The appellant did not appear and was not represented.

LORD GODDARD, C.J., delivered the judgment of the court: The appellant was charged before the learned recorder of Dudley, first, with stealing a motor cycle and, secondly, with obtaining credit to the amount of £65 from a firm under false pretences or by means of fraud other than false pretences, I which is an offence under s. 13 (1) of the Debtors Act, 1869. He was represented by counsel and pleaded guilty to both charges and the recorder sentenced him to three years' corrective training on both counts to run concurrently. [HIS LORDSHIP, having stated that the court would not interfere with the conviction or sentence on the first count, continued:] In our opinion counsel should not have advised his client to plead guilty to the second count nor should the learned recorder have agreed to accept that plea. The matter was mentioned to the recorder and he said he thought it was a proper course. The circumstances are these. The first offence charged was stealing. The case was one of the old story of a man getting a motor vehicle (a motor cycle) on hire-purchase and selling it while it was on hire-purchase. That is stealing, because it was not his property to sell; the property remained in the person from whom he hired it until he completed the payments for the hire-purchase. On the second count the appellant was charged with obtaining credit by fraud. He did not obtain credit. To obtain credit by fraud there must be a debt. In this case the appellant took the motor cycle which he had stolen to a firm, represented that it was his own and induced them to let him have another cycle on hire-purchase and to credit him with the second-hand value of the motor cycle which he took to them. That is not obtaining credit. He did not obtain credit for any sum. He entered into a hire-purchase agreement. The firm took a motor cycle which they believed to be his, but which turned out not to be his. We need not speculate what offence that amounted to, but it certainly did not amount to obtaining credit under false pretences or by means of other fraud. He did not obtain credit. No doubt the expression that is used in these cases is that a man is "credited" with a sum and that is taken as if he had paid; but to obtain credit under s. 13 (1) of the Debtors Act, 1869, there must be the creation of a debt and there was no creation of a debt here. Therefore, the conviction on the second count will be quashed.

Conviction and sentence on first count affirmed; conviction on second count quashed.

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

MORCOM AND OTHERS *v.* CAMPBELL-JOHNSON AND OTHERS.

[COURT OF APPEAL (Denning, Hodson and Morris, L.JJ.), October 5, 6, 1955.]

Rent Restriction—Permitted increase—"Improvement" of house—Repairs—Flats—Substitution of modern one-pipe for worn out two-pipe drainage system—Substitution of single large water tank for separate tanks in each flat—Raising of area—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5 *c.* 17), *s.* 2 (1) (*a*).

Landlords of a block of six flats subject to the Rent Restrictions Acts carried out certain works on the premises in respect of which they claimed the right to charge an increase of rent under s. 2 (1) (a) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The works comprised: (i) the substitution for two worn out sets of pipes, one taking refuse from water closets and the other water from wash-hand basins and baths, of the cheaper modern one-pipe system conveying both refuse and water by one pipe to the drains; (ii) the substitution for a worn out eighty-gallon water tank in each flat of a single 480-gallon tank to supply all the six flats; (iii) the lowering of the area adjacent to the flats so that it was no longer above the damp course in the building as originally constructed and so would not cause damp in the walls.

Held: the landlords were not entitled to an increase in the rents in respect of the works, since the expenditure was incurred, in the first two cases, on repairs by replacing old parts with modern equivalents and not "on the improvement . . . of the dwelling-house" within the meaning of the section, which meant an improvement from the tenant's point of view, and in the third case not on the improvement of the block of flats or of any individual flat.

Appeal allowed.

[For permitted increases of rent of controlled houses for improvements, see 20 HALSBURY'S LAWS (2nd Edn.) 323, para. 383.

For the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 2 (1) (a), see 13 HALSBURY'S STATUTES (2nd Edn.) 984; and for cases on the subject, see 31 DIGEST (Repl.).]

Cases referred to:

(1) *Strood Estates Co., Ltd.* v. *Gregory*, [1937] 3 All E.R. 656; [1938] A.C. 118; 106 L.J.K.B. 752; 157 L.T. 338; 31 Digest (Repl.) 667, *7660*.

(2) *Wates* v. *Rowland*, [1952] 1 All E.R. 470; [1952] 2 Q.B. 12; 3rd Digest Supp.

(3) *Rabbitt* v. *Grant*, [1940] I.R. 323; 31 Digest (Repl.) 679, *2555*.

(4) *Lurcott* v. *Wakely & Wheeler*, [1911] 1 K.B. 905; 80 L.J.K.B. 713; 104 L.T. 290; 31 Digest (Repl.) 363, *4953*.

Appeal.

The landlords of six flats at Grey Coat Gardens, Westminster, applied to the Westminster County Court to determine the amount by which the rents of the flats might exceed the standard rents by reason of expenditure which they contended they had incurred on the improvement or the structural alteration or the provision of additional or improved fixtures or fittings of the premises. The tenants contended that the works carried out were not improvements or structural alterations to the flats within the meaning of s. 2 (1) (a) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended by the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (1) and Sch. 1, and that therefore no increase of rent was payable in respect thereof. On May 23, 1955, His Honour JUDGE DALE held that the works were improvements to the flats within the meaning of the sub-section and that increases of rents therefore fell to be made in respect thereof.

The tenants appealed.

R. E. Megarry and *J. H. W. Silberrad* for the tenants.
H. Heathcote-Williams, Q.C., and *S. Rees* for the landlords.

DENNING, L.J.: In this case the question is whether the landlords of a block of flats can charge an increased rent to the tenants on the ground that they have made improvements to the premises. The governors of Grey Coat Hospital own a block of flats at Grey Coat Gardens. They have in recent years expended on work on those premises sums amounting to £25,000, and that has qualified them to increase the rent under the Housing Repairs and Rents Act, 1954, on account of the repairs. In these proceedings they claim that, in addition to that increase, they are entitled to the increase given by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 2 (1) (a), which authorises an increase:

> " Where the landlord has since Sept. 2, 1939, incurred . . . expenditure on the improvement or structural alteration of the dwelling-house (not including expenditure on decoration or repairs)."

The question for our determination is whether three items of work come within the description " improvement . . . of the dwelling-house [the flat] (not including expenditure on decoration or repairs)."

The first item of work concerned the drainage system. When these flats were put up nearly sixty years ago, they had water closets the refuse from which was taken down one set of pipes into drains below the ground, and alongside they had wash-hand basins and baths from which a separate set of pipes went down the house but when they got underground the water went into the same drains as the refuse from the water closets. That was what is called a two-pipe system. In the course of time it has been found that that two-pipe system is not the best that can be devised. It is better to have a system whereby everything—refuse and water—from water closets, wash-hand basins and baths is all taken down by one set of pipes. This is called the one-pipe system. It so happened that in these flats after sixty years the two-pipe system had come to the end of its life, and the landlords were faced with the question whether to repair all that system piece by piece or whether they should put in a modern one-pipe system. On taking advice, the landlords were told that the better and cheaper way of making good this drainage system at the present day was to install a one-pipe system. It was a system which the by-laws of the London County Council require for any new dwellings. They did the work at a cost of £5,200.

The second item of work concerned the cold-water supply to the flats. When the flats were built, each flat had its own storage cistern of eighty gallons in the flat. In the course of time troubles arose. For instance, some of the tenants had put taps on the rising mains, and the pipes were worn out. The system had come to the end of its life. The landlords took advice and decided that the best way to make the system good was to put a 480-gallon tank in the top of the building which would supply the six flats instead of having an eighty-gallon tank in each flat. That is what they did. The work cost £4,600.

The third item of work was the lowering of the area in the middle of or adjacent to the flats. The trouble was of long standing. When the area was first made, it was an inch or so higher than the damp course, with the result that if water collected in the area it might percolate into the walls above the damp course and so might rise up the walls and cause dry rot. That was a defect in the work done when the flats were originally built. It was decided that, when all the work of repairs was being done, the area should be lowered an inch or two so as to bring it below the damp course. That cost £690.

The county court judge, in a careful judgment, has said that the primary facts are undisputed. He held that all these three works were improvements and qualified the landlords for an increase of rent. I think his decision involved necessarily the true construction of this statute; and that is a point of law which this court is in a position to review.

I find great difficulty in framing a definition of what is an " improvement " as distinct from a " repair ". Perhaps the most helpful way is to give a few illustrations. In *Strood Estates Co., Ltd.* v. *Gregory* (1) ([1937] 3 All E.R. 656) there was an old-fashioned privy at the bottom of the garden, which was simply a pit which was emptied every month or so by the local authority. The landlords removed that old-fashioned privy, and substituted a modern water closet in which the refuse was taken away by a water-borne system. That was, no doubt, an improvement. In *Wates* v. *Rowland* (2) ([1952] 1 All E.R. 470) the floor of a house had become rotten by damp. When the floor was made good, instead of a wooden floor, a tiled floor was put in. That was held not to be an " improvement ", but a " repair ". But in the self-same case a new concrete bed, some nine inches in depth, was put into the house because the water level in the area had risen. That was held to be an " improvement ". JENKINS, L.J., said (ibid., at p. 475):

> " The replacement of a floor of some kind would, I think, therefore, fairly come within the description of ' repairs ' ",

and he held that the tiled floor replacing the old wooden floor was repairs. SIR RAYMOND EVERSHED, M.R., said (ibid., at p. 476):

> " In the course of the argument examples were given showing that what was undoubtedly repair might yet involve some degree of improvement, in the sense of the modern substitute being better than that which had gone before."

It seems to me that the test, so far as one can give any test in these matters, is this: If the work which is done is the provision of something new for the benefit of the occupier, that is, properly speaking, an improvement; but if it is only the replacement of something already there, which has become dilapidated or worn out, then, albeit that it is a replacement by its modern equivalent, it comes within the category of repairs and not improvements.

Applying this test, it seems to me that the drainage system in these flats is the same now as the system which existed before. All that has happened is that, instead of there being two pipes to carry the water and refuse away, there is one pipe. That is simply the replacement of the older two pipes by its modern equivalent of one pipe. I think it comes properly within the category of repairs and not that of improvement. So also with the cold-water system. There were six individual tanks before, one in each flat. They have been replaced by one bulk storage tank in the roof of the block. That again is simply the replacement of something which existed before by a more suitable modern substitute. In both cases, as the surveyor said, it was a cheaper way of doing it than it would have been simply to restore the old system as it was. It seems to me that in both those instances the work done properly comes within the category of repairs and not that of improvements.

So far as the tenants are concerned, the position in the flats for them from the practical point of view is no different from what it was before. The water closets, the baths, and the cold-water system all operate just as they did before. Some of the tenants said that if anything it was a little more inconvenient, because, for instance, the baths were higher. In a sense, of course, the work benefits them in the same way as any repairs must benefit the people who live in a house when it gets old and dilapidated, because they are better off when it is repaired and made good. But that is the extent of the benefit to them. There is no provision of anything new for their benefit, but only the replacement of the old parts by a modern equivalent, and, in my judgment, that does not amount to improvement so as to qualify the landlords for an increase in rent.

There remains the third item, which, I confess, has given me much difficulty. That is the lowering of this area. Counsel for the tenants submitted to us that, on the strict and true construction of this statute, an improvement has got to be executed on the site of the flat itself—on the dwelling-house itself. I am not prepared to go as far as that. I can well see that there is much force in what counsel for the landlords contended, that for instance, if a landlord brings a water supply or an electricity supply into a row of houses, the whole of that expenditure would qualify for an increase. The expenditure on the common pipe which led up to the house would have to be apportioned amongst the individual houses, even though the expenditure was common to all. The same would apply if a new lift were put into a block of flats instead of an old staircase. I do not myself wish to exclude the possibility in such a case of the landlord qualifying for an appropriate increase. I would not be deterred from so holding by the fact that the statute makes no express provision for apportionment. I think the courts have enough resources open to them to solve questions of that kind. Nevertheless, when I come to consider this particular expenditure—lowering an area to make good a defect which had been there from the commencement; just making good a defect—and when I consider the evidence in the case, it seems to me difficult to say that this is expenditure on the improvement of the flats or on any individual flat. I do not myself think that even that item qualifies the landlords for an increase. In those circumstances, in my judgment, the appeal should be allowed and judgment should be entered for the tenants.

HODSON, L.J.: I agree. The landlords have spent some £25,000 on works in connection with Grey Coat Mansions, a block of flats in the city of Westminster, and they seek to claim an eight per cent. increase of rent on £10,000 of it, on the basis that that £10,000 has been spent on improvements. They claim under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 2 (1), which reads:

> " The amount by which the increased rent of a dwelling-house to which this Act applies may exceed the standard rent shall, subject to the provisions of this Act, be as follows, that is to say:—(a) Where the landlord has since

> Sept. 2, 1939, incurred, or hereafter incurs, expenditure on the improvement or structural alteration of the dwelling-house (not including expenditure on decoration or repairs) an amount calculated at a rate per annum not exceeding eight per cent. of the amount so expended."

September 2, 1939, was substituted for an earlier date by a later Act.* The question for consideration on this appeal is whether the £10,000 is money spent on improvement or whether it is excluded by the words in brackets, which lay down that that is not to include expenditure on decorations or repairs.

The three heads of charge are the renewing of a drainage system, the renewing of a cold-water supply, and work in lowering the surrounding area. The first two items are the biggest. The first amounts to £5,200 in round figures, the second amounts to £4,600 in round figures, and the third amounts to £690.

In considering first of all the question of the drainage, the learned county court judge sought to be guided by what was said by this court in *Wates* v. *Rowland* (2), in which it had to consider a section with which we are not confronted. In reading that case, as his judgment shows, he cited the argument of counsel as stated by JENKINS, L.J., rather than the expressions of JENKINS, L.J., which he made his own in the concluding part of his judgment. So that the learned county court judge, I think, was more concerned to consider whether or not what had been done with regard to this drainage was something better than what had been there before than whether it was something which satisfied the conception of improvement—an improvement going beyond repair. When one considers this somewhat troublesome question, it is obvious that all repairs, if well done, will in the majority of cases involve some improvement, particularly in the case of old property where modern methods have been introduced—modern systems of plumbing, improved systems of drainage, and so forth—where it would be foolish to replace them in their ancient condition in order to carry out the repair. In dealing with the facts of that case (to which my Lord has referred) in his judgment, JENKINS, L.J., said ([1952] 1 All E.R. at p. 475):

> ". . . the landlord has incurred expenditure, and I think he has certainly incurred expenditure on a structural alteration, that is to say, the addition of the further nine inches of concrete. He has also incurred expenditure on what is prima facie, according to the ordinary meaning of the word, an 'improvement', for on the evidence he has made the house, as regards its substratum and the system of construction of the floor and its foundations, very much better than they ever were before. Is there, then, any sufficient reason for holding that this expenditure is to be excluded from consideration on the ground that it was expenditure on repairs ? In my judgment, the answer to that question is that up to a point the totality of the work done was work of repair. The tenant had a floor in the house when he went in, and clearly the house could not be said to be in good tenantable repair after the floor had become rotten. The replacement of a floor of some kind would, I think, therefore, fairly come within the description of 'repairs'. It would be making good a defect arising from the action of the water underneath the floor which had caused the floor to rot, and to that extent the expenditure, in my view, could not properly rank for the eight per cent. increase, and it is not contended that it should so rank. The landlord, however, did substantially more than merely provide a new floor. He made a structural alteration and an improvement, consisting of the laying of the additional concrete bed over the existing concrete, and that provided the house with a better substratum than it had ever had before in the shape of a solid concrete bed on which the new floor could be laid direct, thus getting rid of the disadvantage under which the house had laboured from the time it was built, consisting of the cavity beneath the floor into which, under the changed

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* The Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (1) and Sch. 1: 13 HALSBURY'S STATUTES (2nd Edn.) 1077.

A conditions brought about by the rise in water level, water could find its way."

Accordingly, JENKINS, L.J., in a judgment with which the other members of the court concurred, held that the expenditure, consisting of a structural alteration in the shape of the concrete work, should be considered as expenditure on improvement, and not be excluded from consideration as being an expenditure on repairs.

B That is a clear illustration of the way the court has dealt with this question. I think it is clear that what one has to look at is whether there has been the provision of something new rather than the replacement of what was there before. In *Wates* v. *Rowland* (2), the Irish case of *Rabbitt* v. *Grant* (3) ([1940] I.R. 323) was considered and also the earlier case in this court of *Strood Estates Co., Ltd.* v. *Gregory* (1) to which reference has already been made. Those cases concerned C premises where earth closets had been taken away and the pits used with them had been filled in, and water-borne drainage had been put in their place. It was thought in *Wates* v. *Rowland* (2), and the earlier case of *Strood Estates Co., Ltd.* v. *Gregory* (1), that that class of case was rightly regarded as one of an improvement and not of a mere repair. But the substitution of one water-borne form of drainage for another seems to me to be an entirely different thing, which D comes under the heading of repair. In my judgment, guidance is to be obtained from the case concerning covenants to repair of *Lurcott* v. *Wakely & Wheeler* (4) ([1911] 1 K.B. 905) in which there were three covenants: a covenant to keep in good condition, a covenant to keep in thorough repair, and a third covenant to repair. The observations of FLETCHER MOULTON, L.J., on that are relevant. When he came to the third covenant to repair, he said ([1911] 1 K.B. at p. 918):

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> "Here there is a duty to perform an operation. No doubt, if you thoroughly repair, it will put the house in a good condition and in a state of thorough repair. But it is plain that the word 'repair' refers to the operation to which the defendants bind themselves to have recourse. For my own part, when the word 'repair' is applied to a complex matter like a F house, I have no doubt that the repair includes the replacement of parts. Of course, if a house had tumbled down, or was down, the word 'repair' could not be used to cover rebuilding. It would not be apt to describe such an operation. But, so long as the house exists as a structure, the question whether repair means replacement, or, to use the phrase so common in marine cases, substituting new for old, does not seem to me to be at all G material. Many, and in fact most, repairs imply that some portion of the total fabric is renewed, that new is put in place of old. Therefore you have from time to time as things need repair to put new for old."

In the beginning of BUCKLEY, L.J.'s judgment there is the following passage (ibid., at p. 923):

> "'Repair' and 'renew' are not words expressive of a clear contrast. H Repair always involves renewal; renewal of a part; of a subordinate part . . . Repair is restoration by renewal or replacement of subsidiary parts of a whole. Renewal, as distinguished from repair, is reconstruction of the entirety, meaning by the entirety not necessarily the whole but substantially the whole subject-matter under discussion."

I Even taking into account the comment made by counsel for the landlords that that was a case dealing with a covenant to repair and must not be taken as necessarily being the last word on what can be said about repairs under the Rent Restrictions Acts, nevertheless I think that it is a guide as to what has to be taken to be a repair.

Taking the premises as a whole, in my judgment this change-over from the old system of water-borne drainage to the new was quite clearly a repair, and there is no room for any other conclusion on the construction of this Act. The primary facts are not in dispute. The facts, as summarised by my Lord, are substantially agreed between the parties. There is no dispute as to what was done. Distinguished surveyors were acting on behalf of the landlords, and what they have done, no doubt, was well done and done on the best possible advice. Nor, indeed, is there any question on any inference of fact, since the learned judge drew no inference of fact. The only question is whether the facts which have been agreed in this case amount to the making of an improvement or whether they are covered by the more limited word " repair ". I think that the drains (which have occupied the greater time in argument in this court), come within the heading of repair. The change-over of the water system again was a necessary repair, and I think nothing was done which can take the case out of the class of repair into that of improvement.

In considering whether or not anything is an improvement, it seems to me plain that it must be looked at objectively from the point of view of the reasonable tenant because it provides for the landlord obtaining an increase of rent from a tenant—eight per cent. on the amount expended. It seems to me to follow that whether or not there is an improvement for which an increase can properly be made ought to be looked at from the point of view of the proposed or existing tenant of the dwelling-house in question.

The third head of charge, work in lowering the surrounding area, has also given me considerable difficulty, because that was clearly an improvement, and indeed it has not been otherwise contended. The only question is whether it is an improvement of the dwelling-house. To revert to the language of the section, the expenditure has to be on the improvement or structural alteration of the dwelling-house. If structural alteration is considered, and one asks: " What has to be structurally altered ? ", the answer must be " the dwelling-house itself ". The question is whether the word " improvement " is also limited to the dwelling-house itself. I think that it must be conceded that there may be works carried on away from premises which could be regarded as improvements of the dwelling-house. But the question in this case is whether there is any evidence which can justify the conclusion that the lowering of this area, which was outside the body of the flats, was an improvement of any of these dwelling-houses which constitute the parts of this block of flats. I am not satisfied on the evidence that there is any material on which the court can so hold. Therefore, I think that the appeal must be allowed in toto, and that the landlords have failed to qualify under s. 2 of the Act of 1920.

MORRIS, L.J.: I am of the same opinion. We are concerned with the words

> " expenditure on the improvement or structural alteration of the dwelling-house (not including expenditure on decoration or repairs) ",

and not with any question under the proviso to s. 2 (1) (a). It is clear that repair may, and often does, involve some measure of improvement. Certain passages from *Lurcott* v. *Wakely & Wheeler* (4) bear that out. FLETCHER MOULTON, L.J., said ([1911] 1 K.B. at p. 919): " Many, and in fact most, repairs imply that some portion of the total fabric is renewed, that new is put in place of old ". BUCKLEY, L.J., said (ibid., at p. 924): " Repair is restoration by renewal or replacement of subsidiary parts of a whole ". Some measure of improvement may be involved in work of repair. In *Wates* v. *Rowland* (2), JENKINS, L.J., said ([1952] 1 All E.R. at p. 475):

> " Turning again to the facts of the present case in their relation to the relevant statutory provisions, there is no doubt that the landlord has incurred expenditure, and I think he has certainly incurred expenditure on a structural alteration, that is to say, the addition of the further nine inches of concrete. He has also incurred expenditure on what is prima facie, according to the ordinary meaning of the word, an ' improvement ', for on the evidence he has made the house, as regards its substratum and the

> A system of construction of the floor and its foundations, very much better than they ever were before. Is there, then, any sufficient reason for holding that this expenditure is to be excluded from consideration on the ground that it was expenditure on repairs ? "

That approach, I think, follows the wording of the section, namely, the words: " Expenditure on the improvement of the dwelling-house (not including expendi- B ture on decoration or repairs) ". I think *Wates* v. *Rowland* (2) affords a helpful and useful illustration of what may be regarded as repair and what may be regarded as improvement. As JENKINS, L.J., said in that case ([1952] 1 All E.R. at p. 475): " The replacement of a floor of some kind would, I think, therefore, fairly come within the description of ' repairs ' ". Later on he said (ibid., at p. 476):

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> " The landlord, however, did substantially more than merely provide a new floor. He made a structural alteration and an improvement, consisting of the laying of the additional concrete bed over the existing concrete, and that provided the house with a better substratum than it had ever had before in the shape of a solid concrete bed on which the new floor could be D laid direct, thus getting rid of the disadvantage under which the house had laboured from the time it was built, consisting of the cavity beneath the floor into which, under the changed conditions brought about by the rise in water level, water could find its way."

An argument was submitted whether the provision should be approached from the point of view of the landlord or the tenant. Should improvement be con- E sidered from the point of view of the tenant ? The matter clearly cannot be determined by considering what any particular tenant thinks. If the view of a tenant is being considered, it must be the view of a reasonable tenant. But it seems to me that the real inquiry must always be one to ascertain the true facts whether or not there has been an " improvement ". Though JENKINS, L.J., used the words " very much better " in the passage that I have quoted, he also used F the words " according to the ordinary meaning of the word ". Expenditure must be expenditure on improvement or structural alteration not including expenditure on decoration or repairs. Of course, the very purpose of a dwelling-house is that it should be lived in, and if a tenant may be called on to pay more under this section, presumably he will have to do so because he is getting something which is an improvement of the dwelling-house in which he is to live, which, G I think, contemplates an improvement from his point of view. But it is the word " improvement ", to which attention must always be directed on the facts of a particular case.

On first approach, in a matter of this kind it would seem that any decision would be a decision of fact which could not be the subject of appeal. But it is clear from his judgment that the learned judge regarded the essential facts H as not in dispute, and he considered—I think rightly—that we would be in as good a position as he was to arrive at a conclusion. The surveyors' report of Nov. 2, 1954, was taken by the learned judge as conveniently summarising the position. In reference to the sanitary system it states:

> " The sanitary inspector would not have allowed us to repair the system in the form in which it was in 1952 and it was considered to be more satis- I factory and economical to install a ' one-pipe' system in lieu of the conventional old and insanitary ' two-pipe ' system. In the new system the whole of the soil and waste branches in each half block of six flats discharge into a single pipe directly connected to the drain, with anti-syphonage pipes connected to the individual fittings ",

and so on. Further on, in reference to the water system, is this passage:

> " The services as they stood in 1952 consisted, in each half block of six flats, of a rising main from ground level to the roof space feeding, in most

> flats, a large cold-water supply tank and, in some cases, the flushing tanks, lavatory basins, sinks and baths. In many cases, however, alterations had been made over the years and the fittings were served direct from the rising main, in itself a contravention of the by-laws. Most of the cold-water storage tanks in the individual flats were either rotted or unused, and the rising mains themselves were found to be defective. We were of the opinion, therefore, that the repair of the rising mains would be costly and that the additional load which would be placed on them by the modernisation of the system as a whole, would impose such a strain that there might be danger of failure within a short time."

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It seems to me that this report, which is really in conformity with the evidence of the surveyors, to which we were referred, rather demonstrates that repairs were necessary, that some work had to be done, and that opportunity was taken to do the work in the most modern way. There may also have been some anticipation of repairs which would have to be done in a short time, and it may have been thought to be more economical and in accordance with good estate management to do everything at the one time.

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It seems to me that what ultimately has to be decided is whether the work comes within the category referred to by the Master of the Rolls in *Wates* v. *Rowland* (2) when he said ([1952] 1 All E.R. at p. 476):

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> " In the course of the argument examples were given showing that what was undoubtedly repair might yet involve some degree of improvement, in the sense of the modern substitute being better than that which had gone before."

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A consideration of the evidence leads me to the view that here in substance work of repair was being done, although that repair involved some degree of improvement and although the modern substitute might be better than that which had gone before. I think, therefore, that we are obliged to differ from the judgment of the learned judge.

Appeal allowed. Leave to appeal to the House of Lords refused. F

Solicitors: *Baylis, Pearce & Co.* (for the tenants); *Trollope & Winckworth* (for the landlords).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

NOTE.

R. v. PHILLIPS.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Devlin and Donovan, JJ.), June 20, 1955.]

Street Traffic—Driving while disqualified for holding licence—Sentence of imprisonment and disqualification—Period of disqualification—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5 *c.* 43), *s.* 6 (1) (*a*), *s.* 7 (4).

[For the Road Traffic Act, 1930, s. 6 (1) (a) and s. 7 (4), see 24 HALSBURY'S STATUTES (2nd Edn.) 579, 580.]

Appeal against sentence.

The appellant, Gordon William Phillips, was convicted on Apr. 5, 1955, at the County of London Sessions, of three offences of driving a motor vehicle while disqualified for holding a licence. He was sentenced to twelve months' imprisonment (that is to say, two periods of six months to run concurrently, in respect of two of the offences, and a third period of six months to run consecutively, in respect of the third offence), and was disqualified* for holding a licence for twelve months.

The appellant was not represented.

LORD GODDARD, C.J., delivered the judgment of the court: The appellant pleaded guilty at the County of London Sessions before the deputy chairman to three offences of driving a motor vehicle while he was disqualified for holding a licence. He had been convicted in April, 1954, of various offences under the Road Traffic Act, 1930, and was disqualified for holding a licence for twelve months. During the period of disqualification he deliberately drove a motor vehicle on, at least, three occasions, but two are enough for present purposes. He was seen driving a van in January, 1955, and again on Feb. 16, 1955. In other words, he simply ignored the sentence of disqualification passed on him.

Parliament has treated driving when disqualified as a very serious offence. It is one of the offences in the Road Traffic Act, 1930, for which a sentence of imprisonment is to be passed unless the court comes to the conclusion that, having regard to the special circumstances, a fine will be an adequate punishment.† For instance, if a man met with a sudden emergency owing to his wife or child being ill and wanted to drive a car to get a doctor, those might be "special circumstances." In the ordinary case, however, the court is not given a discretion in the matter, but is directed to impose a sentence of imprisonment. In the present case there was no suggestion of "special circumstances", and the appellant was sentenced to imprisonment. The reason why leave to appeal was given was because quarter sessions not only sentenced the appellant to imprisonment for twelve months but also ordered him to be disqualified for holding a licence for twelve months. Similar sentences have been imposed more than once, and it is time that courts should realise that it is not the least use ordering a man to be disqualified merely for the period during which he is going to be in prison. He will not be able to drive while he is in prison, and the effect of a sentence of twelve months' imprisonment and disqualification for twelve months is only to disqualify him for the very short period of his remission. For instance, if he is sentenced to imprisonment for twelve months, he may obtain a remission of one-third, and, accordingly, the disqualification will be effective only for four months, which is not enough for such a serious offence. For that reason the court gave leave to appeal. As the law stands at present the disqualification must date from the conviction. Therefore, if a man is convicted and is sentenced to twelve months' imprisonment and disqualified for twelve months, the disqualification runs during the time while he is in prison. We think that this is a very bad case. We do not alter the sentence of imprisonment, but the disqualification will be for three years to date from conviction.

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* See s. 6 (1) (a) of the Road Traffic Act, 1930.

† See the Road Traffic Act, 1930, s. 7 (4).

Sentence varied.

Solicitor: *Registrar, Court of Criminal Appeal.*

[*Reported by* A. P. PRINGLE, ESQ., *Barrister-at-Law.*]

SAUNDERS *v.* INLAND REVENUE COMMISSIONERS.

[CHANCERY DIVISION (Wynn-Parry, J.), July 27, 1955.]

Surtax—Settlement—" Power to revoke or otherwise determine settlement "—Power to apply part of capital for benefit of class including settlor's wife—Finance Act, 1938 (1 *&* 2 *Geo.* 6 *c.* 46), *s.* 38 (1), (2).

A clause of a settlement provided that the trustees might apply part of the capital of the trust funds for the benefit of a class of persons who included the settlor's wife. The settlor was assessed to surtax for the year 1951-52 on the income from the property comprised in the settlement under s. 38 (2)* of the Finance Act, 1938. On appeal,

Held: the trustees' power to apply part of the capital for the benefit of the settlor's wife was a power " to revoke or otherwise determine . . . [a] provision " of the settlement within the meaning of s. 38 (2) of the Act, and the settlor was therefore liable to be assessed to surtax in respect of the income of the trust funds liable to be applied under the power.

Per CURIAM: in s. 38 (2) of the Finance Act, 1938, the word " provision " refers to the result ensuing from a particular clause of a written settlement rather than to the clause of the document itself, and the word bears the same meaning in sub-s. (1); see p. 277, letter C, p. 276, letter H, post.

Berkeley v. *Berkeley* ([1946] 2 All E.R. 154) applied.

Appeal dismissed.

[For s. 38 (2) of the Finance Act, 1938, see 12 HALSBURY'S STATUTES (2nd Edn.) 411; and for the corresponding s. 404 (2) of the Income Tax Act, 1952, see 31 HALSBURY'S STATUTES (2nd Edn.) 381.]

Cases referred to:

(1) *Berkeley* v. *Berkeley*, [1946] 2 All E.R. 154; [1946] A.C. 555; 115 L.J.Ch. 281; 175 L.T. 153; 2nd Digest Supp.

(2) *Inland Revenue Comrs.* v. *Kenmare* (*Countess*), (1955), 48 R. & I.T. 442.

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* So far as relevant the terms of s. 38 (2) of the Finance Act, 1938, are as follows—" If and so long as the terms of any settlement are such that—(a) any person has or may have power, whether immediately or in the future, and whether with or without the consent of any other person, to revoke or otherwise determine the settlement or any provision thereof; and (b) in the event of the exercise of the power, the settlor or the wife or husband of the settlor will or may become beneficially entitled to the whole or any part of the property then comprised in the settlement or of the income arising from the whole or any part of the property so comprised; any income arising under the settlement from the property comprised in the settlement in any year of assessment or from a corresponding part of that property, or a corresponding part of any such income, as the case may be, shall be treated as the income of the settlor for that year . . . Provided that, where any such power as aforesaid cannot be exercised within six years from the time when any particular property first becomes comprised in the settlement, this subsection shall not apply to income arising under the settlement from that property, or from property representing that property, so long as the power cannot be exercised."

Case Stated.

The taxpayer appealed to the Special Commissioners of Income Tax against an additional assessment to surtax in the sum of £4,167, made on him for 1951-52. Under the terms of a settlement made by the taxpayer, the trustees were required to invest £100 transferred by him to them on July 25, 1951, and any further sums thereafter so transferred, in authorised investments, with power to vary the investments. They were to hold the sums, the trust funds, on certain trusts subject to specified powers and provisions. They were to pay, divide or apply the income of the trust funds (less any portion of the capital appointed under cl. 4) during an appointed period to or between or for the maintenance, support or benefit of any one or more, to the exclusion of the other or others, of a specified class, as in their absolute discretion they determined. By cl. 4 they were empowered, with the taxpayer's consent during his life, and thereafter at their absolute discretion, to apply part of the capital of the trust funds for the benefit of all or any of the specified class to the exclusion of the others, " freed and released from the trusts concerning the same ", with a proviso that during the life of the taxpayer, the capital of the trust funds remaining subject to the trust after such exercise with the taxpayer's consent must be of a value of not less than £100. The specified class of persons was set out in the schedule to the deed and included the taxpayer's wife. On July 25, 1951, the taxpayer transferred £100 to the trustees, and on Aug. 13, 1951, he transferred £25,000 to them. Of the £25,100 capital so transferred the trustees invested £25,000, and in the year ending on Apr. 5, 1952, the gross income arising under the settlement was £4,166 13s. 4d. An additional assessment to surtax for the year 1951-52 was made on the taxpayer in respect of this income.

The taxpayer contended that the £100 and £25,000 constituted one settlement, that the property comprising the trust funds was not itself a provision of the settlement within the meaning of s. 38 (2) of the Finance Act, 1938, and that in any event there was no power in cl. 4 or elsewhere in the deed to determine a provision of the settlement within the meaning of that enactment. The sub-section therefore did not apply to the settlement. The Crown contended that the transfers of each of the two sums constituted a settlement, that the terms of the settlement of the £25,000 were such that the income arising thereunder was to be treated as income of the taxpayer under s. 38 (2) or alternatively that the terms of the one settlement (if the transfers were comprised in one settlement) were such as to bring it within the sub-section. The commissioners held that the sums of £100 and £25,000 were comprised in one settlement and that the trustees' power to pay or apply part of the capital of the trust funds for the benefit of one or more of the specified class, with a limitation that the capital must not be reduced below £100, was a power to determine a provision of the settlement within the meaning given to the word by Lord Simonds in *Berkeley* v. *Berkeley* (1) ([1946] 2 All E.R. 154), and that the taxpayer's wife might on the exercise of the trustees' discretion become entitled to part of the property comprised in the settlement. They held that the appeal failed but reduced the amount of income comprised in the assessment to £4,153.

A. P. L. Barber for the appellant taxpayer.
Geoffrey Cross, Q.C., *Sir Reginald Hills* and *E. B. Stamp* for the Crown.

WYNN-PARRY, J.: In the Case Stated by the Special Commissioners of Income Tax they expressed the view that the two sums, of £100 and £25,000, were comprised in one settlement, the terms of which were set out in the deed of July 25, 1951, and for the purpose of this appeal only, the Revenue does not challenge this conclusion. That leaves one short point in dispute which turns on the construction of s. 38 of the Finance Act, 1938, and cl. 4 of the settlement.

Clause 4 is in these terms:

> "It shall be lawful for the trustees at any time or times during the appointed period but subject to the consent in writing of the [taxpayer][*] during his life and thereafter at their absolute discretion to pay or apply any part or parts of the capital of the trust funds to or for the benefit of all or any one or more to the exclusion of the other or others of the specified class freed and released from the trusts concerning the same."

Then follows the proviso:

> ". . . during the life of the [taxpayer] any exercise by the trustees with such consent as aforesaid of the power in this clause contained shall be subject to the limitation that the capital of the trust funds remaining subject to the trusts of this settlement immediately after such exercise shall be of a value of not less than £100."

Section 38 (1) deals with payments in the nature of income and, as was pointed out by counsel for the taxpayer, down to a certain point its language is exactly the same as that employed in sub-s. (2), which is designed to deal with capital. Counsel for the taxpayer urged on me that I should not place on the word " provision " in sub-s. (2) a different meaning from that to be given to it in sub-s. (1), and I have no intention of doing so, as I quite accept the principle that it should be given the same meaning wherever it occurs in the section. As I propose to put the same meaning on the word in both sub-sections, it will be sufficient if I confine my analysis to sub-s. (2), which applies in this case.

The sub-section opens with the words " If and so long as the terms of any settlement are such . . ." and I agree with counsel for the Crown that the phrase " the terms " there merely means the language employed. Paragraph (a) of the sub-section proceeds:

> " any person has or may have power, whether immediately or in the future, and whether with or without the consent of any other person, to revoke or otherwise determine the settlement or any provision thereof."

It was urged for the taxpayer that the word " provision " must mean some written part of the instrument and cannot have the alternative meaning applied by the House of Lords in *Berkeley* v. *Berkeley* (1) ([1946] 2 All E.R. 154). LORD SIMONDS pointed out (ibid., at p. 166) (as did the others of their Lordships in slightly different language) that the word " provision "

> ". . . is a word of diverse meanings which slide easily into each other. It has come sometimes to mean a clause or proviso, a defined part of a written instrument. Or it may mean the result ensuing from, that which is provided by, a written instrument or part of it."

The Special Commissioners took the view that, on the true construction of s. 38 (2) of the Finance Act, 1938, " provision " in its context was wide enough to bear the second of the two meanings mentioned by LORD SIMONDS. The taxpayer contends that that is not so.

Now it appears to me that the problem is to be solved by considering the phrase " to revoke or otherwise determine the settlement or any provision thereof ". If the word " provision " meant only a clause or proviso, a defined part of a written instrument, it would have been unnecessary to have included in the sub-section the words " or otherwise determine ", for the verb " revoke " would have sufficed, that being from the conveyancer's point of view the natural word to use, whether the revocation was to cover the whole of the settlement or only specific parts of it. The word " determine " appears to me to be an inapt

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[*] The taxpayer was the settlor and was described as such in the deed of settlement.

A word to use where the object is to provide a power to bring to an end the operation of a defined part of a written instrument. On the other hand, if I can, I must give effect to the words " or otherwise determine ", because they are clearly put in deliberately for the purpose of achieving something more than the word " revoke " alone. The word " determine " seems to me to be an apt word to use where the power contemplated is to bring to an end some benefits provided by B the settlement. As counsel for the Crown pointed out, that construction is reinforced by the proviso to s. 38 (2), which it is difficult to see as having any operation at all without it.

Looking merely at the sub-section, therefore, and neither helped nor embarrassed by authorities, I should come to the conclusion that the decision of the C Special Commissioners was correct. I can see nothing in the language of s. 38 (1), nor in the authorities cited on problems arising under that sub-section which would prevent the construction which I have placed on sub-s. (2) being placed on the language of sub-s. (1).

I come to this conclusion without basing myself on the judgment of DANCKWERTS, J., in *Inland Revenue Comrs.* v. *Countess of Kenmare* (2) (1955) (48 D R. & I.T. 442), because it may be said that that case may possibly be distinguishable on the ground that there was a possibility that the whole of the trust funds might find their way back to the settlor. Although DANCKWERTS, J., regarded that possibility as remote, he mentioned it in his judgment when arriving at his conclusion as to the effect of s. 38 (2). As I read his judgment, however, I think that it is a fair inference that he would have come to the same conclusion apart E from that consideration, and, therefore, although I do not base myself on that judgment, I think that, to a very great extent, if not entirely, it supports the construction of s. 38 (2) which I have adopted. For those reasons this appeal fails.

Appeal dismissed.

Solicitors: *Henry Pumfrey & Son* (for the taxpayer); *Solicitor of Inland Revenue.*

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

NOTE.

O'DONOVAN *v.* O'DONOVAN.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Wallington, J.), July 13, 1955.]

Contempt of Court—Divorce—Child—Child taken out of jurisdiction—Undertaking to bring him back at the end of three months—Breach of undertaking—Application for committal—Summons not served.

[As to contempt of court by breach of an undertaking, see 8 HALSBURY'S LAWS (3rd Edn.) 29, para. 54; and as to application ex parte, see ibid., p. 40, para. 66 note (r); and for cases on the subject, see 16 DIGEST 45, 46, *471-486*, 65, *749*, *750*.

As to the remedy by attachment or committal in the Divorce Division, see 12 HALSBURY'S LAWS (3rd Edn.) 468-470, paras. 1049, 1050; and for cases on the subject, see 27 DIGEST (Repl.) 677, *6458-6460*.]

Cases referred to:

(1) *Favard* v. *Favard*, (1896), 75 L.T. 664; 27 Digest (Repl.) 677, *6458*.

(2) *Hyde* v. *Hyde*, (1888), 13 P.D. 166; 57 L.J.P. 89; 59 L.T. 529; 27 Digest (Repl.) 525, *4679*.

(3) *Re Evans*, [1893] 1 Ch. 252; 62 L.J.Ch. 413; 68 L.T. 271; 16 Digest 9, *21*.

Summons.

The wife applied ex parte* for an order for the committal of the husband for contempt of court.

On Mar. 12, 1953, the wife obtained a decree nisi of divorce which in due course was made absolute. By an order dated Dec. 7, 1953, the husband was granted custody of M., a boy, the eldest child of the marriage, and the mother was granted custody of the two younger children. The husband undertook to send the boy M. to a boarding school and to allow the wife reasonable access to him during the school holidays. In June, 1954, the husband obtained an order of the court permitting him to take M. on a three months' visit to the United States of America, the husband undertaking to bring M. back to school in England in the autumn.

The husband failed to return M. to England and the wife applied for an order committing the husband to prison for contempt of court. The present address of the husband was not known to the wife and it was not possible to serve him with notice of the present application.

K. B. Campbell (*J. B. Gardner* with him) for the wife.

The husband did not appear.

WALLINGTON, J., asked whether the court had power to make a committal order against a man who was apparently outside the jurisdiction and who had not been served with notice of the application.

K. B. Campbell referred to *Favard* v. *Favard* (1) (1896) (75 L.T. 664), *Hyde* v. *Hyde* (2) (1888) (13 P.D. 166), and *Re Evans* (3) ([1893] 1 Ch. 252) and said: Persons breaking undertakings such as that given in the present case frequently remain out of the jurisdiction. If no order for committal may issue, there

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* A committal order (and also an order for the issue of a writ of attachment) were made on ex parte application in *Gordon* v. *Gordon* ([1903] P. at p. 144), where a respondent to a petition for divorce had left the country with the child. The case subsequently went before the Court of Appeal, but no question was raised regarding the validity or regularity of the order of committal (see [1904] P. 163).

A being no possibility of service out of the jurisdiction, undertakings of this nature are rendered largely nugatory.

Wallington, J.: Very well. You may have your order.

Solicitors: *Pothecary & Barratt* (for the wife).

[*Reported by* A. T. Hoolahan, Esq., *Barrister-at-Law.*]

B

J. MILLER, LTD. v. BATTERSEA BOROUGH COUNCIL.

[Queen's Bench Division (Lord Goddard, C.J., Ormerod and Glyn-Jones, JJ.),
C October 14, 1955.]

Food and Drugs—Sale of unsound food—Piece of metal in bun—Bun not unfit for human consumption—Whether food not of the nature, substance or quality demanded—Food and Drugs Act, 1938 (1 *&* 2 *Geo.* 6 *c.* 56), *s.* 3 (1), *s.* 9.

D The appellants sold from their shop in Battersea four chocolate cream buns one of which contained a small piece of metal. They were convicted under s. 9 of the Food and Drugs Act, 1938*, of having sold food that was intended for, but was unfit for, human consumption. On appeal,

Held: the presence of the small piece of metal did not render the food "unfit for human consumption" within s. 9 (1) of the Food and Drugs Act, 1938.

E Per Glyn-Jones, J.: the offence should have been dealt with under s. 3 of the Food and Drugs Act, 1938.

Appeal allowed.

[For the Food and Drugs Act, 1938, s. 3, s. 9, see 10 Halsbury's Statutes (2nd Edn.) 386, 392.]

F Case referred to:

(1) *Lindley* v. *George W. Horner & Co., Ltd.*, [1950] 1 All E.R. 234; 114 J.P. 124; 2nd Digest Supp.

Case Stated.

This was a Case Stated by a stipendiary magistrate in respect of his adjudication at the South-Western Magistrates' Court on Mar. 17, 1955. G

On Feb. 18, 1955, an information was preferred on behalf of the respondents against the appellants that they on Jan. 14, 1955, by their servant or agent, sold a chocolate-coated cream-filled cake intended for but unfit for human consumption in that it contained a piece of metal, contrary to s. 9 of the Food and Drugs Act, 1938. The information was heard on Mar. 17, 1955, and the following facts H were found. On Jan. 14, 1955, a purchaser bought at the appellants' shop four chocolate cream buns which were served by a servant of the appellants. The buns were intended for human consumption. At the time of the sale one of the buns contained a piece of metal. On the same day the purchaser's son began to eat the bun which contained the piece of metal and got the piece of metal into his mouth. It was contended on behalf of the respondents, that the bun was, as a whole, unfit for human consumption. The appellants contended (i) that the bun itself was perfectly sound and uncontaminated, notwithstanding that it contained a small piece of metal, and that there was no evidence that the bun was unfit for human consumption; (ii) that s. 9 of the Act of 1938 was intended to apply only to unsound food; (iii) that s. 3 of the Act of 1938 created an offence which consisted in the sale of food that was not of the quality of food demanded by a purchaser by reason, among other reasons, of the presence of additional extraneous matter, and that s. 3 was the appropriate section for proceedings in the present case; (iv) that if the proceedings had been brought under s. 3 of the Act of 1938, a number of defences would have been open to the appellants by virtue of s. 4 of that Act and that by bringing proceedings under s. 9 the respondents had deprived the appellants of the opportunity of raising any of these defences, and (v) that the maximum penalty for an offence under s. 9 was greater than that for a first offence under s. 3 and that proceedings under a wrong section of the Act should not render the appellants liable to a more severe penalty than could be imposed on a conviction under the appropriate section.

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* The Food and Drugs Act, 1938, provides:—

s. 3. **Prohibition against sale of any food or drug not of the nature, substance or quality demanded.**—(1) If a person sells to the prejudice of the purchaser any food I or drug which is not of the nature, or not of the substance, or not of the quality, of the food or drug demanded by the purchaser, he shall, subject to the provisions of the next succeeding section, be guilty of an offence.

s. 4. **Defences available in proceedings under s. 3.**—In proceedings under the last preceding section it shall be a defence for the defendant to prove—. . . (4) where the food or drug in question contains some extraneous matter, that the presence of that matter was an unavoidable consequence of the process of collection or preparation.

s. 9. **Penalty for sale, etc., of unsound food.**—(1) A person who—(a) sells, or offers or exposes for sale, or has in his possession for the purpose of sale or of preparation for sale . . . any food intended for, but unfit for, human consumption shall, subject to the provisions of this section, be guilty of an offence.

The magistrate found that by reason of the presence of the small piece of metal in the bun it, as a whole, was unfit for human consumption at the time when it was sold, that it was intended for human consumption and that the proceedings were properly brought under s. 9 of the Food and Drugs Act, 1938. The appellants accordingly were convicted and a fine of £10 was imposed and they were ordered to pay £3 3s. costs. The appellants appealed.

J. C. G. Burge for the appellants.
Paul Wrightson for the respondents.

LORD GODDARD, C.J.: This is a Case Stated by the magistrate sitting at the South-Western Police Court before whom the appellants were summoned for selling "a certain article of goods, to wit, a chocolate-coated cream-filled cake intended for but unfit for human consumption in that it contained a piece of metal, contrary to s. 9 of the Food and Drugs Act, 1938".

It appears that when a small boy was eating, and no doubt was enjoying, the cake, he found in it a small piece of metal. Therefore, it is said, an offence was committed against s. 9 of the Food and Drugs Act, 1938. The Act is divided into certain parts. Part I contains general provisions as to food and drugs. In s. 3 one finds a prohibition "against sale of any food or drug not of the nature, substance or quality demanded". Section 4 sets out defences, and sub-s. (4) provides:

> "where the food or drug in question contains some extraneous matter, that the presence of that matter was an unavoidable consequence of the process of collection or preparation."

So obviously the legislature has considered that an offence under s. 3 may be established by showing that there is extraneous matter, and if there is extraneous matter an offence is committed unless the presence of that matter was an unavoidable consequence of the process of collection or preparation. If a piece of metal is found in an article which is sold for food, the metal is extraneous matter which ought not to be there; that is what happened in the case of *Lindley* v. *George W. Horner & Co., Ltd.* (1) ([1950] 1 All E.R. 234) where some sweets contained a nail. Sections 9 to 12 of the Food and Drugs Act, 1938, however, are concerned with what the statute describes as unsound food. How can one say that food becomes unsound, that is to say, rotten or putrid, merely because there is some piece of extraneous matter in the food which has no effect on the general composition ? Two illustrations have been given in this case which seem to me to make the point perfectly clear. If one buys game, one may find in the game some metal pellets. The game is not made unfit for human consumption because it has shot in it, though everybody who has eaten game has known sometimes that it is quite painful to bite on the shot. The presence of the shot probably does not prejudice the purchaser because he expects to find shot, but it is absurd to say that some lead shot in a bird, rabbit or hare makes the article unfit for human consumption. It is not unfit for human consumption. There is also the illustration which ORMEROD, J., put in the course of the argument. At Christmas time, particularly when children are about, things like threepenny pieces are put very often into plum puddings. That does not make the plum puddings unfit for human consumption. The threepenny piece is not fit for human consumption, but the pudding is.

The marginal note to s. 9 of the Food and Drugs Act, 1938, reads " Penalty for sale, etc., of unsound food ", and shows that what the section is dealing with is the sale of what may be called putrid foods. It is the section which is called into force when a butcher is found with bad meat exposed in his shop for sale, meat that is going putrid. As counsel for the appellants has pointed out, certain defences are given to proceedings under s. 3—which is the section which applies where extraneous matter has got into the article but otherwise has not affected it. He does not suggest that he could have pleaded one of those defences in this case; that is another matter. He points that out to show the distinction between the two classes of section. Certain definite defences are given to charges under s. 3 which are different from any that might be available under s. 9. Further, the penalties under s. 9 are altogether more severe than those under s. 3. Moreover, a bun with a little bit of metal in it cannot fairly be described as unfit for human consumption. The bun was perfectly good. It had this metal in it which it ought not to have had, and therefore it can be said that metal to the prejudice of the purchaser was in the bun, but it does not make the bun unfit for human consumption. This appeal should clearly be allowed.

ORMEROD, J.: I agree. There is only one small point in this case and that is whether a chocolate cream bun, which has a small piece of metal in it but which in all other respects was perfectly sound, is unfit for human consumption. There can be only one answer to that. It may be that in the circumstances there were grounds for complaint under s. 3, but certainly not under s. 9.

GLYN-JONES, J.: I agree. This case, like most cases reported and unreported decided under this section, really depends on its own facts though it involves the interpretation of the words " unfit for human consumption " in s. 9 of the Food and Drugs Act, 1938. Reading the statute as a whole and bearing in mind that this is an offence which should have been dealt with under s. 3, I have no hesitation at all in agreeing that the presence of a small piece of metal, the size of which is not defined, in one of four chocolate cream buns sold by the appellants does not render the particular bun in which the piece of metal was found unfit for human consumption within the meaning of s. 9 of the Act of 1938. I agree that this appeal should be allowed.

Appeal allowed.

Solicitors: *Claude Barker & Partners* (for the appellants); *Sharpe, Pritchard & Co.* (for the respondents).

[*Reported by* A. P. PRINGLE, ESQ., *Barrister-at-Law.*]

MILLER'S CASH STORES, LTD. *v.* WEST HAM CORPORATION.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Ormerod and Glyn-Jones, JJ.), October 13, 1955.]

Shop—Hours of closing—Early closing day—Order made by local authority in 1912—*No special provision for Jewish registered shopkeepers—Subsequent legislation providing alternative early closing day for Jewish shops—Effect of order—Shops Act,* 1950 (14 *Geo.* 6 *c.* 28), *s.* 1 (2), *s.* 53 (13), *s.* 76 (2).

Statutory Instrument—Subsequent legislation modifying enactment under which instrument made—Instrument not in terms amended—Effect of instrument after modifying enactment in force—Statutes subsequently repealed and consolidated—Subordinate legislation continued by consolidating Act—Effect of instrument after the consolidation—Shops Act, 1950 (14 *Geo.* 6 *c.* 28), *s.* 1 (2), *s.* 53 (13), *s.* 76 (2).

In 1912 a local authority made an order by virtue of s. 4 (2) of the Shops Act, 1912, whereby Thursday was fixed as early closing day, and in compliance with proviso (i) to that sub-section an option was given to shopkeepers to substitute Saturdays for Thursdays on affixing a notice to that effect in the shop. Section 7 (13) of the Shops (Sunday Trading Restriction) Act, 1936, provided that the proviso in the Act of 1912 should have effect as if the word "Friday" were substituted for the word "Saturday" in relation to shops registered under the Act of 1936 as being occupied by persons of the Jewish religion. After the Act of 1936 came into force the local authority did not amend the Order of 1912. These statutory provisions regarding early closing days were repealed by the Shops Act, 1950, and were re-enacted in s. 1 and s. 53 of that Act. Section 76 (2) of that Act provided that nothing should affect any instrument made under any enactment repealed by the Act of 1950, that every such instrument should continue in force, and "so far as it could have been made . . . under this Act, shall have effect as if made . . . under the corresponding provision of this Act."

The appellants, whose shop was registered as occupied by persons of the Jewish religion, were convicted in 1955 under the Order of 1912 for not having closed their shop on a Thursday for a weekly half-holiday. A notice had been affixed in the shop to the effect that Wednesdays were early closing days. The appellants contended that the Order of 1912 was invalid since it did not contain a provision that shopkeepers whose shops were registered as occupied by persons of the Jewish religion might substitute Fridays for Saturdays as the alternative early closing days. On appeal,

Held: the Order of 1912 was not invalidated, but the effect of s. 53 (13) of the Shops Act, 1950, was that in relation to a registered Jewish shop the word "Friday" had to be substituted for the word "Saturday" in s. 1 (2) of the Act and, therefore, also in the Order of 1912, which was continued by s. 76 (2) of the Act of 1950 as if made under s. 1 (2); in the circumstances the appellants had been rightly convicted.

Appeal dismissed.

[**Editorial Note.** Where subordinate legislation is continued in force by a statute which repeals the Act under which the subordinate legislation was made, the general rule is that the construction and scope of the subordinate legislation remains as it was, unless there is express provision altering it: see *Garcia* v. *Harland & Wolff, Ltd.* ([1943] 2 All E.R. at p. 482, letter D), and for a consideration of the construction of statutory instruments and the consequences of repeal or expiry of the statutory powers under which they are made, see 1 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-Issue) 12, 15. In the present case intervening legislation had modified the effect of s. 4 (2) (i) of the Shops Act, 1912, under which the Order of 1912 was made, and thus had modified also the effect of the order, before the Act of 1912 was repealed. The repeal and re-enactment effected by the consolidating legislation (i.e., the Shops Act, 1950) merely continued the position which existed immediately before the consolidation took effect.

As to the weekly half-holiday in shops, see 14 Halsbury's Laws (2nd Edn.) 689, para. 1307.

For the Shops Act, 1950, s. 1 (2), s. 53 (13) and s. 76 (2), see 29 Halsbury's Statutes (2nd Edn.) 189, 234, 249; and for the Shops Act, 1912, s. 4 and the Shops (Sunday Trading Restriction) Act, 1936, s. 7, see 9 Halsbury's Statutes (2nd Edn.) 933, 985.]

Case Stated.

This was a Case Stated on the application of the appellants, Miller's Cash Stores, Ltd., by the justices for the county borough of West Ham in respect of their adjudication as a magistrates' court sitting at West Ham. On Nov. 19, 1954, an information was preferred on behalf of the respondents, the West Ham Corporation, that the appellants, being the occupiers of a grocer's shop at 35, Romford Road, Forest Gate, London, E.7, did unlawfully fail to close the said shop on Sept. 23, 1954, being a Thursday, contrary to the terms of the West Ham Grocers', General Shopkeepers' and Provision Dealers' Half-Holiday Order, 1912. On Feb. 3, 1955, the information was heard and the following facts were found. In pursuance of the powers conferred on the respondents by the Shops Act, 1912, the Order of 1912 provided that all shops in the borough of West Ham in which the retail trade or business of a grocer, general shopkeeper or provision dealer was carried on should be closed for the weekly half-holiday at 1 p.m. on Thursdays throughout the year, provided that any shopkeeper might substitute Saturdays for Thursdays on affixing a notice to that effect in his shop. The appellants carried on the retail trade or business of a grocer. At all material times since the passing of the Shops (Sunday Trading Restriction) Act, 1936, the appellants' shop had been registered in accordance with the terms of s. 7 of that Act, and, since the date of the repeal of that Act, in accordance with the terms of s. 53 of the Shops Act, 1950. The closing hours of the said shop were: Wednesdays after 1 p.m., Saturdays all day, Sundays after 1 p.m. The appellants affixed notices in the shop to the effect that the shop would be closed after 1 p.m. on Wednesday and all day on Saturdays. The shop was open after, and had failed to close at, 1 p.m. on Thursday, Sept. 23, 1954. It was contended for the respondents that by opening the shop on the afternoon on Thursday, Sept. 23, 1954, the appellants had failed to comply with the order and thereby contravened s. 1 of the Shops Act, 1950. It was contended on behalf of the appellants that since the order contained no proviso that any shopkeeper whose shop was registered in accordance with the terms of s. 53 of the Shops Act, 1950, might substitute Fridays for Thursdays on affixing a notice to that effect in his shop, the order did not comply with s. 1 and s. 53 of the Act, and was, therefore, a nullity as regards, and did not apply in respect of, the shop. The justices were of opinion that the order was validly made under s. 4 (2) of the Shops Act, 1912; that s. 7 (13) of the Shops (Sunday Trading Restriction) Act, 1936, amended s. 4 (2) of the Shops Act, 1912, with respect to shops registered in accordance with the terms of s. 7 (13); that the Shops Act, 1950, repealed both the Acts of 1912 and 1936, but that provision for registration was continued by virtue of s. 53 of the Act of 1950, and the order continued to be operative by virtue of s. 76 (2) of the Act of 1950; that with respect to shops registered in accordance with s. 53 of the Act of 1950 any shopkeeper might substitute Fridays for Thursdays for the weekly half-holiday, notwithstanding the terms of the order, on affixing a notice to that effect in his shop, and otherwise adhering to the terms of that order; that as the appellants had failed to affix a notice in their shop to that effect their failure to close their shop at 1 p.m. on Thursday, Sept. 23, 1954, constituted a contravention of s. 1 of the Shops Act, 1950. The justices convicted the appellants, and imposed a fine of 5s., and the appellants now appealed.

R. H. Bernstein for the appellants.
A. G. F. Rippon for the respondents.

LORD GODDARD, C.J.: The history of the legislation can be stated very briefly. In 1912 the Shops Act, 1912,[*] was passed which (by s. 4) enabled local authorities to make orders fixing the day for the compulsory closing of shops during one half-day a week. Under that Act the West Ham Grocers', General Shopkeepers' and Provision Dealers' Half-Holiday Order, 1912 (herein called the Order of 1912), was made on Sept. 24, 1912. This required grocers, among other shopkeepers, to close at 1 p.m. on Thursdays subject to the following proviso, viz.:—

> " Provided that any shopkeeper may substitute Saturdays for Thursdays on affixing a notice to that effect in his shop."

That was a privilege given by s. 4 (2) proviso (i) of the Act of 1912 because in many towns the big stores preferred to close on Saturdays rather than on other days in the week. That remained the law apparently until the Shops (Sunday Trading Restriction) Act, 1936,[†] was in force, s. 7 of which provided (by sub-s. (13)) that a Jewish shopkeeper whose shop was registered under the Act could substitute Friday for the Saturday closing day. For this purpose a shop occupied by a partnership or company which had a majority of partners or of directors of the Jewish religion was deemed (by s. 7 (3)) to be occupied by a person of the Jewish religion. These two Acts were repealed by the Shops Act, 1950, which was a consolidating Act and is the Act with which we are now concerned. The Shops Act, 1950, s. 1 (2), provides:

> " The local authority may, by order, fix the day on which a shop is to be so closed [under sub-s. (1)] (in this Act referred to as ' the weekly half-holiday '), and any such order may either fix the same day for all shops, or may fix—(a) different days for different classes of shops; . . . Provided that—(i) where the day fixed is a day other than Saturday, the order shall provide for enabling Saturday to be substituted for such other day as respects any shop in which notice to that effect is affixed by the occupier."

The proviso is the same as that to s. 4 (2) of the Act of 1912 . Section 53 reproduces s. 7 of the Shops (Sunday Trading Restriction) Act, 1936. Having provided for the registration of Jewish shopkeepers, it enacts in sub-s. (13):

> " As respects any shop which is for the time being registered under this section, this Act shall have effect as if—(a) in s. 1 (1) and s. 17 (1), the references to weekdays were construed as references to weekdays other than Saturdays; (b) throughout s. 1 (2) ' Friday ' were substituted for ' Saturday '."

Section 76 and Sch. 8 repealed the whole of the Act of 1912 and the Act of 1936. All the orders which had been issued up to date were made under the Act of 1912. Section 76 (2) of the Act of 1950 provides:

> " Nothing in this repeal shall affect any instrument made or other thing whatsoever done under any enactment repealed by this Act or under any

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[*] 2 Geo. 5 c. 3. The text is printed in 9 HALSBURY'S STATUTES (2nd Edn.) 931.

[†] 26 Geo. 5 & 1 Edw. 8 c. 53. The text is printed in 9 HALSBURY'S STATUTES (2nd Edn.) 982. The Act came into force on May 1, 1937; see s. 16 (3).

> enactment repealed by the Shops Act, 1912, and every such instrument or other thing shall continue in force and, so far as it could have been made or done under this Act, shall have effect as if made or done under the corresponding provision of this Act."

One of the provisions which could have been made under the Act of 1950 and which, I suppose, must be deemed to have been made, is that in respect of a shop registered under s. 53 " Friday " must be substituted for " Saturday ".

Counsel for the appellants' main point is that the Order of 1912 is invalid because it does not contain a provision that in respect of registered shops " Friday " should be read instead of " Saturday ". I think, however, when one has considered these sections, especially s. 76 (2), it is clear that Parliament meant that whenever a Jewish shop has been registered under s. 53, the word " Friday " should be substituted for " Saturday " in s. 1 (2). The order would read:

> " Provided that any registered shopkeeper may substitute Fridays for Thursdays on affixing a notice to that effect in his shop."

If the local authority had occasion to make a fresh order, they might see fit to add such a proviso. Further it has to be remembered that the orders depend on the Shops Act, 1950, and it is clear from s. 53 (13) of the Act that although the word printed is " Saturday " you have to read it as though it were " Friday ". If that is so with regard to the Act, it must be so with regard to any order made under the Act, and any such order under s. 1 (2) of the Act of 1950 must be read as if " Friday " were substituted for " Saturday ". The matter becomes clearer if one remembers that the information is for a breach of the Act of 1950 because the Order of 1912 is deemed to have been made under that Act; the order is permitted by the Act and the penalties are imposed by the Act. The point taken by counsel for the appellants is not sound, and the true construction of this Act and the order is that in respect of a Jewish shop for the word " Saturday " there must be read the word " Friday ". I think the justices came to a right decision in law, and this appeal fails.

ORMEROD, J.: I agree and have nothing to add.

GLYN-JONES, J.: I also agree.

Appeal dismissed.

Solicitors: *Breeze, Benton & Co.* (for the appellants); *Town clerk*, West Ham (for the respondents).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

BROPHY *v.* J. C. BRADFIELD & CO., LTD.

[Court of Appeal (Singleton, Jenkins and Parker, L.JJ.), October 5, 6, 1955.]

Factory—Ventilation—Boiler room with furnace—Fumes—Employee suffocated—Whether boiler room a workroom—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6 *c.* 67), *s.* 4 (1), *s.* 47 (1).

Master and Servant—Duty of master—Reasonable precautions not to expose employee to unnecessary risks—Employee at place where it was not his duty to go after work had ceased.

The deceased was employed as a lorry driver by the defendants in whose factory premises there was a boiler room containing a coke furnace and boiler which provided hot water for central heating. The furnace and boiler had been in the premises for twenty-five years without any accident occurring. On a Saturday in January, 1952, the man in charge of the boiler room stoked the furnace shortly before work ceased at 4 p.m. He left the furnace door closed and, in accordance with the usual practice, the door of the boiler room wide open. This open door together with a flue on the furnace provided the boiler room with some ventilation. Early the following morning the deceased was found dead in the boiler room the cause of death being suffocation from inhaling carbon monoxide fumes. The furnace door was found to be open and the boiler room door half shut. It was no part of the deceased's duty to enter the boiler room or to attend to the furnace. In an action for damages under the Fatal Accidents Acts, the deceased's widow alleged that the defendants were in breach of their duty under s. 4 (1) and s. 47 (1) of the Factories Act, 1937,* and were negligent at common law.

Held: (i) the boiler room was not a workroom nor were the fumes generated in the course of any process carried on, within the meaning of s. 4 (1) and s. 47 (1) of the Act; therefore those sections were not applicable to the case and there was no breach of statutory duty on the part of the defendants.

(ii) negligence on the part of the defendants had not been established, since the accident had been caused by the deceased's interfering with the furnace which was shown by the defendants to have operated without accident for twenty-five years and which he had no right to touch.

Appeal dismissed.

[**Editorial Note.** Singleton, L.J., did not assent to the submission that the onus of proof shifted, once it had been established that the deceased was found dead in the boiler room and that his death had been caused by carbon monoxide (see p. 290, letter C, post). The distinction which may be drawn between cases where the maxim res ipsa loquitur applies and those where the cause of the accident is unknown is discussed in 23 Halsbury's Laws (2nd Edn.) 674, para. 957; and for cases on the subject, see 36 Digest (Repl.) 149, *779*, *780*.

For the Factories Act, 1937, s. 4 (1) and s. 47 (1), see 9 Halsbury's Statutes (2nd Edn.) 1004, 1038.]

Appeal.

The plaintiff appealed from an order of Glyn-Jones, J., at Liverpool Assizes dated Feb. 9, 1955, whereby he held that the defendants were not guilty of negligence at common law or in breach of their statutory duty under the Factories Act, 1937, s. 4 (1) and s. 47 (1), and dismissed the plaintiff's claim.

The plaintiff was the widow of the deceased, Patrick Brophy, who was employed as a lorry driver by the defendants. The defendants had a warehouse situated in Great Howard Street, Liverpool, in which there was a ground floor lobby and a staircase leading down to a boiler room in the basement. The boiler room was divided into two parts, one part containing a furnace and a boiler which provided hot water for the heating system and the second part

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* The text of these enactments is printed at p. 289, letter F, and pp. 289, 290, post.

A containing coke for use in the furnace. The only ventilation provided in the boiler room was by means of a flue which carried off the fumes and smoke from the furnace and a door leading to the basement stairs which was always left open. On Saturday, Jan. 19, 1952, work had ceased at the warehouse at about 4 p.m. and the man in charge of the furnace, Mr. Robertson, had stoked up the fire at about 3.30 p.m. leaving the furnace door closed and the boiler room door B wide open as was the usual practice. The deceased and two fellow employees, Mr. Fairclough and Mr. Gorst, were engaged on Jan. 19 in taking a load by lorry from Liverpool to North Wales. They arrived back at the defendants' warehouse after 7 p.m. to fetch the bicycles of Mr. Fairclough and Mr. Gorst. Mr. Fairclough went down to the basement to switch off the lights. The three men " clocked off " at 9.20 p.m. and then left the premises, Mr. Brophy taking C the other two men home in the lorry. Mr. Brophy called at his own home at about 11.30 p.m. and informed his wife that he was going to take the lorry back to the defendants' warehouse, and in fact he did so and locked it in the garage.

On the following morning the foreman, Mr. Crossley, and the stoker, Mr. Robertson, found Mr. Brophy on the floor of the boiler room dead from inhaling carbon monoxide fumes from the furnace. They also found the furnace door D open, the boiler room door half shut, and all the lights in the basement switched off. It was no part of the deceased's duty to go into the boiler room or to attend to the furnace. The furnace and boiler had been used in the premises for twenty-five years without accident. In an action under the Fatal Accidents Acts, 1846 and 1908, the plaintiff alleged that the defendants were negligent at common law and in breach of their statutory duty under the Factories Act, E 1937, s. 4 (1) and s. 47 (1).

GLYN-JONES, J., held that the defendants were not liable under either head and dismissed the plaintiff's claim.

Edward Wooll, Q.C., and *E. E. Youds* for the plaintiff.

D. J. Brabin, Q.C., and *R. S. Nicklin* for the defendants.

F **SINGLETON, L.J.:** This appeal shows some of the difficulties which may confront a judge of first instance who has to decide a claim under Lord Campbell's Act. The man Brophy died when he was alone in the defendants' warehouse, and it is difficult to form a true conclusion how quickly his death occurred.

The plaintiff, Mrs. Hilda Brophy, brought her action in respect of the death G of her husband, Patrick Brophy, who was employed by the defendants who have a warehouse in Great Howard Street, Liverpool. They are makers of tents and canvas goods. Mr. Brophy was the driver of a motor lorry. The defendants' premises in Great Howard Street have an entrance from the main road; there is a lobby inside and there are steps down from that part of the warehouse to the basement, and in the basement there is a boiler room. I have not before H me the dimensions of that room; it is divided into two parts, one of which contains a boiler and the other is a place where coke is stowed for use in the boiler.

On Sunday morning, Jan. 20, 1952, Mr. Brophy was found dead on the floor of the boiler room. It is admitted in para. 5 of the defence that he died from carbon monoxide fumes and that he inhaled the fumes and died in the boiler I house, and it is not disputed that the fumes which brought about his death were fumes from the boiler in the basement of the defendants' premises. The defendants' foreman, Mr. Crossley, arrived at the premises on the Sunday morning and he saw someone on the floor of the boiler room. He did not recognise that it was Mr. Brophy, but when Mr. Robertson, whose duty it was to look after the boiler, arrived, he realised that it was Mr. Brophy who was on the floor, and a short time afterwards it was realised that Mr. Brophy was dead. Mr. Crossley was asked by GLYN-JONES, J.:

" Do you happen to know what sort of boiler it was, the name of it ?

> A.—I don't sir. Q.—Is it the ordinary water jacketed boiler with a hot-water heating system ? A.—Yes."

That is really all the information which was given about the boiler. The furnace was stoked with coke and the boiler provided hot water for the pipes throughout the factory in order to keep the temperature of the place suitable for the work-people.

The case was not left in a very satisfactory position. The learned judge in the course of his judgment referred to the fact that there had been an expert sitting with the plaintiff's advisers and that he was not called as a witness. The plaintiff had legal aid and there would have been no difficulty in her advisers obtaining the help they desired in order to present the case. There was no expert witness called before the judge to describe the boiler and to say what, if any, steps should have been taken in the boiler room and in the basement. We were told this morning that at the time of the trial the boiler had been dismantled. I asked counsel for the defendants when the boiler was removed, and he could not say. I should like to have had further information about the boiler and what should be done in regard to ventilation if such a boiler is installed in a basement; furthermore, I do not know how soon a man may be stricken down by such fumes as come from a boiler of that kind. There was no evidence as to that before the learned judge—and I think there might have been. Glyn-Jones, J., came to the conclusion that the plaintiff had not proved her case and gave judgment for the defendants. The plaintiff appeals to this court. Counsel for the plaintiff has put forward submissions which merit close consideration. His case can be stated really in two sentences which he used at the beginning of his argument. He said that there were two factors to be borne in mind: (1) that early one Sunday morning Mr. Brophy was found dead from carbon monoxide fumes from a boiler in the defendants' factory basement, and (2) that there was absolutely no ventilation in the boiler house. Put in that short way the plaintiff's case appears to have considerable force behind it, but I am not sure whether the second factor stated by counsel is not stated too widely.

[His Lordship summarised the evidence concerning the events of the evening immediately before the day on which Mr. Brophy's body was found and, after saying that work had ceased at the factory at 4 p.m. and that Mr. Robertson, who had charge of the boiler, had stoked it at about 3.30 p.m., closed the furnace door, put the damper in and left the premises, leaving, in accordance with the usual practice, the boiler room door open, His Lordship continued:] In the ordinary way there was a draught coming down the steps from the ground floor to the basement. Moreover there was said to be a flue or chimney to the boiler to take away the fumes or smoke. It is not, therefore, quite correct to say that there was absolutely no ventilation in the boiler house. The foreman, Mr. Crossley, was asked:

> " Q.—What is the position in the normal way of those men in relation to the ventilation ? What is the ventilation like down there ? A.—When it is hot in the summer, of course, they open the windows in the cellar, and in the winter they get what ventilation there is from the door at the top of the stairs, you see, and, of course, there is a reasonable draught, because they put a curtain across to counteract the draught coming down."

Both he and Mr. Robertson in reply to other questions said that there was no ventilation in the boiler house and it is on those admissions that counsel for the plaintiff says there was no ventilation. This further fact emerges from the evidence. Mr. Brophy had no duty in the boiler house; he was a motor driver. How he came to be in the boiler house or how long he had been in there before he died, no one will ever know. When he was found on the floor on the Sunday morning, the door of the furnace was open and, according to the evidence of Mr. Robertson, the shovel was not in the place in which he had left it on the previous afternoon. It is clear, therefore, that after Mr. Robertson stoked up someone had opened the door of the furnace and moved the shovel. It may be that someone had put some more fuel on the fire. The learned judge drew an inference that Mr. Brophy, having switched the lights out, had gone into the boiler house to rest for a while or to sleep and had opened the furnace door. The learned judge was faced with considerable difficulties owing to the lack of evidence. So far as the evidence shows, work had ceased at the factory on the Saturday afternoon at 4 p.m., soon after the furnace had been stoked and the furnace door had been closed. When Mr. Brophy's body was found the furnace door was open. Moreover, the door of the boiler house was partly closed; it was not fully open as it had been left the afternoon before. It may be that Mr. Brophy had gone into the boiler house to get warm after his long day, he may have switched off the lights and gone into the boiler house with the idea of warming himself in front of the furnace: he may have opened the door —and he may have put some more fuel into the furnace. It appears to me that the learned judge was entitled to draw the inference which he drew. Counsel asked us to reject that finding, and his main argument was that it is not in line with some other evidence and in particular with the evidence of Mr. Gorst who said that when he was on the floor above and somewhere above the top of the steps he noticed a strong smell of fumes coming from below. Mr. Fairclough who went downstairs at about 9 o'clock in the evening, did not notice any smell or anything unusual; and the judge accepted his evidence. I do not think that this court ought to accede to counsel's submission that the judge's inference on this point was wrong.

Counsel further submitted that, even if the judge's inference was right, the plaintiff was entitled to succeed in this action on three grounds. First, that the defendants were negligent at common law and the death of Mr. Brophy was caused by their negligence; secondly, that the defendants were in breach of s. 4 (1) of the Factories Act, 1937; and, thirdly, that they were in breach of s. 47 (1) of that Act.

I propose to deal first in so far as is necessary for the purpose of this case with those sections. Section 4 (1) reads:

> "Effective and suitable provision shall be made for securing and maintaining by the circulation of fresh air in each workroom the adequate ventilation of the room, and for rendering harmless, so far as practicable, all fumes, dust and other impurities that may be injurious to health generated in the course of any process or work carried on in the factory."

On the facts it does not appear to me that the boiler room was a workroom within the meaning of s. 4 (1) of the Act or that the fumes were "generated in the course of any process or work carried on in the factory". This was a boiler used for heating the factory. Moreover, in the absence of any evidence it cannot be said that effective and suitable provision had not been made having regard to the fact that the boiler had existed for some twenty-five years in the same place with such ventilation as there was from above and through the flue without anybody ever having noticed anything wrong so far as the evidence shows. I should have liked some evidence as to what the boiler was like and I think the defendants might have given the judge some information about it. I do not think s. 4 (1) of the Act applies to this case.

Section 47 (1), which deals with the removal of dust and fumes, provides:

> "In every factory in which, in connection with any process carried on, there is given off any dust or fume or other impurity of such a character and to such extent as to be likely to be injurious or offensive to the persons employed, or any substantial quantity of dust of any kind, all practicable measures shall be taken to protect the persons employed against inhalation of the dust or fume or other impurity and to prevent its accumulating in

> any workroom, and in particular, where the nature of the process makes it practicable, exhaust appliances shall be provided and maintained, as near as possible to the point of origin of the dust or fume or other impurity, so as to prevent it entering the air of any workroom."

That section again deals with workrooms and with processes carried on in a factory. For the reason I have given with regard to s. 4 (1), I do not think that s. 47 (1) applies to the facts of this case.

It appears to me that the case for the plaintiff can be based best on the allegation that there was a breach by the defendants of the duty which they owed to the plaintiff at common law. An employer owes to his workmen the duty of taking all reasonable precautions to prevent their having to undergo unnecessary risk. Counsel for the plaintiff submitted that the fact that Mr. Brophy was found in the defendants' boiler room dead from carbon monoxide poisoning shifted on to the defendants the onus of proving that they had taken reasonable precautions. I am not sure that that is the true position for the reason that Mr. Brophy was found in a place to which his work did not take him. There was no reason for him to go into the boiler room so far as his duties with the defendants went. If a man goes to some part of a factory where he has no duty to go and there interferes with a boiler (as the judge found that Mr. Brophy did), I am not sure that it can be said that there is an onus on the defendants to explain the accident. If, however, the onus is shifted from the plaintiff to the defendants, it appears to me that the defendants do put forward an answer when they say that this furnace and boiler had worked without accident for some twenty-five years and, but for the interference of someone (in this case, they say, the interference of Mr. Brophy) would have continued to work safely. They say that the accident was caused by Mr. Brophy's interfering with the furnace, which he had no right to do, and, therefore, they submit that there is no liability on them. That was the view of GLYN-JONES, J. I agree with him that this was a most unfortunate accident. If the plaintiff had been able to show by the evidence of some expert witness that it was not proper or not good practice to have a furnace of this kind in a basement without some ventilation other than that which I have mentioned, it may be that the plaintiff could have established a case. The position was, however, that the furnace had existed for many years without complaint: neither side called any evidence on it, and there was no evidence before the judge as to what should have been done. With the case left in that position I am of opinion that the judgment of GLYN-JONES, J., was right, although I confess I should have been happier if more evidence had been put before the court. This appeal must be dismissed.

JENKINS, L.J.: I agree and have nothing to add.

PARKER, L.J.: I also agree.

Appeal dismissed.

Solicitors: *Silverman & Livermore*, Liverpool (for the plaintiff); *Weightman, Pedder & Co.*, Liverpool (for the defendants).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

NATIONAL ASSISTANCE BOARD *v.* MITCHELL.

[Queen's Bench Division (Lord Goddard, C.J., Ormerod and Glyn-Jones, JJ.), October 14, 1955.]

Bastardy—Application for order—Right of National Assistance Board to apply—National Assistance Act, 1948 (11 *&* 12 *Geo.* 6 *c.* 29), *s.* 44 (2), (3).

National Assistance—Bastardy order—Right of National Assistance Board to apply—National Assistance Act, 1948 (11 *&* 12 *Geo.* 6 *c.* 29), *s.* 44 (2), (3).

The respondent admitted that he was the father of the twin children born to Mrs. F. on Sept. 30, 1947. He had made no payment for their maintenance within the twelve months following their birth. In December, 1954, complaints were preferred by the National Assistance Board against the respondent, stating that assistance had been given under Part 2 of the National Assistance Act, 1948, on Oct. 18, 1954, and other days by reference to the requirements of the two children, and applying under s. 44 (2)* of that Act for a summons to be served on the respondent under s. 3 of the Bastardy Laws Amendment Act, 1872.† On the question whether the board's right to a summons was limited by the conditions imposed by s. 3 of the Act of 1872 on a mother's right to such a summons, viz., proof that the man alleged to be the father had within the twelve months next after the birth of the child paid money for its maintenance, or whether the board had a separate right under s. 44 (2) of the Act of 1948 to apply within three years from the time when assistance was given,

Held: the board's right under s. 44 (2) of the National Assistance Act, 1948, to commence proceedings was separate from the right conferred on a mother by s. 3 of the Bastardy Laws Amendment Act, 1872, and could be exercised within three years after the board had last given assistance.

National Assistance Board v. *Parkes* (ante, p. 1) applied.

Appeal allowed.

[For the National Assistance Act, 1948, s. 44, see 16 Halsbury's Statutes (2nd Edn.) 970.

For the Bastardy Laws Amendment Act, 1872, s. 3 and s. 4, see 2 Halsbury's Statutes (2nd Edn.) 478, 480.]

Cases referred to:

(1) *National Assistance Board* v. *Parkes*, [1955] 1 All E.R. 700; *affd.* C.A., ante, p. 1.

(2) *Taylor* v. *Parry*, [1951] 1 All E.R. 355; [1951] 2 K.B. 442; 115 J.P. 119; 2nd Digest Supp.

Case Stated.

This was a Case Stated on the application of the National Assistance Board, the appellants, by a magistrate sitting at the Woolwich Magistrates' Court. On Dec. 16, 1954, two complaints were preferred by the appellants against the respondent (a) stating that he was alleged by Violet Mary Fennessey to be the father of her twin children Anne Fennessey and Christine Fennessey, born on Sept. 30, 1947, and that assistance had been given under Part 2 of the National Assistance Act, 1948, on Oct. 18, 1954, and divers other days, by reference to the requirements of the said children, and (b) applying under s. 44 (2) of the said Act for summonses to be served on the respondent under s. 3 of the Bastardy Laws Amendment Act, 1872, to answer the complaints. The complaints were heard on Jan. 25, 1955, and Feb. 17, 1955, when the respondent did not appear and was not represented. The following facts were found:—(a) that the said

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* The text is printed at p. 293, letter D, post.

† For the relevant text, see the footnote at p. 293, post.

Violet Mary Fennessey was a married woman living apart from her husband; (b) that she had obtained an order against her husband at the magistrates' court at Ipswich on June 21, 1945, but there was no proof of the nature of such order; (c) that the said Violet Mary Fennessey gave birth to the said twins Anne and Christine Fennessey on Sept. 30, 1947; (d) that she named her husband as the father when registering the births of the said children; (e) that the respondent had sexual intercourse with the said Violet Mary Fennessey over a considerable period including Christmas, 1946; (f) that the respondent acknowledged the children as his own both before and after their births; (g) that the respondent made no payments with reference to the said children's maintenance within one year of their birth; (h) that on Feb. 17, 1951, the respondent signed a form admitting paternity of the said children and offered to pay the appellants 8s. a week in respect of the requirements of each of the children; (i) that assistance was in payment with reference to the requirements of each of the said children at the weekly rate of 13s. 6d., and (j) that the respondent's average weekly wages were £7 13s.

It was contended on behalf of the appellants that an application could be made under s. 44 (2) of the National Assistance Act, 1948, at any time within three years from the time when assistance was given and that the fact that the respondent had made no payments within one year of the children's birth was irrelevant to proceedings by them under the said section. The respondent did not appear to answer the complaints.

The magistrate was of opinion that (i) s. 44 of the National Assistance Act, 1948, did not enlarge the basis on which a mother could obtain an order under s. 3 of the Bastardy Laws Amendment Act, 1872, but merely determined the time limits for applications made by the board; that the requirements of the said s. 3 were not fulfilled in that the mother could not have obtained an order and therefore the board could not obtain such an order; (ii) the mother having at the time of registering the children declared that her husband was their father the court was not competent to adjudge them now to be illegitimate, and (iii) that he was not satisfied that there was sufficient proof to establish the woman's status as a " single woman " within the meaning of the Bastardy Acts. The complaints were accordingly dismissed.

Rodger Winn for the appellants.

The respondent did not appear and was not represented.

LORD GODDARD, C.J.: This is a Case Stated by the learned magistrate of the Woolwich Magistrates' Court before whom complaints were preferred by the National Assistance Board with a view to obtaining orders in bastardy against the respondent, who did not appear, in respect of two children who were born on Sept. 30, 1947.

The facts stated by the magistrate go to show that the mother of the children was living apart from her husband and had apparently obtained an order against her husband at the magistrates' court at Ipswich in June, 1945. The magistrate says that there was no proof of the nature of this order but counsel tells us that in fact the order was produced at a later stage, although we cannot look at it because it is only referred to in the Case as not having been proved.

She gave birth to the children in question in September, 1947. She named her husband as the father when registering the birth of the children, but the magistrate finds that the respondent and the mother had sexual intercourse over a considerable period, including Christmas, 1946, and that the respondent acknowledged the children as his own both before and after their birth. Although he signed the form admitting the paternity of the children and offered to pay the board 8s. a week, he never paid. The board have now taken proceedings against

A him to get an order to contribute towards the expense to which the board has been put in maintaining these children.

The learned magistrate held that:

> "Section 44 of the National Assistance Act, 1948, did not enlarge the basis on which a mother could obtain an order under s. 3 of the Bastardy B Laws Amendment Act, 1872, but merely determined the time limits for applications made by the National Assistance Board; that the requirements of the said s. 3 were not fulfilled in that the mother could not have obtained an order and therefore the board could not obtain such an order."

There are other findings with which I will deal hereafter, but, as I understand it, the learned magistrate's view was that, as the man had in fact made no payments C and as more than twelve months had expired from the date of the children's birth, the mother could not have obtained an order, and therefore the board could not obtain an order. In that respect the magistrate was, if I may say so, clearly wrong because s. 44 (2) of the National Assistance Act, 1948, under which the board applied, is in these terms:

> D "If no affiliation order is in force, the board or local authority may within three years from the time when the assistance was given or accommodation provided make application to a court of summary jurisdiction having jurisdiction in the place where the mother of the child resides for a summons to be served under s. 3 of the Bastardy Laws Amendment Act, 1872.*"

E Sub-section (3) is in the following terms:

> "In any proceedings on an application under the last foregoing subsection the court shall hear such evidence as the board or local authority may produce, in addition to the evidence required to be heard by s. 4 of the said Act of 1872, and shall in all other respects, but subject to the provisions F of the next following sub-section, proceed as on an application made by the mother under the said s. 3."

That seems to me to be a procedural enactment.

It has been held both by this court and the Court of Appeal in *National Assistance Board* v. *Parkes* (1) ([1955] 1 All E.R. 700; C.A. ante, p. 1) that the G right which is given to the board under this Act to make these applications is a right which is independent of the mother's right. It is a right of their own. It may well be that the mother cannot apply for an order in bastardy because she cannot show that the conditions of the Bastardy Laws Amendment Act, 1872, so far as they apply to her, have been fulfilled. She would have had to show, if she was applying more than twelve months after the birth of the child, that H the respondent had made payments in respect of the maintenance of the child. If it were the case that the board had to prove payments by the respondent within twelve months of the birth of the child what is the point of saying that the board may within three years from the time when the assistance was given apply for a bastardy order? The right so given is in my judgment an entirely separate right, and provided that the board apply within three years of the time when they I have last given assistance, it seems to me that they are entitled to apply for an order if they can prove that the child is a bastard child and a child in respect of whom an order could be made under the Act of 1872, ignoring the question of the time limit which is imposed by s. 3 on the mother. Therefore I think that the view which the magistrate took and which he set out in the first paragraph of his opinion was wrong and that the board have got a right to apply.

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* The Bastardy Laws Amendment Act, 1872, provides: 3. **Putative father to be summoned to petty sessions on application of mother of bastard child.**—Any single woman who may be with child or who may be delivered of a bastard child may either before the birth or at any time within twelve months from the birth of such child, or at any time thereafter, upon proof that the man alleged to be the father of such child has within the twelve months next after the birth of such child paid money for its maintenance . . . make application . . . for a summons to be served on the man alleged by her to be the father of the child . . .

The only other points that arise in the Case are these. The magistrate has held:

> "the mother having at the time of registering the birth of the children declared that her husband was their father this court is not competent to adjudge them now to be illegitimate."

Secondly, he says:

> "I was not satisfied that there was sufficient proof to establish the woman's status as a 'single woman' within the meaning of the Bastardy Acts, and I accordingly dismissed those complaints."

As regards the second point, the National Assistance Board should show, if they can, that the children are bastard children. They will have to show that the mother was a single woman within the meaning of the cases. I think that the Case must go back to the magistrate with a direction that he should continue to hear this case without regard to the view that he set out in his first holding in the Case.[*] He must decide whether, having regard to the various decisions which there have been[†] with regard to a married woman being regarded as a single woman for the purposes of the Bastardy Acts, this woman was a single woman. It appears to the court strongly probable that she was. She was living apart from her husband; there is also the factor of the time of the conception of the children, and there is the fact that the man has admitted that he is the father of these children.

For these reasons I think that the Case must go back to the magistrate with a direction further to hear the case as to the question whether the mother was a single woman within the meaning of the Bastardy Acts and with an intimation that the view that he expressed on the other point was wrong.

ORMEROD, J.: I agree. Section 3 of the Bastardy Laws Amendment Act, 1872, provides that any single woman who is with child or one who is delivered of a child may commence proceedings against the putative father in certain circumstances either before a child is born or within twelve months after the birth of the child, and unless there is evidence that a payment has been made by the putative father within the period of twelve months, she is barred from bringing any other proceedings. If, however, there is evidence of a payment in respect of the child within twelve months of the birth of the child by the putative father, then, of course, the mother may commence proceedings at any later time.

Section 44 (2) of the National Assistance Act, 1948, provides that if there is no affiliation order in force, the board or local authority who have had to make payments in respect of national assistance with regard to the child may within three years from the time that that assistance is given apply for a summons to be served under s. 3 of the Bastardy Laws Amendment Act, 1872.

In this case the learned stipendiary magistrate having considered the application of the National Assistance Board in respect of the maintenance of these two children, has come to the conclusion that the effect of the whole sub-section of the Act of 1948 is not to give any new power to the National Assistance Board or to anybody else but merely to limit the power to that which the mother of an illegitimate child has by virtue of s. 3 of the Act of 1872 if she can produce evidence that payments have been made within a year of the birth of the child.

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[*] I.e., the passage beginning "(i) s. 44 of the National Assistance Act, 1948" at p.292. letter D, ante.

[†] See, e.g., *Taylor* v. *Parry* (2) ([1951] 1 All E.R. 355) and cases there cited.

A That appears to me to be entirely the wrong way of looking at the section. In my view, it is quite clear from s. 44 (2) and (3), that their effect is to give to the National Assistance Board a right to commence proceedings against the putative father, if there is no affiliation order in force, for the recovery of payments made for national assistance in respect of an illegitimate child provided that those proceedings are commenced within three years of the time when the B assistance was made. The only limitation on that right is that the fatherhood of the putative father has to be proved by evidence in accordance with the terms of s. 4 of the Bastardy Laws Amendment Act, 1872. For that reason I am quite satisfied that the learned stipendiary magistrate was wrong in the view that he took of s. 44. This Case must go back to him to decide whether or not in the circumstances an order should be made, having regard to the fact that C at the moment the magistrate is not satisfied that there is sufficient proof that the mother of the child is a single woman. For those reasons I agree with the judgment of the Lord Chief Justice.

GLYN-JONES, J.: I agree. I think that the meaning which the learned magistrate put on s. 44 would have this result, that the statute would give the D board no more than a right to enforce any remedies that the mother might have. My view of the statute is that it creates a wholly independent right which is vested in the board and that the only conditions imposed on the right of the board to apply to enforce their right to a contribution are those contained in s. 44 (2). First, the application may not be made unless the board had to make a payment in respect of the illegitimate child; and secondly, the application must be made E within three years of the time when that assistance by way of money or accommodation was given. The magistrate has read the words " in all other respects " in s. 44 (3) as if they added to the provisions of sub-s. (2) a provision that the board should not be permitted to make their application more than twelve months after the birth of the child unless the putative father had made some payment during those twelve months. I think that the words " in all other F respects " can be given a satisfactory meaning without reading them as incorporating into the proceedings by the board the limitation of time based on the rights of the mother. I respectfully agree with the judgments which have been given.

Case remitted to the magistrate.

Solicitor: *Solicitor, National Assistance Board* (for the appellants).

[*Reported by* A. P. PRINGLE, ESQ., *Barrister-at-Law.*]

Re BETTINSON'S QUESTION, BETTINSON *v.* BETTINSON.

[CHANCERY DIVISION (Wynn-Parry, J.), October 11, 1955.]

Husband and Wife—Title to property—Community of property according to the law of California—Husband's application for determination of questions as to possession—Jurisdiction of court—Married Women's Property Act, 1882 (45 *&* 46 *Vict. c.* 75), *s.* 17.

The parties, whose matrimonial domicil was in the State of California, U.S.A., were both resident within the jurisdiction. They had lived separate and apart since January, 1955, pending the hearing of divorce proceedings in the U.S.A. In April, 1955, the wife had taken away the husband's motor car and had taken from his residence certain documents, correspondence and chattels all of which she refused to return. In May, 1955, she had withdrawn from two banks in California two sums of money standing to the credit of her and her husband's joint account and representing savings from his earnings. According to the law of the matrimonial domicil the doctrine of community of property obtained as between the parties, and under it the husband had management and control of the personal property subject thereto with the like absolute power of disposition (other than testamentary) as he had of his separate estate.

On an application by the husband under the Married Women's Property Act, 1882, s. 17, for orders in relation to the property mentioned above, it being conceded that the Californian law of community of property applied to the property, the wife contended that no question as to title to or possession of the property within s. 17 of the Act* arose and that the court had, therefore, no jurisdiction.

Held: in order to exercise management and control of the community property as authorised by the law of California the husband must have either physical possession or such a degree of control as would enable him effectively to deal with the property, and, therefore, questions of possession under s. 17 of the Married Women's Property Act, 1882, did arise and the court had jurisdiction to determine them.

Tunstall v. *Tunstall* ([1953] 2 All E.R. 310) distinguished.

[For the Married Women's Property Act, 1882, s. 17, see 11 HALSBURY'S STATUTES (2nd Edn.) 804.]

Case referred to:

(1) *Tunstall* v. *Tunstall*, [1953] 2 All E.R. 310; 3rd Digest Supp.

Adjourned Summons.

The applicant, Ralph Gilbert Bettinson, sought by originating summons (1) the determination of all questions between him and his wife, the respondent Josephine Bettinson, with respect to the title to or possession of all property in the schedule to the summons; (2) an order directing the wife to deliver up to the husband the papers, documents, correspondence and chattels in the schedule belonging to the husband, which (save the motor car) were taken by the wife from the husband's residence; (3) inquiries as to (a) what part of the sum of $6,500 withdrawn by the wife on or about May 9, 1955, from the Bank of America, Hollywood, California, U.S.A., or moneys representing the same, and (b) what part of the sum of $11,600 withdrawn by the wife on or about May 10, 1955, from First National Bank of Los Angeles, Hollywood, California, or moneys representing the same, were in the possession or control of the wife; (4) an inquiry what, if any, property, in the possession or control of the wife was acquired by her with the said sums of money or any part thereof; (5) an order that the wife place to the credit of the joint accounts of the husband and wife at the said banks, such of the said sums as might be declared in answer to (3) (a) and (b) to be in possession or control of the wife; (6) an order that the wife assure or transfer into the said joint names, all such property as may be declared in answer to the inquiry sought in para. (4). The facts appear in the judgment.

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*The relevant part of s. 17 of the Married Women's Property Act, 1882, is printed at p. 298, letter I, post.

D. A. Thomas for the applicant husband.
Edward Morrison for the respondent wife.

WYNN-PARRY, J.: This is a summons dated June 28, 1955, taken out under the Married Women's Property Act, 1882, by the husband, to which his wife is respondent and by which he asks for the determination of certain questions relating to items of property specified in the schedule to the summons on the ground that there are existing between him and his wife questions as to the possession of those items of property.

The parties are citizens of the United States of America. They were married in December, 1942, in the State of Texas, but it is accepted that the matrimonial domicil is in the State of California. The husband is a scenario writer, and he is resident within the jurisdiction, being the tenant of a maisonette at 80 Cadogan Place, London, where he resides in order to be within reasonable reach of his work at Elstree. The respondent wife is also resident within the jurisdiction, so far as is known, her last known address within the jurisdiction being 30 Sloane Gardens, London. The parties separated in January, 1955, owing to matrimonial differences and in June the husband started proceedings for divorce in California.

The matters with which I am concerned arise owing to the action taken by the wife in relation to the items of property specified in the schedule to the summons. Under the law of the State of California, the doctrine of community of property obtains as regards these spouses. I am not concerned on this summons with the extent of that community of property. I have had the benefit of expert evidence from Mr. Crane and it seems that the really relevant aspect of the law concerning this community of property for the purposes of this application is that by art. 172 of the Californian Civil Code, the husband has the management and control of the personal property subject thereto with the like absolute power of disposition (other than testamentary) as he has of his separate estate. He cannot, however, make a valid gift of that property or dispose of it otherwise than for valuable consideration without the written consent of his wife. It is clear, therefore, that the husband is given a very considerable degree of management and control.

There were two sums of money standing to the credit of joint accounts in the names of the husband and wife in two banks in Hollywood. The sums amounted to $11,650 and $6,580 respectively. The wife had the authority of the husband to draw on those accounts which represented savings made by him out of moneys which he had earned since the date of the marriage, and were, therefore, subject to the doctrine of community of property. According to the husband's evidence, which I accept, there was a meeting on Jan. 31, 1955, at the offices of solicitors in London, where the husband and wife agreed that, pending the resolution of their matrimonial disputes, they would keep the community property intact, and that neither of them would draw on these savings accounts. In May, 1955, however, the wife procured her sister to withdraw $11,600 from the first account and $6,500 from the second account, and to send those two sums to her in London.

Then the husband has a motor car, a Ford Zephyr, which, on Apr. 22, 1955, he took to be serviced at a garage in London. Later on that day, the wife took the car away from the garage and has since refused to return it. For the purpose of this application, I treat that car as being part of the community property.

Thirdly, on Saturday, Apr. 30, when the husband was away from his flat, the wife went to the flat, saw the husband's housekeeper, disclosed who she was, procured the housekeeper to hand over the keys and took from the flat a number of articles, consisting of various papers, a diary, a judgment in favour of the husband, and similar items.

The husband now asks that the specific items of personal property, other than the proceeds of the withdrawals from the two American banks, should be returned to him, on the basis that they form part of the community property, and on the ground that, in so far as the Californian law is relevant to be considered, he is by that law given the management and control of the community property, and that he cannot exercise that management and control without possession of the papers and documents. It is also quite clear that some of the items are entirely personal to him, such, for instance, as his diary for 1954.

As to items of property falling into that category, Mr. Crane is categorical in his evidence that a Californian court, if seised of an application by the husband against the wife for the purpose, would order the return of such property by the wife to the husband. Further, the husband asks that, as to the proceeds of the withdrawals from the two American banks, there should be an inquiry what part of those sums or the proceeds thereof are now in the possession or under the control of the wife, and an inquiry what property, if any, now in her possession or control was acquired by her, or on her behalf, directly or indirectly with those sums of money, or any part of those sums. Finally he seeks an order that the wife should, with a view to preserving the position until the resolution of the matrimonial proceedings in California, place to the credit of the joint accounts of the husband and the wife at those banks, or such other banks as this court may direct, such part of those respective sums as may, pursuant to the inquiries to which I have referred, be found to be in the possession or under the control of the wife. It amounts to this, therefore, that what the husband is asking is that orders may be made to preserve the position pending the decision of the Californian court as to what is to happen to the community property.

In the circumstances, such an application appears to me to be founded on the clearest principles and reasons of common sense, and on the basis that I have jurisdiction to make such an order, I should decide to do so. It is said, however, that on the true construction of the Married Women's Property Act, 1882, s. 17, and having regard to the fact that under the law of the matrimonial domicil the doctrine of community of property applies to the spouses, I have no jurisdiction to make any such order. The section opens with these words:

> " In any question between husband and wife as to the title to or possession of property, either party . . . may apply by summons or otherwise in a summary way to any judge of the High Court of Justice in England or in Ireland, according as such property is in England or Ireland . . ."

The argument proceeds in this way: it is said that, in this case, there is no question as between the husband and wife either as to title or possession. It is not disputed, on behalf of the husband, that on the summons no question as to title is involved; but it is asserted that very real questions as to possession exist between the parties. The argument of counsel for the wife, as I understand it, comes to this; since the Californian law as to community of property applies and since under that law the most which is conferred on the husband is the right to manage and control the property subject thereto, no question of possession, as that word is used in s. 17, can arise. I cannot accept that argument. I do not see anything in the context of s. 17 to cut down the meaning of the word "possession", which is prima facie a word of very wide import. If a man be given the right by the relevant law—and I treat the law of California for this purpose as being the relevant law—to manage and control the whole of the property subject to the community of property, then it appears to me that he must be entitled to possession of that property, either to physical possession or to a degree of control as will enable him effectively to say what is to happen to that property. That degree of control is given to the husband by the law of California, and, in my judgment, therefore, there is no substance in the argument that I have no jurisdiction to entertain this application, because no question as to title or possession arises.

Counsel relied on *Tunstall* v. *Tunstall* (1) ([1953] 2 All E.R. 310), but, in my judgment, that case is wholly distinguishable from the present case. There it was held that the proceedings were misconceived, because there was no property or identifiable fund on which an order under s. 17 could operate, and, with respect, it is perfectly clear that that was the case on a short examination of the facts. Here a number of items are identified; and as to the two sums of money it is only after an inquiry has been held that one will be able to postulate whether or not there is any identifiable fund on which an order under s. 17 could operate. It is quite clear from the judgment of LORD GODDARD, C.J., that if it could have been shown that there was an identifiable fund of specified property, means of protecting the position could be taken. He says ([1953] 2 All E.R. at p. 311):

> "It becomes apparent how inappropriate is this order if one asks how it is to be enforced. An order might have been made on a bank in appropriate proceedings to prevent money being paid out, or a solicitor might have been called on by the court to hold money in his hands, but there is no means under s. 17 of giving a money judgment."

No money judgment is asked for here. The only thing asked for is that the necessary steps be taken to find out whether or not an identifiable fund exists on which a further order might be made under s. 17.

The wife has denied in her affidavit that she took a number of the items of property referred to in the schedule to the summons. Those advising the husband wished to cross-examine her, but as soon as that became known to her, she, apparently, took steps to make it impossible to serve her with the necessary order, and her whereabouts, I am told, are unknown to her solicitors. In those circumstances, I prefer the oath of the husband, who, had he been required for the purpose, would have been available for cross-examination. I shall, therefore, proceed on the basis that it is established to my satisfaction, on the evidence as it stands, that the wife took away the whole of the items specified in the schedule to the summons.

There is also before me a motion to discharge an order made by ROXBURGH, J., in July of this year, whereby he ordered the wife to bring into this court, or to the proper officer of this court, certain items, with leave to apply to discharge that order if she so desired. The order was on the basis that she could satisfy the court that she had not taken the items in question. In the circumstances it will be better to discharge that order, although the victory in this case goes to the husband, because the order I propose to make will cover the whole of the items. As to para. 2, there will be an order directing the wife to deliver up to the husband the items specified in the schedule, and that will include the motor car. I shall direct the inquiries asked for under paras. 3 and 4, and I shall stand A over questions 5 and 6 until the results of the inquiries are known.

Order accordingly.

Solicitors: *Rowe & Maw* (for the husband); *Bull & Bull* (for the wife).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*] B

C

R. *v.* GRIMSBY BOROUGH QUARTER SESSIONS, *Ex parte* FULLER.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Ormerod and Glyn-Jones, JJ.), October 11, 18, 1955.] D

Certiorari—Prejudice—Test is whether real likelihood of prejudice is shown—Report of appellant's history and convictions placed before quarter sessions before appeal decided.

Quarter Sessions—Appeal to—Appeal against conviction—Documents to be placed before the court.

On an appeal against a summary conviction nothing should be placed E before the appeal committee or the recorder which could not be given to a jury (see p. 304, letter F, post). Accordingly on an appeal to quarter sessions against conviction no document should be placed before the court except the conviction, the notice of appeal and copies of exhibits if they are going to be proved and no objection has been taken to their admissibility. F To supply a copy of the notes taken by the clerk to the justices is objectionable, though it may be necessary to refer to them in the course of the case. The police report on the accused's antecedents and record should not be given to the court until the decision is announced. See p. 304, letters D, E, post.

The applicant was convicted by a court of summary jurisdiction of being G found in an enclosed place for an unlawful purpose contrary to s. 4 of the Vagrancy Act, 1824, and was sentenced to three months' imprisonment. He appealed to quarter sessions against his conviction. During the cross-examination of the applicant at the hearing of the appeal the clerk of the peace, acting in the interests of the accused, handed to the recorder the H police report on the applicant's antecedents and record and drew the recorder's attention to a passage which might provide the answer to a matter being put to the applicant in cross-examination. On the same page of the police report, immediately below the passage in question, came a list of the applicant's previous convictions. The applicant's character had not been put in issue. The recorder read the passage to which his I attention had been drawn, marked it and kept the document. A police constable, while giving evidence at the hearing of the appeal, stated that the applicant had made a written statement. The recorder asked for a copy and was handed a copy of the proofs of the witnesses open at the page of the proof of the police constable's evidence where the applicant's written statement was set out. In the copy so provided the recorder followed the witness' reading of the written statement and the recorder then put the copy and proofs aside. The appeal having been dismissed the applicant applied for an order of certiorari to quash the order dismissing the appeal. The grounds of the application were that the recorder when hearing the appeal had before him a document setting out the applicant's previous convictions, although the applicant had not put his character in issue, and that the recorder had been supplied with copies of the proofs of the respondent's witnesses. No evidence or explanation from the recorder was before the court.

Held: (i) in the absence of any evidence from the recorder the court must conclude that the sight of the police report made him aware that the applicant had previous convictions; thus, having regard to the nature of the charge, a real likelihood of prejudice was shown and, even though the recorder was not consciously prejudiced, the order for certiorari must be granted.

R. v. *Camborne JJ., Ex p. Pearce* ([1954] 2 All E.R. 850) applied.

(ii) the handing to the recorder of the bundle of proofs in order to give him a copy of the applicant's written statement showed no real likelihood of prejudice and an order of certiorari would not have been granted on this ground.

[As to the ground for granting certiorari and the ground of bias, see 11 HALSBURY'S LAWS (3rd Edn.) 144, para. 272, 69, para. 123; and as to the procedure at the hearing of an appeal from summary conviction, see 21 HALSBURY'S LAWS (2nd Edn.) 714, para. 1240.]

Cases referred to:

(1) *R.* v. *Camborne JJ., Ex p. Pearce*, [1954] 2 All E.R. 850; [1955] 1 Q.B. 41; 118 J.P. 488; 3rd Digest Supp.

(2) *R.* v. *Rand*, (1866), L.R. 1 Q.B. 230; 35 L.J.M.C. 157; 30 J.P. 293; 33 Digest 292, *84*.

(3) *R.* (*De Vesci*) v. *Queen's County JJ.*, [1908] 2 I.R. 285; 26 Digest 356*b*.

(4) *R.* v. *Hertfordshire JJ.*, [1911] 1 K.B. 612; 80 L.J.K.B. 437; 104 L.T. 312; 75 J.P. 91; 14 Digest 201, *1799*.

Motion for certiorari.

At a court of summary jurisdiction sitting at Grimsby on July 8, 1955, the applicant, George Arthur Fuller, was convicted of being found in an enclosed place for an unlawful purpose, contrary to the Vagrancy Act, 1824, s. 4, and was sentenced to three months' imprisonment. The applicant appealed to Quarter Sessions for the Borough of Grimsby against his conviction. On Sept. 12, 1955, his appeal was heard and dismissed. He now applied for an order of certiorari on the grounds that (i) the recorder, when hearing the appeal, had before him a document setting out the applicant's antecedents and previous convictions, (ii) the applicant did not put his character in issue and the document was placed before the recorder without the knowledge of counsel for the applicant or for the respondent and without any form of proof, and (iii) the recorder was supplied with copies of the proofs of witnesses called on behalf of the respondent.

Affidavit evidence before the court showed that it had been the practice for many years for the police, two days before each sessions, to forward to the clerk of the peace histories and records of accused persons and appellants. These were checked by the clerk of the peace with the court records and remained in his custody until they were handed up to the court. Evidence at the hearing of the appeal in the present case was given on oath by four witnesses for the respondent and by the applicant. The facts in relation to the handing-up of the police report on the applicant's history and record during the course of the hearing are stated at p. 302, letter F, to p. 303, letter B. After dismissing the appeal the recorder asked for evidence about the applicant's antecedents and he then took up the papers giving an account of the applicant's antecedents and record and commenced to consider the evidence being given of the applicant's history and record.

A police constable, while giving evidence at the hearing of the appeal, stated that the applicant had made a written statement. The recorder asked whether there was a copy. The only copy of the statement in the hands of the clerk of the peace was the police constable's proof which had been furnished to the clerk of the peace when the notice of appeal had been lodged. The clerk of the peace turned back the proofs of the other witnesses and handed the bundle to the recorder, showing him the copy written statement as it appeared at the bottom of the page of the police constable's proof. The recorder followed the reading of the statement by the police witness with the copy in his hands, and when that was concluded placed the copy on one side.

J. M. Milne for the applicant.

T. R. Fitzwalter Butler for the respondents, the Clerk of the Peace for the Borough of Grimsby and the Chief Constable of Grimsby.

Cur. adv. vult.

Oct. 18. **LORD GODDARD, C.J.:** The judgment which I am about to read is the judgment of the court.

In this matter counsel for the applicant moved for an order of certiorari to bring up and quash an order of the Quarter Sessions for the Borough of Grimsby dismissing an appeal by the applicant against his conviction by the borough justices for being found in an enclosed place for an unlawful purpose, contrary to s. 4 of the Vagrancy Act, 1824, for which offence he was sentenced to three months' imprisonment. Shortly stated, the grounds of the motion were, first, that the recorder was given a document in which the previous convictions of the applicant, of which there were a great many, were set out although he had not put his character in issue, and, secondly, that the recorder was supplied with proofs of the evidence of the witnesses for the prosecution.

The material facts appear from the affidavit filed in support of the motion and one filed by the clerk of the peace which, so far as it relates to matters of which he can speak of his own knowledge, counsel for the applicant accepts as accurate. It seems that the applicant set up the familiar defence in this class of case that he was on the premises in question for the purpose of seeking work. He was asked in cross-examination why he had not accepted work which had been offered to him shortly before he appeared before the justices. Now the police had quite properly prepared a report as to the applicant's antecedents and previous convictions to put before the recorder if the appeal was dismissed and had given it, or a copy of it, to the clerk of the peace. The report contained this passage:

> "In respect of the present offence, [the applicant] was summoned to appear before the Grimsby Borough Magistrates' Court. He failed to appear and was arrested on a magistrates' warrant."

The clerk of the peace, knowing of this passage, intervened in the interests of the applicant as, had he been in custody under the warrant, he could not have accepted the work offered nor, probably, would any have been offered to him. The clerk, accordingly, handed the police report to the recorder, calling his attention to this passage. The latter thereupon marked the passage in question and kept the report by him during the rest of the hearing. Incidentally, though it has no bearing on the result, the passage in question proved to be erroneous.

A for the applicant had appeared on the summons. This was elucidated by the recorder and, consequently, the cross-examination was in fact pertinent. The unfortunate thing is that the very next line after the passage to which I have referred reads: "[The applicant] has previously been convicted as follows" and then are set out fourteen previous convictions, twelve of which are on the same page of the report as the passage I have quoted. The clerk says in his B affidavit that the recorder did not peruse the report except the passage relating to the applicant's appearance before the justices. Though, no doubt, this is what he believes, he cannot possibly prove what the recorder read, or did not read, and, as we have said, not only did the latter mark the passage in question but he kept the report by him and whether he looked at it before announcing C his decision the clerk cannot know. Somewhat to the surprise and regret of this court, the learned recorder has not thought fit to file an affidavit and, in the absence of any affidavit, we find it impossible to believe that he did not become aware that the applicant had previous convictions, though very likely he did not scrutinise the list and may well not have known how many there were. The recorder having seen the actual document, however, we cannot, at least in the D absence of any explanation by him, come to any conclusion other than that the mere sight of the document would show that the applicant was a man with a long list of convictions.

However improbable or unattractive a defence may be, the accused is entitled to have it considered impartially and to be tried in accordance with well-established rules. With a few statutory exceptions, unless the accused puts his E character in issue his convictions must not be made known to the tribunal which has to decide his guilt or innocence as a matter of fact. When, as in this case, the essence of the charge is the purpose for which the accused was on the enclosed premises, it is obvious that information as to his previous bad character is not only highly prejudicial but probably fatal. The merest glance at this F report by anyone accustomed to this class of document, as every recorder would be, would show him that he was dealing with what I may be permitted to call "an old hand". What, then, should this court do in the circumstances? It is not for every irregularity in the course of a hearing either at petty or quarter sessions that a certiorari should be granted. In our opinion, we ought to apply the same rule as in a case where bias on the part of a justice adjudicating is alleged: this G rule was fully considered by this court in *R.* v. *Camborne JJ., Ex p. Pearce* (1) ([1954] 2 All E.R. 850), where, in the result, a certiorari was refused. It was there held that there must be a real likelihood of bias, and so here we would say a real likelihood of prejudice. We emphasise it is likelihood, not certainty. We applied the judgment of BLACKBURN, J., in *R.* v. *Rand* (2) (1866) (L.R. 1 Q.B. 230), and also adopted the words of LORD O'BRIEN in *R.* (*De Vesci*) v. H *Queen's County JJ.* (3) ([1908] 2 I.R. at p. 294):

> "By 'bias' I understand a real likelihood of an operative prejudice, whether conscious or unconscious"

and this, in our opinion, amply justifies us in applying the same test in this case I as would be applied where a motion is brought on the ground of bias. In *R.* v. *Hertfordshire JJ.* (4), AVORY, J., said ([1911] 1 K.B. at p. 624):

> "It would obviously be most improper for the justices to inquire into the character and antecedents of the person charged until, after having heard all the evidence, they have determined to convict him; if they did do so, and then proceeded to convict, the defendant could come to this court and get the conviction quashed on the ground that the justices had wrongly admitted evidence as to character before conviction."

It is true that in this case it was not until he had announced that he would A dismiss the appeal against conviction that the recorder asked for evidence as to character, but, for the reasons already given, we cannot, in the absence of any explanation by the recorder, assume that he did not become aware before he gave his decision that there were previous convictions. This is enough to oblige the court to grant the order of certiorari but, as the matter was raised, we will say a word about the second ground put forward, namely, that the recorder was B supplied with the proofs of the witnesses. What happened was that the applicant had made a statement to the police constable in the case and the bundle of proofs were handed to the recorder in order that he might more easily follow the statement which was therein recorded. While the more correct course would have been to hand up merely a copy of the statement or only that part of the proof which set it out, we should not, and do not, grant the certiorari on that C ground for it shows no real likelihood of prejudice. I desire to add that the court recognises that, in handing the report to the recorder and calling his attention to the passage to which we have referred, the clerk of the peace intended to act in the interests of the applicant, and we do not suggest that the recorder was consciously prejudiced thereby. It was just unfortunate that the form of the report was such that the previous convictions must have come to the eye D of the recorder who kept it beside him.

This case, however, does enable the court to remind quarter sessions that, where there is an appeal against conviction, no documents should be placed before the court except the conviction, the notice of appeal and copies of exhibits if they are going to be proved and no objection has been taken as to their admissibility. We emphasise this matter because, from inquiries that we have made, E it appears that there is by no means uniformity among quarter sessions in this respect. We have learnt that at some courts it is the usual practice to supply a copy of the notes taken by the clerk to the justices. This is objectionable, though it may be that, in the course of the case, it becomes necessary to refer to them. This must depend on the course the trial takes. Care must be taken to see that the police report is not given to the court until the decision is announced. F The safe rule to apply is that, on an appeal against a summary conviction, nothing should be placed before the appeal committee or the recorder which could not be given to a jury.

Order of certiorari granted.

Solicitors: *J. H. Milner & Son*, agents for *James Young*, Grimsby (for the applicant); *Hyde, Mahon & Pascall*, agents for *Town clerk*, Grimsby (for the respondent, the Clerk of the Peace for the Borough of Grimsby); *Godfrey Warr & Co.*, agents for *John Barker*, Grimsby (for the respondent, the Chief Constable of Grimsby).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

Re A SOLICITOR.

[QUEEN'S BENCH DIVISION (Pearson, J.), October 18, 1955.]

Solicitors—Costs—Non-contentious business—Oral agreement to charge less than scale fees—Solicitors Act, 1932 (22 *&* 23 *Geo.* 5 *c.* 37), *s.* 57 (3).

A firm of solicitors did much conveyancing work for a client. On their application their costs were taxed by a taxing master and were allowed on the prescribed scale for conveyancing matters. The client objected to the taxation on the ground that he had made an oral agreement with the solicitor that less than the prescribed scale would be charged in some cases and that in other cases nothing more than out-of-pocket expenses would be charged. On the question whether the client could rely on the alleged oral agreement notwithstanding that s. 57 of the Solicitors Act, 1932, which enables a solicitor and his client to make an agreement as to the costs of non-contentious business, provides by sub-s. (3) that the agreement must be in writing and signed by the party to be bound thereby,

Held: the solicitor was entitled to be remunerated according to the prescribed scale for the business done, because an oral agreement to charge nothing or less than the scale charges for conveyancing business was not effective under s. 57 of the Solicitors Act, 1932, as the agreement was not in writing; accordingly the taxation would stand.

[**Editorial Note.** The business done in the present case was conveyancing business, but the principle of the decision must extend to all business which is non-contentious business within art. 2 of the Solicitors' Remuneration Order, 1883. The meaning of non-contentious business has been considered recently in *Re A Solicitor*, [1955] 2 All E.R. 283. If an agreement is to be made between solicitor and client in respect of the costs of non-contentious business, it should, therefore, be in writing and signed by the party to be bound thereby or by his agent in that behalf.

For the Solicitors Act, 1932, s. 57, see 24 HALSBURY'S STATUTES (2nd Edn.) 51.]

Cases referred to:

(1) *Clare* v. *Joseph*, [1906] 2 K.B. 592; 75 L.J.K.B. 580; 95 L.T. 197; *revsd.* C.A., [1907] 2 K.B. 369; 76 L.J.K.B. 724; 96 L.T. 770; 42 Digest 126, *1209*.

(2) *Jennings* v. *Johnson*, (1873), L.R. 8 C.P. 425; 37 J.P. 695; 42 Digest 126, *1206*.

(3) *Re West, King & Adams, Ex p. Clough*, [1892] 2 Q.B. 102; 61 L.J.Q.B. 639; 67 L.T. 57; 42 Digest 126, *1210*.

(4) *Re Lewis, Ex p. Munro*, (1876), 1 Q.B.D. 724; 45 L.J.Q.B. 816; 35 L.T. 857; 42 Digest 126, *1211*.

(5) *Re Russell, Son, & Scott*, (1885), 30 Ch.D. 114; 54 L.J.Ch. 948; 52 L.T. 794; *affd.* C.A., (1886), 55 L.T. 71; 42 Digest 206, *2292*.

(6) *Stedman* v. *Collett*, (1854), 17 Beav. 608; 24 L.J.Ch. 113; 51 E.R. 1171; sub nom. *Steadman* v. *Collett*, 23 L.T.O.S. 45; 42 Digest 129, *1237*.

(7) *Gundry* v. *Sainsbury*, [1910] 1 K.B. 90; 79 L.J.K.B. 101; 101 L.T. 685; *affd.* C.A., [1910] 1 K.B. 645; 79 L.J.K.B. 713; 102 L.T. 440; 42 Digest 126, *1207*.

Summons for review of taxation.

Solicitors having acted for a client in conveyancing matters obtained taxation of their costs of that business. The client carried in objections in writing to the taxing master's having allowed to the solicitors the usual scale charges according to the Solicitors' Remuneration Order, 1883, r. 2 and Sch. 1, Part 1. By his objections the client alleged an oral agreement on the part of the solicitors to charge in certain cases nothing except out-of-pocket expenses and to charge in other cases less than the scale fees. The taxing master disallowed the objections and the client applied by summons for review of taxation. PEARSON, J., adjourned the matter into open court before giving his judgment. The full facts and the answers of the taxing master appear in the judgment.

P. C. M. Curtis-Bennett for the client.
L. Wainstead for the solicitors.

Cur. adv. vult.

Oct. 18. **PEARSON, J.:** In this case the firm of solicitors did a considerable amount of conveyancing work for their client. On Sept. 6, 1954, on the application of the solicitors, an order was made for taxation of their bill of costs. The costs were taxed by the taxing master, and the ordinary scale costs of conveyancing were allowed. Then the client by objections in writing dated May 26, 1955, objected to numerous items, on the ground that he had made an oral agreement with the solicitor, who was at one time (as was said) the sole partner in the firm, that the firm would charge less than the authorised scale in some cases and would make no charge, save out-of-pocket expenses, in certain other cases.

The question then arose whether the alleged oral agreement, if made, could be relied on in law by the client as a reason for reducing the amounts allowed, which were the scale costs, to lower figures in some cases, or to nil in other cases, in accordance with the alleged oral agreement. This question was argued before the learned taxing master and decided by him as a preliminary question of law. He decided that the alleged oral agreement, even if made, could not be relied on, and therefore he did not decide whether or not the alleged agreement was in fact made. Accordingly he overruled the objections and the matter then came before me as judge in chambers on an application for review of the taxation involving a reconsideration of the question of law.

Normally, I suppose a firm of solicitors would not think it right to take advantage of the absence of writing to defeat an oral agreement with their client for lower fees to be charged. But in this case there is, as I understand, a special situation which I have not investigated, as it is not relevant to the issue to be decided, and it is enough to say that the person seeking to exclude the alleged oral agreement is not the person with whom it is alleged to have been made.

The learned master's answers to the client's objections were as follows:

> " (1) In this case I have been attended by counsel for the above-named solicitors and for the client on various dates between Oct. 19, 1954, and July 25, 1955, and I have taxed five bills of costs comprising some twenty-nine separate conveyancing transactions each attracting its own separate fee, but all clearly classified as ' non-contentious business '.
>
> " (2) In the course of the taxation the client alleged the existence of an agreement to charge less than the authorised scale in some cases and to charge nothing (save out-of-pocket expenses) in others.
>
> " (3) The client has applied to me and has been granted inspection of the solicitors' accounts and has had such access as was necessary to the solicitors' papers and admits there is no agreement in writing signed by the person to be bound thereby (or at all) as required by s. 57 (3) of the Solicitors Act, 1932.
>
> " (4) The client now alleges the existence of an oral agreement between the solicitors and himself to charge less than the authorised scale in some cases and nothing at all (save out-of-pocket expenses) in others, and that no written agreement is necessary in view of the dictum of the Court of Appeal in *Clare* v. *Joseph* (1) ([1907] 2 K.B. at p. 379) approving *Jennings* v. *Johnson* (2) (1873) (L.R. 8 C.P. 425).
>
> " (5) The case of *Clare* v. *Joseph* (1) was decided by the Court of Appeal on the basis (i) that the common law made a distinction between agreements

favourable to the client and those unfavourable (see also Cordery, Law Relating to Solicitors (4th Edn.), p. 328). (ii) that the legislature did not intend s. 4 of the Attorneys' and Solicitors' Act, 1870 (which required the agreement to be in writing) to apply to an agreement which was favourable to the client.

"(6) It is contended by the client that s. 4 of the Attorneys' and Solicitors' Act, 1870, applied to both contentious and to non-contentious business and that it is for all intents and purposes similar to s. 57 and s. 59 of the Solicitors Act, 1932.

"(7) In fact: (i) The subject-matter of *Clare* v. *Joseph* (1) and *Jennings* v. *Johnson* (2) related solely to contentious business. (ii) At the date when the decision of the Court of Appeal in *Clare* v. *Joseph* (1) was given the legislature had separated contentious and non-contentious business so that at that date the Attorneys' and Solicitors' Act, 1870, applied solely to contentious business and non-contentious costs were governed by s. 8 of the Solicitors Remuneration Act, 1881. (iii) This separation of the two classes of business has been maintained in the Solicitors Act, 1932, which repeals the Attorneys' and Solicitors' Act, 1870, and the Solicitors Remuneration Act, 1881, and adopts quite dissimilar wording in s. 57 for non-contentious to that in s. 59 for contentious matters.

"(8) In my view whilst s. 59 may permit a client to make an oral agreement favourable to himself the wording of s. 57 is clear and requires of 'a solicitor and his client' who desire to make an agreement as to the remuneration of the solicitor in non-contentious business that the agreement shall be in writing and signed by the person to be bound thereby.

"(9) For the above reasons I overrule the whole of these objections."

Counsel for the client argued that under s. 4 of the Attorneys' and Solicitors' Act, 1870, it had been held (in *Jennings* v. *Johnson* (2)) that the client could rely on an oral agreement for special charges to be made; and that that must still be the position in regard to contentious business under s. 59 of the Solicitors Act, 1932, which is a merely consolidating Act; and that the position should have been and still should be the same in relation to non-contentious business under the Solicitors Remuneration Act, 1881, and s. 57 of the Solicitors Act, 1932, as otherwise there would be an anomaly. He also claimed to have found in the judgment of the court in *Re West, King & Adams, Ex p. Clough* (3) ([1892] 2 Q.B. 102) an obiter dictum to the effect that the client could rely on an oral agreement in relation to non-contentious business under the Act of 1881.

On the other hand, counsel for the solicitors was prepared to admit for the purposes of the argument that the position is anomalous, but he contended that nevertheless effect must be given to the plain words and unmistakable meaning of the Act of 1881 as reproduced in s. 57 of the Act of 1932.

There are two real or apparent anomalies or inequities which can be suggested if the contention on behalf of the solicitors, upholding the decision of the learned taxing master, is correct, namely (1) in relation to contentious business the client can, but the solicitor cannot, rely on an oral agreement, and (2) the client's right to rely on an oral agreement exists only in relation to contentious business and not in relation to non-contentious business.

I therefore reserved judgment for further consideration, and as there is apparently no previous decision, so that this one may be referred to in other cases, judgment is being given in open court in order that the reasons may be known.

The position as it was before the Act of 1870 is set out in Cordery, Law Relating to Solicitors (4th Edn.), p. 328, and this passage has been expressly stated to be correct in Lord Alverstone's judgment in the case of *Clare* v. *Joseph* (1) ([1907] 2 K.B. at p. 372). What is said in the passage is:

"Under the old law a solicitor might settle his accounts with his client

> so as to take a gross sum in payment of costs already incurred, though no bill was delivered, where the settlement was made fairly and with proper knowledge on both sides; but there was some difficulty in upholding it, since in many cases it might be the solicitor's duty to advise the client against such a mode of payment. And a special agreement, whether in writing or not, touching the scale or mode of remuneration as to costs to be incurred, was not binding on the client so as to preclude the delivery and taxation of a proper bill; but in the absence of a plea of no signed bill delivered, the solicitor could recover in an action. On the other hand, an agreement to take less than he would otherwise have been entitled to was binding on the solicitor. Thus it was a good defence to an action by the solicitor that he had agreed to charge nothing for his trouble, or to charge costs out of pocket only, or that the costs out of pocket should not exceed a limited sum. And where a solicitor undertook an action on the terms that he was not to be paid unless it succeeded, he could not, on its failure, recover even costs out of pocket . . ."

That was apparently the position before the Act of 1870. Then we come to the Attorneys' and Solicitors' Act, 1870. Section 4 opens with some words which may be said to be curiously one-sided and one finds that there is an important point which arises from that. Section 4 is in these terms:

> "An attorney or solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges, or disbursements in respect of business done or to be done by such attorney or solicitor, whether as an attorney or solicitor or as an advocate or conveyancer, either by a gross sum, or by commission or percentage, or by salary or otherwise, and either at the same or a greater or at a less rate as or than the rate at which he would otherwise be entitled to be remunerated, subject to the provisions and conditions in this part of the Act contained: Provided always, that when any such agreement shall be made in respect of business done or to be done in any action at law or suit in equity, the amount payable under the agreement shall not be received by the attorney or solicitor until the agreement has been examined and allowed by a taxing officer of a court having power to enforce the agreement; and if it shall appear to such taxing officer that the agreement is not fair and reasonable he may require the opinion of a court or a judge to be taken thereon by motion or petition, and such court or judge shall have power either to reduce the amount payable under the agreement or to order the agreement to be cancelled and the costs, fees, charges, and disbursements in respect of the business done to be taxed in the same manner as if no such agreement had been made."

It will be observed that s. 4 of that Act, as originally enacted, applied both to contentious and to non-contentious business.

Jennings v. *Johnson* (2), which has already been mentioned in the reasons of the learned taxing master, was decided under that Act. The headnote states very shortly:

> "An agreement by an attorney with a client 'to charge him nothing if he lost the action, and to take nothing for costs out of any money that might be awarded to him in such action', need not be in writing."

Very short judgments were delivered. Bovill, C.J., said (L.R. 8 C.P. at p. 426):

> "There is no ground for a rule in this case. The object of s. 4 was to enable the attorney in certain cases to claim more than he would otherwise be entitled to. For that purpose the agreement must be in writing. Section 11 was intended to provide against champerty. But a promise not to charge anything for costs is not champerty."

A Brett, J., said (ibid.):

> "I am of the same opinion. The Act was not intended to prevent such an agreement as this. The jury thought fit to believe the plaintiff and to disbelieve the defendant."

Grove and Honyman, JJ., concurred.

B That is a decision given very soon after the Act was passed when it may well be that the situation in relation to which and the purpose for which it was passed were well in everybody's mind.

Then in order of date comes the Solicitors Remuneration Act, 1881, which brings in a separate set of provisions for non-contentious business. The long title of the Act is: "An Act for making better provision respecting the remunera-
C tion of solicitors in conveyancing and other non-contentious business". Section 2 sets up a committee or something like a committee, with power to make general orders for remuneration in conveyancing. It provides that the committee, composed of the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls and others

> ". . . may from time to time make any such general order as to them
> D seems fit for prescribing and regulating the remuneration of solicitors in respect of business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing, and in respect of other business not being business in any action, or transacted in any court, or in the chambers of any judge or master, and not being otherwise contentious business, and may revoke or alter any such order."

E Then those proposed rules are to be communicated to the Incorporated Law Society. Section 4 states what kind of rules they may be and what kind of remuneration may be prescribed. Section 6 prescribes that any such proposed general order should be laid before each House of Parliament. Then s. 7 says this:

> F "As long as any general order under this Act is in operation, the taxation of bills of costs of solicitors shall be regulated thereby."

Then s. 8 provides:

> "(1) With respect to any business to which the foregoing provisions of this Act relate, whether any general order under this Act is in operation or
> G not, it shall be competent for a solicitor to make an agreement with his client, and for a client to make an agreement with his solicitor, before or after or in the course of the transaction of any such business, for the remuneration of the solicitor, to such amount and in such manner as the solicitor and the client think fit, either by a gross sum, or by commission or percentage, or by salary, or otherwise; and it shall be competent for the solicitor to
> H accept from the client, and for the client to give to the solicitor, remuneration accordingly. (2) The agreement shall be in writing, signed by the person to be bound thereby or by his agent in that behalf."

I do not think sub-s. (3) is of great importance. Sub-section (4) provides:

> "The agreement may be sued and recovered on or impeached and set aside in the like manner and on the like grounds as an agreement not relating
> I to the remuneration of a solicitor . . ."

and so on.

Section 9 provides:

> "The Attorneys' and Solicitors' Act, 1870, shall not apply to any business to which this Act relates."

The main point to notice there is the difference of wording in s. 8 of the Act of 1881 from the wording in s. 4 of the Act of 1870. Section 4 of the Act of 1870 oddly provided only that a solicitor might make an agreement with his client, but s. 8 (1) of the Act of 1881 provided:

> ". . . it shall be competent for a solicitor to make an agreement with his client, and for a client to make an agreement with his solicitor . . ."

The Act of 1881 is clearly regarding the transaction from each of its two sides.

The next case is *Re West, King & Adams, Ex p. Clough* (3). The decision was, as reported in the headnote ([1892] 2 Q.B. 102):

> "A client employed a solicitor to transact for him certain business, partly contentious and partly non-contentious, and deposited with him a sum of money to be applied in payment of the costs to be incurred in such business. After the costs had been incurred, and before delivery of any bill, the solicitor and the client settled by oral agreement the amount of the costs at a lump sum, which sum the solicitor retained out of the money deposited with him. The client having subsequently become bankrupt, his trustee applied for the delivery of a bill of his costs by the solicitor:—*Held*, that the retainer of the money by the solicitor did not amount to payment, and that a bill must be delivered."

Then there is the passage in the judgment of CAVE, J., on which counsel for the client was seeking to rely and in which he sought to find an obiter dictum to the effect that in regard to non-contentious business the lay client could rely on an oral agreement, even if his solicitor could not. What is said is this ([1892] 2 Q.B. at p. 105):

> "Secondly, as to the verbal agreement as to the amount of costs. The statute which now governs agreements as to costs between solicitor and client in non-contentious business is the Solicitors Remuneration Act, 1881, which enacts (s. 8 (2)) that such agreements shall be in writing, and signed by the party to be charged. The last section of this Act excludes the Solicitors Remuneration Act of 1870* as to all business to which the Act of 1881 applies.
>
> "Now, the Act of 1870 . . . enacted by s. 4 that an attorney or solicitor might make an agreement in writing with his client respecting the amount of his costs amongst other things, which agreement, it was decided in *Re Lewis, Ex p. Munro* (4) (1876) (1 Q.B.D. 724) must be signed by both solicitor and client. It was further held, in *Re Russell, Son, & Scott* (5) (1885) (30 Ch.D. 114), where the business was contentious, that since the Act of 1870 a verbal agreement as to the amount of costs is not binding on the client. We are of the same opinion with regard to a verbal agreement as to the costs of non-contentious business under the Act of 1881. The verbal agreement here can, in our opinion, afford no answer to this application, and may be disregarded; though we think that if there had been here, as there was in the case of *Stedman* v. *Collett* (6) (1854) (17 Beav. 608), a perfectly fair agreement in writing signed by the client, that might have been a good answer to this application. The only defence, therefore, which we have to consider is that of payment."

It is to be observed that in that case it was the solicitor or those acting for the solicitor who were seeking to rely on an oral agreement, and that passage is saying that the solicitor is not entitled to rely on an oral agreement for a special charge in relation to costs, either in regard to non-contentious business or in regard to contentious business, neither under the Act of 1870 as to contentious business, nor under the Act of 1881 as to non-contentious business, and in my view that passage in CAVE, J.'s judgment is not dealing with the opposite position on the other side. That passage is not saying whether or not the lay client can rely on an oral agreement; it does not say so, either expressly or by implication;

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* I.e., the Attorneys' and Solicitors' Act, 1870.

A it simply does not deal with that subject at all, because it did not arise for decision in that case.

Next we come to *Clare* v. *Joseph* (1) reported at first instance ([1906] 2 K.B. 592), but the decision of the court there was overruled by the Court of Appeal ([1907] 2 K.B. 369). The headnote is:

> B "An agreement by a solicitor with a client to charge him nothing for costs if he won his action, and, if he lost it, to charge only the same amount for costs as he would have recovered from the opposite party had the action been successful, is not an agreement which is required by s. 4 of the Attorneys' and Solicitors' Act, 1870, to be in writing. *Jennings* v. *Johnson* (2) (L.R. 8 C.P. 425) approved."

C I have already pointed out that LORD ALVERSTONE, C.J., had said that the passage now at p. 328 in CORDERY, LAW RELATING TO SOLICITORS (4th Edn.) is correct.

I think it is possible to pass over the rest of LORD ALVERSTONE's judgment, which is on the same lines as those of the two lords justices, and to go to the passage in the judgment of FLETCHER MOULTON, L.J. ([1907] 2 K.B. at p. 376):

> D "It is to be remarked in the first place that this [s. 4 of the Act of 1870] is a purely enabling, and not a disabling, section, and the court would not, unless forced to do so, construe such a section so as to take away or alter powers already in existence, except indeed by extending them. Let us now consider the state of the law on this subject at the date of the coming into operation of the Act of 1870. At that date agreements between a E solicitor and his client as to the terms on which the solicitor's business was to be done were not necessarily unenforceable. They were, however, viewed with great jealousy by the courts, because they were agreements between a man and his legal adviser as to the terms of the latter's remuneration, and there was so great an opportunity for the exercise of undue influence, that the courts were very slow to enforce such agreements where they were F favourable to the solicitor unless they were satisfied that they were made under circumstances that precluded any suspicion of an improper attempt on the solicitor's part to benefit himself at his client's expense. But when it appeared that the agreement was favourable to the client, the courts often held the solicitor to his bargain, for there was no ground in equity why they should be suspicious of a bargain of that kind. Section 4, therefore, was G not required for the purpose of enabling persons to enter into these agreements, nor was it required in order to strengthen the hands of the courts in their examination of them. Before 1870 the court had full power to investigate their propriety, and in my opinion the specific provisions of s. 4 did no more than provide and regulate a procedure for the control of such agreements; they did not in substance alter the law affecting them."

H BUCKLEY, L.J., said (ibid. at p. 378):

> "I agree. The jury has found as a fact that the defendant verbally agreed with the plaintiff that, in the event which has happened, he would make no charge against the plaintiff for his costs. In order to succeed in this action, the defendant must show that under the Act of 1870 he is not I bound by his bargain. The law in existence when the Act of 1870 was passed is clear; the solicitor could not charge his client more than the amount of his bill of costs when taxed, and it was his duty to advise his client that it was contrary to his interest to pay more. Further, if there were an agreement between them by which the client was to pay less, the solicitor, being in a fiduciary relationship to him, owed the duty of advising him that he ought not to enter into such an agreement if other provisions in it were contrary to the client's interest. The solicitor was under these disabilities when bargaining with his own client, because it was his duty to guard him

> from acting in a way prejudicial to his interest. Then came the Act of 1870. Its effect is as if it recited that the solicitor was under these disabilities, and then enacted that, notwithstanding such disabilities, he might make an agreement in writing with his client as to his remuneration, provided he complied with the requirements of the Act. The Act, when complied with, relieved the solicitor of his disability. After the operative words of s. 4 come provisions by which certain benefits are reserved to the client, such as the provision that in certain cases the taxing officer must be satisfied that the agreement is fair and reasonable, and must examine and allow it before it can be put in force. The later provisions of the section in short cut down the benefits given in the earlier part to the solicitor . . ."

BUCKLEY, L.J., goes on to decide (ibid. at p. 379):

> " Before the Act of 1870 the solicitor was bound by such an agreement as the present one; that Act was wanted, not for the protection of the client, but for the benefit of the solicitor, in order to relieve him of the disability with which he was affected. Section 4 does not empower the client to do anything which he could not do before, but does empower the solicitor, provided he complies with the conditions imposed, to enter into a contract with his client which, prior to that statute, he could not have entered into. The solicitor here, as the jury found, has entered into a verbal agreement to take remuneration at a less rate than he would otherwise have been entitled to charge, and he cannot, I think, set up the defence that the agreement is not binding upon him because it is not in writing. I think, therefore, that the appeal should be allowed and the judgment of the county court judge restored."

I do not think that the case of *Gundry* v. *Sainsbury* (7) ([1910] 1 K.B. 90) adds anything material to the present question.

So one comes now to the Act under which this decision has to be given, namely the Solicitors Act, 1932. That Act appears by its long title to be

> " An Act to consolidate the Solicitors Acts, 1839 to 1928, and other enactments relating to solicitors of the Supreme Court."

It is not said to be an Act to consolidate and amend previous Acts, so one would therefore expect at any rate to find the same provisions as there were before. The question is whether under this Act in regard to non-contentious business an agreement to charge less or more than the scale fees in order to be effective must be in writing.

The sections dealing with non-contentious business are s. 56 and s. 57, and to some extent s. 58. Section 56 sets up a committee, just as a committee was set up under the Act of 1881, and provides in sub-s. (2):

> " The committee or any three of them (the Lord Chancellor being one) may make general orders prescribing and regulating in such manner as they think fit the remuneration of solicitors in respect of non-contentious business and may revoke or alter any such order."

Then there are similar provisions to those contained in the Act of 1881 as to the order being sent to the Law Society's Council and being laid before Parliament and as to what the order may contain.

Section 56 (7) is important:

> " As long as any order under this section is in operation, the taxation of bills of costs of solicitors shall, subject to the provisions of the next succeeding section with respect to agreements as to remuneration, be regulated by that order."

Therefore, when a bill of costs in regard to non-contentious business is being taxed it must be taxed in accordance with the scale, subject only to the provisions

A of the next succeeding section with respect to agreements as to remuneration; so I think it must follow that, if an agreement as to remuneration does not comply with the requirements of s. 57, then it does not displace this provision in s. 56 (7) that, subject only to the provisions of the next succeeding section, the taxation of bills of costs shall be regulated by the order. Section 57 (1) says this:

> B "Whether or not any order is in force under the last preceding section, a solicitor and his client may, either before or after or in the course of the transaction of any non-contentious business by the solicitor, make an agreement as to the remuneration of the solicitor in respect thereof."

Sub-section (2) deals with the possible content of such an agreement. Then sub-s. (3) provides:

> C "The agreement shall be in writing and signed by the person to be bound thereby or his agent in that behalf."

Sub-section (4) provides:

> "The agreement may be sued and recovered on or set aside in the like manner and on the like grounds as an agreement not relating to the remuneration of a solicitor."

D I think the scheme of that is perfectly plain. Under s. 56 (7), the scale must be applied subject to the provisions of s. 57, and the meaning of s. 57 (3) is that an agreement between a solicitor and his client with regard to the amount of charges must be in writing in order to have the effect which is referred to in s. 56 (7), that is to say, in order to displace the scale. The scale in the present E case under consideration was not displaced, because no agreement in writing was made.

There remains s. 59 dealing with contentious business, with which I am not concerned in this case.

As this was merely a consolidating Act and as the provisions of s. 59 and the following sections are rather similar to those of the Act of 1870, it may be that the F decisions in *Jennings* v. *Johnson* (2) and *Clare* v. *Joseph* (1) still hold good. There may, however, be some argument to the contrary. I do not have to decide the question in this case. Even though it may be right to say that those decisions still hold good and that there are created the two anomalies or inequities to which I have referred, I agree with the argument that counsel for the solicitors puts forward that, in spite of that, effect must be given to the plain words and the G unmistakable meaning of the provisions of s. 56 and s. 57. It follows, therefore, that I agree with the learned master's answers and also with the reasons given by him, which are in my view upheld on an examination of the relevant statutory provisions and the relevant decided cases. Therefore, this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Theodore Goddard & Co.* (for the client); *Denton, Hall & Burgin* (for the solicitors).

[*Reported by* A. P. PRINGLE, ESQ., *Barrister-at-Law.*]

DAWSON *v.* PRESTON (LAW SOCIETY, Garnishee). A

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Ormerod and Glyn-Jones, JJ.), October 12, 1955.]

*Legal Aid—Legal aid fund—Garnishee proceedings—Sum representing damages
paid to legal aid fund—Existing debt to assisted person—Garnishee order* B
obtained against Law Society—Legal Aid (General) Regulations, 1950
(*S.I.* 1950 *No.* 1359), *reg.* 16 (6).

Execution—Garnishee order—Judgment debtor's right of appeal—Garnishee's position in relation to appeal—R.S.C., Ord. 45, *r.* 1.

A judgment debtor is entitled to be heard on the hearing of an application to
make absolute a garnishee order nisi, and, if an order is made which affects
him, is entitled to appeal (see p. 316, letter B, post). C

A garnishee has no locus standi on an appeal against a garnishee order even though he has been served with notice of the appeal, unless he is a party to the appeal, and, if he wishes to be an appellant, he must serve notice of appeal (see p. 316, letter E, post).

In 1954 P., a legally aided plaintiff, received £350 damages in consequence D
of the settlement of his action. This sum was paid in July, 1954, to the Law
Society for the legal aid fund in accordance with the Legal Aid and Advice
Act, 1949, s. 2 (2) (d) and the Legal Aid (General) Regulations, 1950, reg. 16.
Part of that sum was paid out to P., leaving a balance in the legal aid fund
subject to any charge conferred on the Law Society by s. 3 (4) of the Act
of 1949, to cover the prescribed deductions, which remained to be quantified, E
e.g., deduction for the taxed costs of the action. In November, 1954, the
judgment creditor, who had previously obtained judgment with costs against
P., obtained a garnishee order nisi on the Law Society as administrators
of the legal aid fund, which order, after an inquiry as to the amount owing
to P. when allowance had been made for the prescribed deductions, was
made absolute in April, 1955. On appeal by P. on the ground that, at the F
date of the garnishee order nisi, there was not a debt owing to him from the
Law Society as administrators of the legal aid fund, or that any such debt
was not then ascertainable and, therefore, was not an existing debt and
could not be attached,

Held: under the Legal Aid and Advice Act, 1949, and the Legal Aid
(General) Regulations, 1950 (particularly reg. 16 (6)), there was at the time G
of the garnishee order nisi an existing debt owing by the Law Society as
administrators of the legal aid fund to P., although payment of the debt
was deferred pending the ascertainment of the amount of the charge in
favour of the Law Society; and the order absolute for the attachment of the
debt was, therefore, rightly made.

Dictum of BANKES, L.J., in *O'Driscoll* v. *Manchester Insurance Committee* H
([1915] 3 K.B. at p. 516) applied.

Appeal dismissed.

[**Editorial Note.** All moneys payable to an assisted person by virtue of
any order or agreement made in proceedings to which his certificate relates
must be paid to his solicitor who must pay them to the Law Society (Legal Aid
(General) Regulations, 1950, reg. 16 (1), (2)). On receipt of the moneys the Law I
Society are entitled to retain certain amounts referred to in reg. 16 (6) of the
regulations, which then provides that they " shall pay the balance to the assisted
person ".

As to the requirement that debts which may be attached by garnishee proceedings shall be existing debts, even though not immediately payable, see 14 HALSBURY'S LAWS (2nd Edn.) 108, para. 172; and for cases on the subject, see 21 DIGEST 621-624, *2085-2104*, 627-629, *2122-2129*.

For the Legal Aid and Advice Act, 1949, s. 3 (4), see 18 HALSBURY'S STATUTES (2nd Edn.) 537.

For the Legal Aid (General) Regulations, 1950, reg. 16, see 5 HALSBURY'S STATUTORY INSTRUMENTS 216.]

Case referred to:

(1) *O'Driscoll* v. *Manchester Insurance Committee*, [1915] 3 K.B. 499; 85 L.J.K.B. 83; 113 L.T. 683; 79 J.P. 553; 21 Digest 634, *2156*.

Appeal.

In 1954 the judgment debtor, Ronald Preston, a legally aided person, commenced proceedings to recover damages for breach of contract. In consequence of a settlement of the action, he received £350 which, on July 27, 1954, was paid to the Law Society. On Aug. 5, 1954, £275 was paid out of the legal aid fund to the judgment debtor, leaving a balance of £75 which, together with £23 which the judgment debtor had paid in contributions, was available to meet the prescribed deductions. On June 8, 1954, the judgment creditor, D. J. Dawson & Co. (suing as a firm), obtained judgment with costs against the judgment debtor for £85 15s. On Nov. 11, 1954, the judgment creditor obtained a garnishee order nisi on an affidavit which stated

> "1. By a judgment of the court given in this action and dated June 8, 1954, it was adjudged that I should recover against [the judgment debtor] the sum of £77 7s. and costs allowed at £8 8s. 2. The said judgment still remains unsatisfied to the extent of £85 15s. 3. The Law Society as administrators of the legal aid fund are indebted to [the judgment debtor] in the sum of £75 damages or thereabouts."

On an application for the garnishee order absolute, Master LAWRENCE adjourned the matter in order that an inquiry* might be held to ascertain in what amount the Law Society, as garnishees, were indebted to the judgment debtor under the Legal Aid and Advice Act, 1949, and the Legal Aid (General) Regulations, 1950, and on Apr. 27, 1955, Master LAWRENCE made a garnishee order absolute that £66 14s. 6d. was due to the judgment debtor from the Law Society and ordered that sum to be paid to the judgment creditor.

The judgment debtor now appealed against that order on the grounds (i) that the master was wrong in fact in holding that at the date of the garnishee order nisi there was a debt owing by the garnishee to the judgment debtor, and (ii) that the master was wrong in law in holding that money in the legal aid fund could be attached by the garnishee before the amount thereof payable under the Legal Aid and Advice Act, 1949, and the Legal Aid (General) Regulations, 1950, had been ascertained and determined.

F. Hallis for the appellant, the judgment debtor.

J. R. B. Fox-Andrews for the respondent, the judgment creditor.

J. Perrett for the garnishee.

LORD GODDARD, C.J.: On Apr. 27, 1955, Master LAWRENCE in garnishee proceedings made an order absolute in consequence of a garnishee order nisi which had been obtained at an earlier date finding that the sum of £66 14s. 6d. was due from the Law Society to the judgment debtor, one Preston, and ordered that sum of money to be paid to the judgment creditor. Against that order an appeal was entered by the judgment debtor.

Counsel for the judgment creditor first of all took the point that the judgment debtor was not entitled to appeal, and he also took the point that, as the judgment debtor was not a person who could be said to be affected by the order, no appeal could, in any case, be entertained. Where garnishee proceedings are taken, the garnishee order nisi has, under R.S.C., Ord. 45, r. 1, to be served on the judgment debtor, and it would be a mere farce if he were not entitled to appear on the hearing to make the order absolute and to submit any argument which he might have. It might be that the judgment debtor would desire to say: "I do not mind what the garnishee is saying in this case; I want to show that there is no attachable debt here". Ordinarily the garnishee would probably take the point, but one can well imagine a case in which the garnishee would not take the point and then the judgment debtor would be entitled to take it because, if he could succeed in defeating the order absolute, he might be able to recover the debt. From the mere fact that the rule relating to attachment of debts provides that the judgment debtor should be served not merely with notice of the proceedings but actually with the order nisi, it must follow that he has a right to be heard, and, if he has a right to be heard and an order is made which affects him, he has a right of appeal.

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* Compare the note of *Olds Discount Co., Ltd.* v. *Alldred*, March, 1952, unreported, in the ANNUAL PRACTICE, notes to R.S.C., Ord. 45, r. 1, under the heading "debt of unascertained amount."

There is one other matter which I should mention. It was the judgment debtor who gave notice of appeal in this case. The Law Society gave no notice of appeal, but were represented here by counsel, and we have to consider whether counsel had any locus standi. Counsel said that he had been served with the notice of appeal. If he had been served with the notice of appeal, was he going to object to the order ? If he was, and he was the person ordered to pay, it would seem that he ought to appeal himself and get rid of the order. In that case, he would be entitled to his costs, and, if the appeal went the other way, he would be liable for costs. We thought that we could not hear the Law Society unless they were on the record here either as appellants or as respondents. If they wished to be appellants, they ought to have served notice of appeal against the order. Apparently, their counsel desired to support the argument which counsel put forward on behalf of the judgment debtor, but, if they wanted to take part in the argument, it seems to the court that they ought to have appealed. The court gave them an opportunity of serving notice of appeal now, counsel for the judgment creditor saying that he would not object, and they elected not to give notice of appeal. Therefore, we have not heard them. [HIS LORDSHIP stated the facts and read the affidavit in support of the application for the garnishee order nisi, and, after observing that it was not necessary for a judgment creditor applying for such an order to state the exact amount of the debt owed to the judgment debtor, continued:] The debts which can be attached are not only debts which are presently payable; they include also debts which exist in praesenti, although it may be a case of debita in praesenti solvenda in futuro. There is no question about that being the law with regard to the attachment of debts, and in *O'Driscoll* v. *Manchester Insurance Committee* (1) ([1915] 3 K.B. 499), BANKES, L.J., put the matter very concisely and neatly in this way (ibid., at p. 516):

> "It is well established that 'debts owing or accruing' include debts debita in praesenti solvenda in futuro. The matter is well put in the ANNUAL PRACTICE, 1915, p. 808: 'But the distinction must be borne in mind between the case where there is an existing debt, payment whereof is deferred, and the case where both the debt and its payment rest in the future. In the former case there is an attachable debt, in the latter case there is not'."

What is the position here? As soon as the Law Society received the damages which had been agreed on, they became an accounting party to the plaintiff in the action on whose behalf they received the money. The money was not and never became the Law Society's money. The effect of the Legal Aid and

Advice Act, 1949,* and the Legal Aid (General) Regulations, 1950* is that a charge was imposed on that money in the Law Society's hands in their favour in order that they might reimburse the legal aid fund any additional sums of costs to which they had been put, other than the costs which they recovered from the other side. The other side in the judgment debtor's action did pay a certain sum of costs. The solicitor and client costs which are not recoverable from the other side are paid by the Law Society,† and then the Law Society have the right to take that money out of the money recovered; if they do not get the full amount of costs from the other side they can still, if they see fit, take the balance out of the damages. If it were not for the fact that this charge was imposed, a debt would arise as soon as the Law Society received that money; the debt would be between them and the person for whom they had been acting, because the money was his money and nobody else's money. The Law Society, before they pay over the money, there being this existing charge and the debt being still an existing debt, are entitled to find out how much the costs and such other amounts as the law allows them to deduct will be. In some particular case the costs might absorb the whole of the damages recovered, but in general the costs of a successful plaintiff would not swallow up the whole of the damages and there would be still sums to come from the fruits of the action to the plaintiff. Those sums remain the plaintiff's moneys, and the Law Society are liable to account to the assisted person for the moneys which they have received. A garnishee order on the Law Society will act as an attachment of the money in the hands of the Law Society, but it will only attach the money which is payable by the Law Society to the legally aided person. The fact that the amount which they have to pay over has not been ascertained at the date of the order nisi is quite immaterial. If there is a debt, the fact that the debt has to be quantified does not make it any the less a debt which is owing, although the amount which is to be paid may have to wait until some calculations or taxations are gone through. As Glyn-Jones, J., pointed out in the course of the argument, if it were not for the statutory charge imposed by s. 3, it would be the duty of the Law Society to pay the money received over to the legally aided person. The Law Society are given the right to reimburse themselves from the legal aid fund the amounts which are due to them and the balance is to be paid over to the legally aided person.

It seems to me that this is a perfectly clear case. The money when it was paid to the Law Society and held by the Law Society was the judgment debtor's money. The Law Society were bound to account for it. They were bound to hand over the money to him, although, no doubt, by virtue of the statutory charge which is given, they could retain it in their hands until the amount of the charge was found; it is a case of debita in praesenti solvenda in futuro, and debts which partake of that nature are, and always have been, attachable. In my opinion, there is no doubt here that the master was right in making the order he did. What, in fact, happened was this: When the application for the order absolute came before the master, he adjourned the matter in order that an inquiry might be held what amount of money the Law Society owed, that is to say, what amount they had to hand over when their charges were calculated and deducted. The moneys in the Law Society's hands were subject to their charge, but also the moneys were attached under the order nisi; all that had to be found was what sums of money the Law Society were entitled to retain out of the damages to recoup the legal aid fund for the costs to which it had been put. That inquiry was held by the master, who found what was the amount due and, so far as the amount is concerned, there has been no appeal. Thereupon, having discovered what amount the Law Society were entitled to deduct for costs, he made an order absolute with regard to the rest. He was perfectly entitled to do so. This appeal fails and will be dismissed with costs.

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* See Legal Aid and Advice Act, 1949, s. 3 (4), 18 Halsbury's Statutes (2nd Edn.) 537, and Legal Aid (General) Regulations, 1950 (S.I. 1950 No. 1359), reg. 16 (6), 5 Halsbury's Statutory Instruments 216.

† See Legal Aid and Advice Act, 1949, s. 6 (5) (6) and Sch. 3, para. 4 (1).

ORMEROD, J.: I agree. The argument of counsel for the judgment debtor, as I understand it, is this, that an existing debt may be attached even although the payment of the debt is deferred to some future date. He says that a debt which is not ascertainable at the particular time when the garnishee order is made cannot be an existing debt unless all the factors are present at that time which enable the debt to be ascertained. Counsel says that in this case those factors could not be present, because the Law Society, by virtue of the Act and certain regulations made thereunder*, had the power of exercising their discretion in various ways and of exercising it solely at some future time, and counsel says that in those circumstances this cannot be an existing debt. I cannot agree with that submission. It appears to be quite clear from the Legal Aid (General) Regulations, 1950, reg. 16 (6), that it is the duty of the Law Society, when money is paid into their hands in such circumstances, to pay the balance of the money to the assisted person after deductions have been made in respect of costs and other sums in accordance with reg. 16 (6). It appears to be clear that, under the regulation, there is in such circumstances an existing debt, because there is a liability on the Law Society having received that money, to pay it over to the assisted person. It may be that, by reason of the regulations, and by reason of certain provisions of the Act, the Law Society have power to deduct further sums from that money in exercise of some charge which they may have arising from the regulation, but that is merely a question of ascertaining the debt which has to be paid over to the assisted person and does not prevent that debt from being an existing debt at the material date. I agree that this appeal must be dismissed.

GLYN-JONES, J.: I agree.

Appeal dismissed.

Solicitors: *Gard, Lyell & Co.*, agents for *Theodore Bell, Cotton & Curtis*, Sutton (for the appellant); *Wilkins, Rohan & Newman* (for the respondent); *James & Charles Dodd* (for the garnishee).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

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* Legal Aid and Advice Act, 1949, see s. 3; Legal Aid (General) Regulations, 1950, see reg. 16.

SILLS *v.* WATKINS.

[COURT OF APPEAL (Denning, Hodson and Morris, L.JJ.), October 10, 11, 1955.]

Rent Restriction—Alternative accommodation—Security of tenure—Offer of house owned by local authority—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 *&* 24 *Geo.* 5 *c.* 32), *s.* 3 (2), (3).

Except where a local authority for the area in which the dwelling is situated gives a certificate under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (2), that it will provide suitable alternative accommodation for the tenant, a dwelling-house of which a local authority is the landlord does not constitute suitable accommodation within s. 3 (3)* of the Act of 1933 because the dwelling-house will not be one to which the Rent Restrictions Acts apply and will not be let on terms which will afford to the tenant reasonably equivalent security to that afforded by the Rent Restrictions Acts in the case of a dwelling-house to which those Acts apply.

[As to proof of alternative accommodation, see 20 HALSBURY'S LAWS (2nd Edn.) 332, para. 398; and for cases on the subject, see 31 DIGEST (Repl.) 714-719, *7995-8029*.

For the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3, see 13 HALSBURY'S STATUTES (2nd Edn.) 1048.]

Appeal.

This was an appeal by the tenant of a dwelling to which the Rent Restrictions Acts applied against an order of His Honour JUDGE REID dated May 13, 1955, made at Kingston-upon-Thames County Court by which the tenant was ordered to give possession of the dwelling to the landlord on Feb. 1, 1956, subject to the tenant's being offered a house as alternative accommodation by the local authority at Surbiton, Surrey.

D. M. Wacher for the tenant.

A. C. Warshaw for the landlord.

DENNING, L.J.: The tenant is a schoolmaster at the Surbiton Grammar School, and some five or six years ago he obtained a flat in a house at Thames Ditton for which he paid a rent of 30s. a week. In 1953, after he had been there a few years, the whole house was bought by Mr. Sills, the landlord, who is a butcher. The landlord is carrying on his butcher's business in the shop underneath the flat and seeks possession of the flat for occupation by himself and his family. He cannot obtain possession of this flat unless he can satisfy the requirements of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3, which provides that he is not entitled to it unless he can show that suitable alternative accommodation is available for the tenant.

The landlord is himself living in a council house in Surbiton, and he offers the tenant his council house. The rent of the council house is 6s. 10d. a week more than the flat, but it is a reasonable rent in the circumstances, and suitable to the tenant's means. The landlord has called the housing officer of the Surbiton Borough Council to say that the local authority is disposed to favour exchanges of houses if both parties agree to it; and the housing officer thinks that the housing committee would accept the tenant as a tenant in the council house.

Section 3 (2) of the Act of 1933 provides that, if the local authority for the area gives a certificate that it will provide suitable alternative accommodation available for the tenant, then that certificate is conclusive. That sub-section does not apply in this case because the flat in question is in the Thames Ditton area, and the local authority for that area has no house available. The council house which is offered is in the Surbiton area and a certificate of the authority for that area is not within the sub-section. In order to establish that there is suitable alternative accommodation, the landlord must, I think, bring the case within s. 3 (3) of the Act. It provides: A

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* The text is printed at p. 320, letter A, *post*.

> " Where no such certificate as aforesaid is produced to the court, accommodation shall be deemed to be suitable if it consists either—(a) of a dwelling-house to which the principal Acts apply; or (b) of premises to be let as a separate dwelling on terms which will, in the opinion of the court, afford to the tenant security of tenure reasonably equivalent to the security afforded by the principal Acts in the case of a dwelling-house to which those Acts apply, and is, in the opinion of the court, reasonably suitable to the needs of the tenant and his family as regards proximity to place of work . . . " B

and there follow provisions about rent.

The council house which the landlord offers fulfils all the requirements of sub-s. (3) except in regard to security of tenure. It fails on that point. On the letting of a council house by a local authority to an individual there is no security of tenure. The terms of letting do not provide for any security at all. It is an ordinary weekly tenancy, and the council can evict the tenant at a week's notice if it pleases. In practice the local authority does not take such a stringent course except in the case of a tenant who does not pay his rent or does not behave properly. Nevertheless the terms of the tenancy do not give security. They enable the local authority to evict the tenant at a week's notice. This means that the requirements of s. 3 (3) are not satisfied. We cannot read the words " on terms " as if they meant " in circumstances ". We have no right to put words into the Act or alter what is there. It appears to me that except when a housing authority in the same area gives a certificate within the terms of s. 3 (2), then a council house is not suitable alternative accommodation because it is not let on terms which afford reasonable security of tenure. C D E

For these reasons I think that the appeal should be allowed.

HODSON, L.J.: I agree.

MORRIS, L.J.: I agree. F

Appeal allowed.

Solicitors: *Wilkinson, Howlett & Moorhouse* (for the tenant); *Bower, Cotton & Bower*, agents for *Sherwood, Cobbling & Williams*, Kingston-upon-Thames (for the landlord).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

A

BINGHAM *v.* INLAND REVENUE COMMISSIONERS.

[Chancery Division (Harman, J.), October 13, 14, 1955.]

Surtax Deductions—Annual payments—Alimony to former wife under foreign decree—Former wife resident abroad—Tax not deductible from payment—Payment not deductible from total income—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5 *c.* 40), *All Schedules Rules, r.* 19—*Finance Act,* 1927 (17 *&* 18 *Geo.* 5 *c.* 10), *s.* 39 (3).

B

Under an order made by a foreign court, a taxpayer, while resident in England, made annual payments of alimony to his former wife resident abroad out of profits or gains brought into charge to tax in England. On the question whether the amount of the alimony so paid for the year 1937-38 could be deducted in computing the taxpayer's income of that year for surtax purposes,

C

Held: the payments were not deductible from the taxpayer's total income for surtax purposes as payments of annual sums within s. 39 (3)* of the Finance Act, 1927, since that sub-section extended only to payments from which the taxpayer could have deducted tax under r. 19* of the All Schedules Rules of the Income Tax Act, 1918, and no tax could be deducted from the payments of alimony in question.

D

Earl Howe v. *Inland Revenue Comrs.* ([1919] 2 K.B. 336) and *Rossdale* v. *Fryer* ([1922] 2 K.B. 303) applied.

E

Appeal dismissed.

[As to deductions of annual payments from total income for income tax and surtax purposes, see 17 Halsbury's Laws (2nd Edn.) 232, para. 471, p. 246, para. 497; 28 Digest 111, *683-689*, and Supplements.

For the Income Tax Act, 1918, s. 27 and Sch. 5, No. XVII, and r. 19 of the All Schedules Rules, see 12 Halsbury's Statutes (2nd Edn.) 20, 197, 188; and for the Finance Act, 1927, s. 38 (2) and s. 39 (3) see ibid., 295, 297.

F

Corresponding provisions of the Income Tax Act, 1952, are s. 169, s. 2 (2), for which, see 31 Halsbury's Statutes (2nd Edn.) 162, 18.]

Cases referred to:

G

(1) *Rhokana Corpn., Ltd.* v. *Inland Revenue Comrs.*, [1937] 2 All E.R. 79; [1937] 1 K.B. 788; 106 L.J.K.B. 444; 156 L.T. 395; *revsd.* H.L., [1938] 2 All E.R. 51; [1938] A.C. 380; 107 L.J.K.B. 377; 159 L.T. 170; 21 Tax Cas. 552; Digest Supp.

(2) *Keiner* v. *Keiner*, [1952] 1 All E.R. 643; 34 Tax Cas. 346; 3rd Digest Supp.

H

(3) *Howe (Earl)* v. *Inland Revenue Comrs.*, [1919] 2 K.B. 336; 88 L.J.K.B. 821; 121 L.T. 161; 7 Tax Cas. 289; 28 Digest 111, *683*.

(4) *Rossdale* v. *Fryer*, [1922] 2 K.B. 303; 91 L.J.K.B. 620; 127 L.T. 392; 31 Digest (Repl.) 318, *4547*.

Case Stated.

I

The appellant taxpayer appealed to the Special Commissioners of Income Tax against an assessment to surtax made on him for 1937-38 in the sum of £13,500. He had resided and been domiciled in the Netherlands until 1934, and resided in England from 1934 to 1940 and thereafter in the United States of America. By a decree of the Dutch District Court of the Arrondissements Rechtbank, in Amsterdam, dated Mar. 18, 1929, he was divorced from his wife and ordered to pay her 3,000 guilders per month for her maintenance, that sum

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* The texts of these enactments are printed at p. 322, letter I, and p. 323, letter E, post.

being amended by a subsequent order in 1932 to three sums totalling 34,500 A
guilders annually. During his residence in England he made these payments out
of profits or gains brought into charge to British income tax. The annual total
represented £4,187 17s. 10d. at the rate of exchange of about 8.24 guilders to the
£ in 1937. The taxpayer contended that the payment of the sums, being
compulsory in pursuance of an order of a court of competent jurisdiction,
constituted a charge on his income deductible from his total income for surtax B
purposes. The Crown contended that, as the taxpayer was bound to pay the
sums in full, no deduction from his total income was allowable, since to qualify
as an annual payment deductible from total income the payment must be one
from which tax could be deducted at source. The commissioners held that the
payment constituted Dutch income in the hands of the taxpayer's wife since she
received it in Holland, with the result that, although paid out of profits or gains C
brought into charge to British income tax, it was not one to which r. 19 of the All
Schedules Rules of the Income Tax Act, 1918, applied. They held, therefore,
that the payments could not be recognised as charges against the taxpayer's
total income for income tax or for surtax purposes. The taxpayer appealed.

Roy Borneman, Q.C., and *G. B. Graham* for the taxpayer.
J. E. S. Simon, Q.C., and *Sir Reginald Hills* for the Crown. D

HARMAN, J.: The facts out of which this point arises are to be assumed
to be the following. The taxpayer, then named Birnbaum, was resident in the
Netherlands until 1934, and domiciled there. He was a married man until 1929
when his marriage was dissolved by a court in Amsterdam, when he was ordered
to pay his wife alimony at the rate of rather over £4,000 a year. In 1934 he E
came to England, became resident here, and subject to our income tax laws.
His wife remained either in Holland or, at any rate, outside this country. In
1940 the taxpayer went to the United States of America where he has since been
resident.

During the years that he was taxable in this country, the taxpayer paid the
alimony due to his wife out of profits or gains brought into charge to tax here, F
and the question raised by this case is whether, for the purpose of ascertaining
the amount of surtax for which he is liable for 1937-38, he is entitled to deduct
the £4,000 odd alimony which he paid to his wife in arriving at the total sum.
His total income has certainly been diminished by that sum, and it would
therefore seem just that he should be able to deduct from his income the amount
by which it is in truth reduced; but it is said that justice will not be done to him G
owing to the unusual circumstances and the state of the income tax law.

The matter arises under the Finance Act, 1927, s. 38. In that Act surtax was
substituted for its predecessor, supertax; and in s. 38 (2) " total income " is
defined:

> " The expression ' total income ' . . . means the total income of that
> person from all sources estimated . . . in accordance with the provisions H
> of the Income Tax Acts as they apply to income tax chargeable at the
> standard rate . . . "

Section 39 (3) provides:

> " Where a person is required to be assessed and charged with income tax
> in respect of any . . . profits or gains out of which he makes any payment I
> in respect of any annual interest, annuity or other annual sum . . . he
> shall, in respect of so much of the . . . profits or gains as is equal to the said
> payment and may be deducted in computing his total income, be charged
> at the standard rate only."

Therefore, surtax is not paid in respect of any annual sum which may be deducted
in computing total income. The question is whether this £4,000 is an annual sum
which may be deducted in computing the total income of the taxpayer.

It is not easy to find either how to arrive at total income or what deductions may be made from it. The Income Tax Act, 1918, s. 27 (1), as amended by the Finance Act, 1920, s. 32 and Sch. 3, provides:

> "Any person who claims any . . . deduction shall, within the time limited by this Act . . . deliver to the assessor . . . a notice of his claim . . . setting forth . . . (b) all particulars of any yearly interest or other annual payments, reserved or charged thereon, whereby his income is or may be diminished."

In Sch. 5*, which deals with statements, lists and declarations, No. XVII is headed "Declarations and statements of total income". It contains three declarations, the third being

> "Declaration of the amount of . . . annual payments to be made out of the property or profits or gains assessed on the claimant . . ."

So far there does not appear to be much difficulty. This clearly is a payment to be made out of profits or gains assessed on the payer. His income is diminished by the £4,000 which he pays his wife.

Rule 19 of the All Schedules Rules deals with cases where payments are made by a taxpayer out of his income already brought into charge to tax. That was the case here. The person obliged to make the payment is charged with the tax and the person entitled to the payment is bound to suffer deduction of it. Rule 19 of the All Schedules Rules of the Income Tax Act, 1918, provides that where an annual payment

> "... is payable wholly out of profits or gains brought into charge to tax, no assessment shall be made upon the person entitled to such interest, annuity, or annual payment, but the whole of those profits or gains shall be assessed . . . on the person liable to the interest, annuity, or annual payment, without distinguishing the same, and the person liable to make such payment . . . shall be entitled, on making such payment, to deduct . . . a sum representing the amount of the tax . . .";

and the payee is bound to suffer that deduction. So, if this had been a case of ordinary alimony by English law, the taxpayer would undoubtedly have been entitled to deduct the tax from the payment, and his former wife would have been bound to suffer the deduction. There is similar machinery under r. 21† of the All Schedules Rules, if the payment is made out of capital and therefore not out of profits or gains brought into charge to tax, but the payer must then account to the Crown for the tax which he has deducted. Apart from authority, therefore, it looks as if the deduction could be made in this case; and relief under s. 39 (3) of the Act of 1927 would then apply to surtax.

The Crown contends that a line of cases shows that no deduction can be made unless the payer can deduct income tax from the payment under r. 19 and pass it on to the recipient, and that otherwise the payment does not rank as an annual payment within the section. It has been said in those cases that the only object of this method of collecting tax, by allowing a deduction, is to prevent double taxation, and therefore it applies only where the recipient is a person himself liable to tax; and that if the payment is made to a person not liable to tax, that will result in some tax not being paid. That argument may be true when applied to income tax, but it does not apply so well to surtax. For instance, if the taxpayer was allowed to deduct £4,000 from his total income, he would not pay surtax on that sum. His former wife not being liable to English taxation, will not pay it either. If she were liable to English taxation, she would not pay surtax on the sum at the same rate as that at which he would have to pay it on his income, so that the justice which is sought is not borne out by the cases. However that may be, I must examine them to see whether they go to the length that the Crown alleges.

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* Now Sch. 24 to the Income Tax Act, 1952; 31 HALSBURY'S STATUTES (2nd Edn.) 578.

† Now s. 170 of the Income Tax Act, 1952; 31 HALSBURY'S STATUTES (2nd Edn.) 165.

The commissioners' reasons given in the case are not altogether intelligible to me, and the Crown did not seek to support them or to rest its case on them. I think I need not deal with them any further. It is clear that r. 19 may apply to payments made abroad. That is expressed in the rule, and it is pointed out by Lord Wright, M.R., in *Rhokana Corpn., Ltd.* v. *Inland Revenue Comrs.* (1) ([1937] 2 All E.R. at p. 89).

It is admitted that the present taxpayer is not entitled to deduct tax as against his former wife. The reason for that is that the obligation depends on foreign jurisdiction, and the payee is not liable to the English taxation network and is therefore not bound to suffer a deduction of this sort. That was clearly shown in the judgment of Donovan, J., in *Keiner* v. *Keiner* (2) ([1952] 1 All E.R. 643), which was not an income tax case except incidentally. The man sued his former wife for a declaration that, having to pay her alimony under a United States decree and having deducted tax, he had satisfied his obligation. The learned judge held that was not so. He held that under the contract so called—it was really an order of the court—the rule of law which applied was that of the State of New Jersey, and therefore r. 19 had nothing to do with it. He said ([1952] 1 All E.R. at p. 645):

> " The question at issue in this case is not what are the husband's rights and obligations vis-à-vis the Inland Revenue here. The question is : What are the rights and obligations of the parties inter se ? These are to be ascertained by referring to the contract between them, [i.e., the order which, being a consent order, I suppose he might describe as a contract], in other words, to the rules by which they have both agreed to abide, and those rules are to be found in the contract itself as governed by the law of New Jersey. It may well be that if r. 21 applies to this payment—as to which I say nothing—the husband may find himself bound, vis-à-vis the Revenue here, to deduct and pay over tax on the payment, and yet have to pay the wife in full. That is not her fault. It arises, if at all, because the husband has chosen to come and live here."

I accept that and so indeed, does the taxpayer, but he points out that in the view of Donovan, J., the fact that he had got to pay his former wife in full did not necessarily mean that he had finished with the income tax authorities.

Counsel for the taxpayer argues that, where a payment made is what is called a pure income payment, it ought to be treated as against the Crown as deductible, even though by the accident of the payee residing abroad tax cannot be deducted against her. If the former wife came to reside in England, it would seem that the taxpayer could deduct the tax against her because she would be liable to be taxed as a resident here; and, if that were so, he could deduct the gross sum from his total income for surtax purposes. It does seem that his right to make that deduction depends on where his former wife chooses to set up her domicil.

In *Earl Howe* v. *Inland Revenue Comrs.* (3) (1919) (7 Tax Cas. 289) Earl Howe was making payments partly on account of mortgage interest and partly to meet the premiums on sinking fund policies taken out to replace the mortgage money on his death, and he claimed for surtax purposes to deduct both those payments from his total income. It was agreed that he could deduct the mortgage payments, but it was said, as clearly was right, that the payments in respect of the policies were not true income payments at all. They were payments to make up a sinking fund, and not income in the hands of the payee, the insurance company, or at any rate not income taxable as such, although they might have been part of the profits of the company. Therefore, the decision was that Lord Howe could not make that deduction from his total income for super-tax purposes. If I may say so with respect, the decision was manifestly right, but the expressions which the court used seem to me to go rather further than the case necessarily required. It was held that the amount paid annually by the appellant in respect of premiums on the mortgaged life insurance policies was not an " annual payment reserved or charged " on his income within the meaning of s. 164 of the Income Tax Act, 1842, the predecessor of the Act in question in this case.

Swinfen Eady, M.R., said (7 Tax Cas. at p. 297):

> " The contention on behalf of Earl Howe is that the annual premiums on the policies are ' annual payments ', and that they have to be made out of the profits brought into charge and are charged thereon. And they are charged on his income in this manner, that if he fails to pay the premiums, in accordance with his covenant, his mortgagees have power to pay the same and resort to the security for what they shall so pay. It cannot be disputed that these annual premiums are, in one sense, annual payments; but the question is, are they annual payments within the meaning of s. 164 ? The Inland Revenue Commissioners contend that no annual payment is within the section unless the payment is one in respect of which the person paying can deduct from it the income tax he may have paid in respect of it, and so pass on the burden of the tax to the recipient of the income. Of course, premiums on life insurance must be paid in full to the assurance company and no deduction therefrom on account of income tax is permissible. On the one hand, interest from which tax has been deducted will form part of the income of the payee, and will have to be treated by him as part of his income. Unless the payer could deduct the interest from his income, the result would be that such income would be subjected to double taxation. On the other hand premiums of life assurance paid to an assurance company are not subject to assessment as annual payments, although they doubtless form items in an account upon which the gains and profits of the assurance company for the year are to be arrived at."

The Master of the Rolls there comes to the conclusion that these were not annual payments within the true meaning of the Income Tax Act, 1842.

Warrington, L.J., is even more explicit because he says (ibid., at p. 300):

> " In my opinion, the annual payments referred to in s. 164 . . . are those and those only which for taxation purposes are treated as income, not of the payer, but of the recipient, in respect of which the latter has to bear the duty."

Then he inquires: Are these payments such payments, and he says " No ". " They are in truth instalments of purchase money for a capital sum payable on death."

Scrutton, L.J., expresses the same view (ibid., at p. 303). After rehearsing the section he says:

> " The result of these sections seems to be that the ' annuities, interest, and other annual payments' which can be deducted to obtain exemption are those from which the claimant can deduct tax on behalf of the recipient; being in effect the profits of the recipient who bears the tax, they are not also to be treated as profits of the person paying them. If no tax can be deducted on behalf of the recipient, they cannot be treated as profits of the recipient, and must be treated as paid out of profits of the person paying, who is therefore to be taxed on them."

A little later he says that the premiums

> " . . . do not seem to me to be annual payments ejusdem generis with annual interest or annuities, and as income tax on them cannot be deducted against the recipient, I see no reason why the person paying should deduct them from his taxable income. To allow this would be to establish a kind of profits which would escape taxation, in the hands of the person paying because he could deduct it as an annual payment, in the hands of the recipient because it did not represent his profits. From this point of view

> it is immaterial whether the payment is charged or not; it is not an 'annual payment' within s. 102 . . . " A

It will be seen, therefore, that the Court of Appeal was quite categoric that it would have been enough to say that the payments were not income payments at all in any true sense, i.e., not income in the hands of the recipient, and therefore the deduction could not be made. But I think the court went further than that and did say that, unless the deduction can be made on behalf of the recipient, B the payment cannot be deducted when it comes to dealing with surtax.

In *Rossdale* v. *Fryer* (4) ([1922] 2 K.B. 303), SCRUTTON, L.J., affirmed his opinion. That case again seems to me to be manifestly right. It concerned Schedule A. Profit rental escaped tax in 1922, though it does not today. SCRUTTON, L.J., said (ibid., at p. 312): C

> "We had to consider in *Earl Howe* v. *Inland Revenue Comrs.* (3) the limitations that ought to be put upon those words [i.e., yearly payments] because, as was pointed out in that case, and as I think is accepted here, it is not every yearly payment which you can deduct. Take the case put in *Earl Howe* v. *Inland Revenue Comrs.* (3). If you are paying a garage proprietor so much a year for letting you a car for four or five years, you cannot deduct D from every payment that you make to the garage proprietor income tax on that payment. I do not desire to repeat (because having considered it again I think it is accurate) the view that I took in *Earl Howe* v. *Inland Revenue Comrs.* (3), which was to this effect, that if the sum from which you are deducting is properly taxable as part of the profits of the recipient you can deduct; if it is not so taxable you cannot deduct, but the amount must E be treated as final."

Therefore, I have to consider those emphatic expressions of opinion by members of the Court of Appeal. It would otherwise be my inclination to say that, where the money is income in the hands of the recipient, it could be deducted, even though, by reason of the recipient's being outside the jurisdiction or for some other reasons, he happened not to be liable to the English taxation F system. Section 39 (3) of the Act of 1927, to which I return, includes the words, "and may be deducted in computing his total income". It seems to me that I cannot disregard those words. This taxpayer may not deduct this payment from his total income. It is said that that is only true as against his wife and not as against the Revenue; but, having regard to the emphatic expressions of opinion in the *Earl Howe* case (3) and in *Rossdale* v. *Fryer* (4) that a deduction may only be G made where the recipient is a person liable to English tax, I am not at liberty to take that view.

It seems to me to be very unfortunate for the taxpayer that the accident of his wife being outside the fiscal area should cause him to pay surtax on the £4,000 which he would not pay if she was within it. These things happen, however, to people who change their domicil, as DONOVAN, J., pointed out in *Keiner* v. H *Keiner* (2). Having regard to the decisions to which I have referred, I feel that I am not at liberty to say here that, although the taxpayer cannot deduct against his wife, he can deduct for surtax purposes as against the Crown; and, therefore, I think that the commissioners arrived at the right conclusion, although not for the reasons which appealed to them, and I must dismiss this appeal. I

Appeal dismissed.

Solicitors: *Frere, Cholmeley & Nicholsons* (for the taxpayer); *Solicitor of Inland Revenue.*

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

HEARST AND ANOTHER *v.* CLARK.

[QUEEN'S BENCH DIVISION (Lloyd-Jacob, J., sitting as a judge of the Division), October 10, 11, 12, 1955.]

Master and Servant—Wages—Regulation—Catering worker—Minimum remuneration—Joint employment of husband and wife—Employees to receive profits after fixed payment to employer—Claims by both for minimum remuneration—Catering Wages Act, 1943 (6 *&* 7 *Geo.* 6 *c.* 24), *s.* 1 (2), (4).

In October, 1951, the plaintiffs, who were husband and wife, orally agreed with the defendant to manage the defendant's café. They were to live on the premises, and pay to the defendant a certain weekly sum out of the profits, the rest of which they were to keep for themselves. The plaintiffs were not to be paid any wage other than the remainder of the profits. The defendant paid the rent of the café premises, and the arrangement was to last for fifteen months certain. The profit proved not to be sufficient, after paying the defendant's weekly sum, to leave a reasonable sum as remuneration for the plaintiffs. Following a dispute, the defendant gave the plaintiffs notice of immediate dismissal. The arrangement had lasted only about eleven months. The plaintiffs claimed payment by the defendant of forty-eight weeks' wages by virtue of the Catering Wages Act, 1943.

Held: the plaintiffs were " workers " employed in an undertaking within the Catering Wages Act, 1943, which applied to employees whether engaged either individually or (as the plaintiffs were) together; and each of the plaintiffs was entitled to the statutory minimum remuneration under that Act, viz., the wages appropriate to an assistant in charge as prescribed by the Wages Regulation (Unlicensed Place of Refreshment) Order, 1951, and the Wages Regulation (Unlicensed Place of Refreshment) (Amendment) Order, 1952.

Parkinson v. *H. & J. Plumpton* ([1954] 1 All E.R. 201) explained.

[**Editorial Note.** The orders cited in the headnote above have been revoked and replaced and those in force at the present time (i.e., at and about the date of the decision in the present case) are the Wages Regulation (Unlicensed Place of Refreshment) Order, 1953 (S.I. 1953 No. 1611), as amended by S.I. 1955 No. 386; see, as regards the statutory instruments currently in force, 7 HALSBURY'S STATUTORY INSTRUMENTS 136 and Service.

For the Catering Wages Act, 1943, s. 1, see 9 HALSBURY'S STATUTES (2nd Edn.) 104.]

Cases referred to:

(1) *Parkinson* v. *Plumpton* (*H. & J.*), [1954] 1 All E.R. 201; 3rd Digest Supp.

(2) *Pauley* v. *Kenaldo, Ltd.*, [1953] 1 All E.R. 226; 3rd Digest Supp.

(3) *Short* v. *Henderson, Ltd.*, (1946), 115 L.J.P.C. 41; 1946 S.C. (H.L.) 24; 174 L.T. 417; 39 B.W.C.C. 62; 2nd Digest Supp.

Action for damages.

The defendant advertised for a manager and manageress of his café at Newmarket, and the plaintiffs, who were husband and wife, answered the advertisement. The defendant said that the post was no longer open but that he expected to require assistance at his café-restaurant at Cambridge. The plaintiffs were told that if they accepted the post at Cambridge they would be required to occupy living rooms forming part of the premises and to conduct the business. The defendant said that " it would demand your full time and working management ". The defendant would require to be paid a sum to be agreed and would pay the rent of the premises. The plaintiffs would keep the profit remaining after payment of the sum required by the defendant. LLOYD-JACOB, J., found that the defendant contemplated and intended that the business was to remain his, and the plaintiffs were servants of the defendant in the conduct of the business. This appeared from a written draft agreement which was never executed, but which, as the court found, indicated the nature of the agreement between the parties. Clause 3 of the draft agreement provided that

> " the manager shall obey the express directions and orders given to him from time to time by his employer."

The court found that the agreement was for a year certain and thereafter subject to three to six months' notice (i.e., for a period of at least fifteen months), and that the basis of the arrangement between the parties was that the business would be carried on at a profit, which would be divided between the plaintiff and the defendant, the plaintiffs accepting that arrangement in lieu of a regular weekly payment. The sum to be paid to the defendant was quantified in due course. The profits in fact realised were insufficient to pay the sum due to the defendant as well as to leave a reasonable sum as remuneration for the plaintiffs. A dispute arose over the defendant's failure to execute a written agreement relating to the arrangement between the parties, and the plaintiffs withheld the sums payable to the defendant. The defendant dismissed them instantly after the employment had lasted some eleven months.

The plaintiffs claimed damages on several grounds, including the ground that the Catering Wages Act, 1943, applied and that they had not been paid the wages to which they were entitled. The case is reported on this latter point only.

B. C. Sheen for the plaintiffs.
L. J. Solley for the defendant.

LLOYD-JACOB, J., stated the facts and continued: The plaintiffs voluntarily and willingly entered on an arrangement whereby their remuneration was to be the balance of profit derived from this business after the weekly payment had been made to the defendant and the other outgoings had been met, an arrangement which, as it turned out, was an extremely unfortunate one. They say and plead that, by reason of the Catering Wages Act, 1943, they are in fact safeguarded as to proper remuneration, and on the true and fair construction of that Act, they are and were at all material times, notwithstanding their bargain, to be entitled to receive such wages as are set out in the appropriate regulations made under the Act. In that connection, they are of course prepared to bring into account such amounts as they did in fact draw from the business for their maintenance.

The propriety of that claim rests on the construction of the Catering Wages Act, 1943. In approaching that construction I have had the advantage of being referred to two authorities in which various aspects of that Act have been canvassed, and one on which the defendant places considerable reliance is a judgment of LORD GODDARD, C.J., in *Parkinson* v. *H. & J. Plumpton* (1) ([1954] 1 All E.R. 201). It is said that in that case LORD GODDARD, C.J., decided (ibid., at p. 202) that this Act does not apply in cases where the arrangement between the employer and the employee is, as here, one for the joint employment of two parties. I do not myself regard that judgment as deciding that point. It is true that the learned Lord Chief Justice indicates that he did not think that the question of joint engagement was contemplated by the Act, an observation with which I find myself in complete agreement, but it by no means necessarily follows that, because joint engagements may not have been contemplated by the Act, the application of the words of the statute to particular circumstances may not in fact require that persons employed under a joint engagement must receive the remuneration required by the legislature. The learned Lord Chief Justice makes his meaning even more clear where (ibid.) he points out that he cannot find any provision in the Act that, where there is joint employment, the joint remuneration is to be treated as divisible, again an observation with which I find myself in complete agreement. But it must be remembered that those observations were made in a case in which the claim was by one of the two persons engaged jointly in the absence of the other and which would require for its true determination an estimation of the amount of the joint remuneration which was to be attributed to each party. In the present case, as I have already indicated, both the employed persons are parties to the proceedings and no such difficulty is presented, for no apportionment is required. In those circumstances I do not find that the decision in *Parkinson* v. *H. & J. Plumpton* (1) is directly relevant to the issues which I have to decide and accordingly I must necessarily approach the matter afresh.

Section 1 of the Act identifies the persons to whom the Act applies. They are referred to as workers, and by s. 1 (2) workers are defined as

> ". . . all persons employed in any undertaking, or any part of an undertaking, which consists wholly or mainly in the carrying on (whether for profit or not) of one or more of the following activities . . .",

which activities, it will be noted, include the supply of food or drink for consumption. There can therefore be no doubt whatever that the undertaking, the café business in Mill Road, Cambridge, consisted, if not wholly, at any rate mainly in the supply of food or drink for immediate consumption, and if, as I have already held, these two plaintiffs were employed in that business, then, as I understand the statute, I must hold that they are workers within the meaning of the Catering Wages Act, 1943. By s. 1 (4) there is a provision that

> ". . . any worker who, for the purposes of any undertaking or part of an undertaking performs any work in pursuance of an arrangement express or implied, made by the worker by way of trade with the persons carrying on that undertaking shall be deemed to be employed by them in that undertaking or part."

The arrangement between the parties in this case was that the two plaintiffs should manage the defendant's business, but it was an arrangement entered into by way of trade, the operation of running and managing a café business being the trade or occupation in which all three of these parties were engaged, and in those circumstances, whether or not the agreement between the parties can properly be termed an agreement of employment, I am quite satisfied that the terms of s. 1 (4) are so wide that it must be regarded as intended that persons in the position of these two plaintiffs, who in fact carried out the work of operating this café business, should be regarded as workers within the purview of the Catering Wages Act, 1943.

In respect of any such workers, the Act provides that the minimum remuneration to which they are entitled, notwithstanding any agreement to the contrary, is to be fixed by the appropriate machinery, and by s. 9 (1) it is provided that, if a contract between a worker, which expression I construe to mean a worker or workers to whom a Wages Regulation Order applies, and his employer provides him with a less remuneration than the statutory minimum, then that contract shall have effect as if for the agreed remuneration there were substituted the statutory minimum, clear of any deductions. If the employer in fact fails to pay a worker the statutory minimum, then he is liable on conviction to a substantial fine, and there is a provision that employees who are denied the statutory minimum remuneration shall be entitled to receive the deficit.

It was urged in the present case that the contract between the parties was not a contract of employment. I do not need to say any more about that; from what I have already said it will be plain that the reasons that commend to me a contrary conclusion are manifold. Secondly, it was submitted that the arrangement was not entered into by the parties by way of trade. In my view, plainly it was an agreement for the commercial employment by the defendant of the plaintiffs, and one that I should myself regard as an agreement entered into by way of trade, but it was suggested, and there is some colour for the suggestion, that by reason of the arrangements between the parties the agreement cannot be regarded as a contract of service but ought to be put into that limited category of contracts which are compendiously referred to as contracts for services, and in that connection the defendant relied on a judgment of BIRKETT, L.J., sitting as an additional judge of the Queen's Bench Division, in *Pauley* v. *Kenaldo, Ltd.* (2) ([1953] 1 All E.R. 226). In his judgment (see ibid., p. 228) the learned lord justice quotes a speech of LORD THANKERTON in *Short* v. *Henderson, Ltd.* (3) (1946) (115 L.J.P.C. at p. 47) in which the indicia of a contract of service are set out, namely, the master's power of selection of his servant—clearly no question arises on that because both plaintiffs were selected by this defendant for the doubtful privilege of running his restaurant; secondly, the payment of wages or other remuneration—no question arises about that; thirdly, the master's right to control the method of doing the work, and fourthly the master's right of suspension or dismissal. No question turns on the last, and so far as the third is concerned, the requirement endeavoured to be put on the male plaintiff by the defendant to enter up inaccurate books is a sufficient indication that he cannot now suggest that he was not in a position to exercise any right of control of the method in which one aspect of the conduct of this business, namely, the keeping of accounts, was to be conducted.

In those circumstances, I entertain no doubt whatever that on its true construction this Act applies to employees whether they are engaged individually or whether they are engaged as a number. Difficulties, however, arise, because the determination of the precise minimum remuneration was left to be determined by statutory instrument, and the statutory instruments do not appear to have been drafted with the idea particularly in mind that the conduct of some of the duties falling within the Catering Wages Act, 1943, might require for their completion more than one person. For example, if this had been a simple agreement between the male plaintiff and the defendant, there could have been no doubt that under the statutory instruments* that applied at the relevant time he would have been entitled to the minimum remuneration appropriate to an assistant in charge. He was aged twenty-one years or over, and he was in fact performing the duties to which the appellation assistant in charge can properly be attributed, i.e., he was wholly or mainly engaged in catering work and in direct control of a catering undertaking in which not more than four persons exclusive of himself were employed and he was immediately responsible for its operation†. Such a person, in respect of a working week of forty-seven hours, would have been entitled in the early part of his employment to £5 2s. a week, and in the subsequent part of his employment to a sum slightly in excess of that. Nor could there be any doubt that, if the agreement had been between the female plaintiff and the defendant, she too, by reason of the fact that she accepted with her husband the obligation of controlling and running this business, would have been an assistant in charge, although the schedule appropriate to female workers provides that she would have received a less remuneration than that to which a male assistant in charge would be entitled.

It is suggested that there is here no provision which would cover the case of these two persons in that the definition of an assistant in charge requires that he shall be a person in direct control with not more than four persons other than himself employed. I can see no difficulty whatever in construing these regulations as meeting the conduct of a business where one assistant in charge is responsible for the control of the business during the forty-seven hours of the week for which he is prepared to accept the responsibility and another assistant in charge is entitled to be treated as falling within the Catering Wages Act, 1943, in respect of the remainder of the period of time in respect of which the catering business is kept open. In the present case there is no question that the business was running for a period of time far in excess of forty-seven hours a week. In those circumstances no harm could conceivably be done to this defendant in regarding these two people as being alternately responsible for the direct control of this catering establishment during the period which the Act provides and permits an assistant in charge to control it. Not that it makes much difference because, as one would have expected, the regulations take care to see that, if the duties on which workers are engaged do not fall precisely within the definition sections of the various categories, then they are to fall within the provisions of "any other worker except manageress or shop assistant", and I construe the expression "manageress or shop assistant" to mean persons falling within the definition of those two expressions in the regulations themselves. Accordingly I can see nothing in the regulation which would require me to reconsider my construction of the Catering Wages Act, 1943, and so to construe it as to exclude these plaintiffs from the purview of its provisions.

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* The Wages Regulation (Unlicensed Place of Refreshment) Order, 1951 (S.I. 1951 No. 637) and the Wages Regulation (Unlicensed Place of Refreshment) (Amendment) Order, 1952 (S.I. 1952 No. 861). These have since been revoked and replaced, see p. 327, letter F, ante.

† See the Wages Regulation (Unlicensed Place of Refreshment) Order, 1951 (S.I. 1951 No. 637), schedule, para. 23.

That brings me to the next point, viz., what in those circumstances is the category into which they fall, because, having determined that each of them can properly be regarded individually as an assistant in charge, it next becomes necessary to see into which of the various sub-divisions of that category they can be placed. Generally speaking, the sub-division is in one or other of three alternative headings: first, where the employer supplies the worker with full board and lodging for seven days a week; secondly, where the employer supplies the worker with neither full board nor lodging but supplies him with meals of good and sufficient quality and quantity whilst on duty; and thirdly, where the employer supplies the worker with neither meals nor lodging. The evidence establishes that these plaintiffs, although permitted to occupy certain rooms, were not provided with lodging. There was some question of a few sticks of furniture being available in these rooms. Whether that was sufficient to exclude the operation of the Rent Restrictions Acts I do not know and I am not called on to decide. It is sufficient for my purpose to hold that the defendant here cannot maintain that he provided these employees with lodging. Therefore it is necessary to hold that he cannot then take advantage of the minimum payments set out in respect of workers who are so provided. Nor can I hold on the evidence that the payments can fall within the category which relates to cases where the employer supplies the worker with neither meals nor lodging, for, as I understand the evidence, both these plaintiffs did receive their meals from the operation of the café business. In those circumstances, the only remaining category is that dealt with in column 3 of the schedule (the second of the classes enumerated above) and I am satisfied that they are entitled to receive the minimum remuneration set out in that column in respect of an assistant in charge aged twenty-one years or over, in the case of the male plaintiff under the appropriate category for male workers, and in the case of the female plaintiff under the appropriate category for female workers. In those circumstances, in respect of the allegation that their employment was one to which the Catering Wages Act, 1943, relates and that they are entitled to the difference between the minimum payment and the amount they have received, the plaintiffs are entitled to judgment.

Judgment for the plaintiffs.

Solicitors: *Waterhouse & Co.*, agents for *Few & Kester*, Cambridge (for the plaintiffs); *Oscar Mason & Co.* (for the defendant).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

BEVAN *v.* BEVAN.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Collingwood, J.), October 6, 10, 1955.]

Justices—Desertion by husband—Continuance of desertion—Reconciliation—Whether efforts of deserting spouse towards reconciliation sufficient to end desertion—Whether deserting spouse exonerated from further efforts.

The parties were married in July, 1954. They were both in employment and the wife gave the husband each week £3 towards the instalments payable for hire-purchase of furniture for their home. On Feb. 1, 1955, the husband told the wife that he was leaving her, that his clothes were packed, and that the furniture was going back to the owner. By that date the wife had paid to the husband a total of £64 in respect of the furniture instalments. The husband had, however, spent the money on his own pleasures. On Feb. 2 the wife together with her father and her cousin met the husband at the matrimonial home. The father demanded from the husband an explanation as to what he, the husband, had done with the money; they came to blows and had to be separated. The wife told the husband to go because, she said, she wanted to bring the troubles to an end. On Feb. 3 the parties again met and the husband still refused to give her any information about the money. On the same day, the wife's solicitors wrote to the husband stating that the owner of the furniture would not seize it if the marriage could be saved and that unless he, the husband, met the wife with a view to discussing this the furniture would be taken back. On Feb. 4 the parties again met, the husband showed no concern for the wife and asked her if she was prepared to pay the money again, otherwise the furniture would have to go back. The wife, being distressed and angry, told the husband that she did not want to see him again and that she wanted a divorce; she also attempted to hit him with a milk bottle. Later, the husband wrote to the wife asking her to " make things up ". She did not reply but caused a summons to be issued against him on her complaint that he had deserted her. On Apr. 26 the wife gave her evidence at the magistrate's court and was cross-examined; the case was then adjourned for a month to enable the parties to see the probation officer. On May 13 the husband wrote to the wife, asking for her forgiveness and for time to " get a place and fix things up ". On May 24, at the adjourned hearing, the wife stated that she had no desire to return to the husband even if the court were satisfied that he genuinely wanted her; and that the husband had done nothing to " make it up " regarding either the money or the home. The magistrate found that the husband had deserted the wife and that his offer to return to the wife was not genuine. On appeal the husband contended that since the wife had made it plain that she would not receive him back, she could not complain that he had persisted without cause in his desertion.

Held: the fact that the wife, when suffering from a deep sense of grievance, had told the husband, who showed no sign of contrition for what he had done, that she did not want to see him any more, did not exonerate him from the necessity of doing something to bring to an end the state of desertion which he had started on Feb. 1; as it was open to the magistrate to find, as he did, that such apparent efforts as the husband did make were not genuine, the court would not interfere with that finding, and accordingly the husband had continued to be in desertion.

Observations of WILLMER, J., in *Church* v. *Church* ([1952] 2 All E.R. at p. 443) applied.

Barnett v. *Barnett* ([1954] 3 All E.R. 689) and *Fishburn* v. *Fishburn* ([1955] 1 All E.R. 230) distinguished.

Appeal dismissed.

[As to refusal by petitioner to resume conjugal relations, see 10 HALSBURY'S LAWS (2nd Edn.) 657, para. 967; and for cases on the subject, see 27 DIGEST (Repl.) 347-350, *2877-2896*.]

Cases referred to:

(1) *Pratt* v. *Pratt*, [1939] 3 All E.R. 437; [1939] A.C. 417; 108 L.J.P. 97; 161 L.T. 49; 27 Digest (Repl.) 350, *2895*.

(2) *Church* v. *Church*, [1952] 2 All E.R. 441; [1952] P. 313; 3rd Digest Supp.

(3) *Sifton* v. *Sifton*, [1939] 1 All E.R. 109; [1939] P. 221; 108 L.J.P. 131; 27 Digest (Repl.) 324, *2697*.

(4) *Barnett* v. *Barnett*, [1954] 3 All E.R. 689; [1955] P. 21.

(5) *Fishburn* v. *Fishburn*, [1955] 1 All E.R. 230; [1955] P. 29.

Appeal.

The husband appealed against an order of the Swansea stipendiary magistrate dated May 24, 1955, whereby, having found the husband guilty of desertion, he ordered the husband to make to the wife a weekly payment for her maintenance.

R. D. Ranking for the husband.

The wife did not appear.

LORD MERRIMAN, P.: I have asked COLLINGWOOD, J., to give the first judgment.

COLLINGWOOD, J.: It is submitted on behalf of the husband that the learned stipendiary misdirected himself in holding that the husband had been guilty of desertion, in that he ignored the evidence which the wife herself gave as to the circumstances of the parting between the parties and what happened shortly afterwards. The parties were married on July 31, 1954, and the last six months or so of their life together was spent in rooms in Sebastopol Street. The wife says that she was not happy in her surroundings there, but there was no real trouble between them until the events which I shall relate, although she had found from a very early stage that he was not truthful over money matters. They had been buying the furniture for their home on hire-purchase. The wife was in employment. She earned some £4 10s. a week, and out of this she gave the husband £3 each week towards the instalments of the hire-purchase of the furniture. At the time of the parting the payments made by the wife to the husband for that purpose aggregated £64. Matters came to a head on Feb. 1, which was a Tuesday. On that evening the husband was on night work, and, as was the custom when he was so engaged, she had gone to her parents' home, whither he came for his tea and supper. After the evening meal, as he was leaving the house, he told his wife that he was leaving her, that his clothes were packed, and that the furniture was going back. In fact, he had spent the whole of the £64 on his own pleasures; but the wife was not told that at the time. The wife says that she tried to induce him to come back as he left the house. Later that evening her father went to the husband's place of work and had an interview with the husband to find out from him what it was all about, and on her father's return to her she learned from him that the furniture was being taken back owing to what the husband had done with the money. On the next day, Wednesday, she went to their rooms in Sebastopol Street with her father and her cousin, and there they met the husband. There was a scene between her father and the husband, the father demanding to know what he had done with the money and suggesting that he was keeping another woman. It led to blows, and they had to be separated, and the wife told the husband to go, she says because she wanted to bring the troubles to an end. On Thursday, Feb. 3, they met at his mother's. He still refused to give the wife any information about what he had done with the money. She says that his whole attitude was one of complete indifference; he just sat there eating his dinner as if nothing had happened at all.

On that date a letter was written to the husband by the wife's solicitors as follows:

> "Dear Sir, We have been consulted by your wife, Mrs. Glenys Bevan, now of 46, Eiddwen Road, Fforestfach, Swansea, in reference to certain matrimonial disputes existing between you. From our instructions, it appears that you do not wish to remain in cohabitation with your wife, and amongst other matrimonial offences you have committed, you have failed to pay for the furniture at the matrimonial home, 16 Sebastopol Street, in respect of which your wife was entrusting you with £3 per week, in payment to Mr. Jenkins, The Stores, Fforestfach, Swansea. Owing to personal endeavours of the writer Mr. Jenkins has stated that he will not in fact seize the furniture if he hears from us that there is any prospect of the marriage being saved. We ourselves can only inform you that unless you see your wife within or before 12 noon on Monday next, the 7th inst., with a view to discussing these matters, all that can be done is to let Mr. Jenkins take the furniture back, as is his undoubted right. We shall be glad to hear from you or your solicitors."

On Friday, Feb. 4, he came to her parents' house, bringing that letter with him. Again, the wife says, he showed no concern for her at all, his only concern being with regard to the furniture. All he did was to ask her if she was prepared to pay it all over again, the alternative to which was to send the furniture back. She, not unnaturally distressed and angry, told him that she did not want to see him again, and said, in fact, that she wanted a divorce; she attempted to hit him with a milk bottle, but was restrained from so doing. With regard to that interview it is clear that there was no explanation of his conduct by him, and he made no effort at all to "make things up" with the wife.

Some time later he wrote a letter to the wife. The date is not clear, and the letter has been destroyed. The wife in her evidence said:

> "It [the letter] did ask me to come back in a way. It started 'Dear Glenys'. He said: 'If you don't answer this letter I shan't bother with you again'. In a way it asked me to make things up. I didn't answer the letter or do anything. I took out a summons."

That she did on Apr. 16. In that summons she alleged desertion by him on Feb. 4, and also wilful neglect to provide reasonable maintenance for her. The matter came before the learned stipendiary on Apr. 26, and after the wife had given her evidence and had been cross-examined the case was adjourned for a month, in order that the parties might have the advantage of the services of the probation officer. The case came again before the stipendiary on May 24. It is clear that the offices of the probation officer had not been effective, because the wife was recalled by the court, and said that she had been to see the probation officer and added:

> "I have no desire now to return to my husband, even if the court is satisfied he genuinely wants me. He has done nothing to try and make it up to me—either over the money or the home."

On May 13, between these two hearings, the husband had written a second letter to the wife asking her for her forgiveness and for a few months to "get a place and fix things up" and adding "Please answer this letter so I will know what to do". The wife did not reply to that letter.

On that evidence the learned stipendiary decided that the husband had been guilty of desertion, and in the course of the reasons he said:

> "The day that they parted he said he was leaving her and packed his belongings. The [wife] was distressed and sent her father to the [husband's] works to find out the reasons and try and effect a reconciliation."

The words "and try and effect a reconciliation" do not appear from the note of the evidence. The reasons go on:

> "During the period of the adjournment the [husband] has written one letter to his wife, that on May 13, in which he asked for forgiveness and time to get other accommodation—otherwise he has made no attempt to see his wife. He has, in fact, made no sort of endeavour to seek any accommodation, saying it would be of no use as his wife didn't want him. He has saved no money, in the meantime, although his wages were the same. If the [husband] was genuine in his desire to resume living with his wife, he would have done everything in his power to win back his wife's affection. He has done nothing, and I have come to the conclusion he doesn't want his wife back and also that at the time of leaving her he intended to break up the marriage permanently, and I am satisfied that his offer in his letter of May 13 was not a genuine offer, and, therefore, the case has been made out by the wife for desertion. In regard to neglect, wife has been able to maintain herself and that summons is dismissed."

That decision is attacked on the ground that it runs counter to a passage in the speech of Lord Macmillan in *Pratt* v. *Pratt* (1) which reads as follows ([1939] 3 All E.R. at p. 438):

> "In fulfilling its duty of determining whether, on the evidence, a case of desertion without cause has been proved, the court ought not, in my opinion, to leave out of account the attitude of mind of the petitioner. If, on the facts, it appears that a petitioning husband has made it plain to his deserting wife that he will not receive her back, or if he has repelled all the advances which she may have made towards a resumption of married life, he cannot complain that she has persisted without cause in her desertion."

As was pointed out by Willmer, J., in *Church* v. *Church* (2) ([1952] 2 All E.R. at p. 443), that passage in the speech of Lord Macmillan is obiter dictum and is, in fact, in conflict with authorities in this country. Willmer, J., says in his judgment (ibid., at p. 443):

> "To my mind, the point under discussion is concluded so far as I am concerned by the decision in *Sifton* v. *Sifton* (3) ([1939] 1 All E.R. 109), which seems to me to be authority for the proposition that once desertion has been started by the fault of the deserting spouse it is no longer necessary for the deserted spouse to show that during the three years preceding the petition he actually wanted the other spouse to come back. It will, I think, be helpful if I read part of the headnote, which seems to me admirably to sum up what was the effect of Henn Collins, J.'s decision in the case. It reads as follows: 'When a spouse is deserted, he or she is in the position that the presumption is in his or her favour and against the deserting spouse. It is not until some offer to return is made by the deserting spouse that the question arises whether it is an offer which ought, in all the circumstances, to be accepted. Notwithstanding that the husband did not expect or really want his wife to come back, it was not incumbent on him to show that he was at all times during the three years next preceding the petition ready and willing to receive her.'"

That being the position, the question arises in the present case: What has the husband done to terminate the state of desertion which he brought about on Feb. 1? He attempted in his evidence to show that since Feb. 1, when he left the house, there had been on his part a supervening animus revertendi, coupled with a bona fide approach to the wife with a view to resuming cohabitation with her. That clearly is what he was setting out to do. The learned stipendiary has found that such efforts as he did make were not bona fide. It is true, and it is perhaps unfortunate, that in his statement of reasons the stipendiary confines himself to the consideration of the final letter written by the husband on May 13. With respect to him I should have thought that, with regard to A the matter of the husband's bona fide efforts to return to the wife, attention could more properly have been directed to (i) the interviews which took place between them, and (ii) the first letter which he wrote to the wife, these being matters which took place before the issue of the summons on Apr. 16. However, the only matter to which the stipendiary refers is the letter written between the two hearings during an adjournment granted with a view to the possibility B of the parties becoming reconciled.

In my opinion, it is impossible, on the evidence before the learned stipendiary, to say that it was not open to him to find that there was desertion originally by the husband on Feb. 1, and that such efforts as were made by him were not genuine efforts to get back to the wife. It is said: " Well, is he not exonerated from making further efforts? He himself says ' I did not go on making further C efforts because she did not want me back ' ", and it is suggested that the present case is really in the same class as *Barnett* v. *Barnett* (4) ([1954] 3 All E.R. 689), a decision of SACHS, J., and *Fishburn* v. *Fishburn* (5) ([1955] 1 All E.R. 230). In my opinion, those cases are in a different category from the present. They were not cases merely of words indicating that the wife had no desire to see her husband again. In both those cases the deserted spouse effectively prevented D the other spouse from approaching her by bolting the door against any advances towards reconciliation, not merely metaphorically, but actually and physically. Those cases go a long way further than anything that can be found in the evidence in the present case, which really amounts to this, that the wife, suffering, and not unjustly, from a deep sense of grievance, says to a husband who apparently is showing no contrition for, and almost no recognition of, what he has done: E " I do not want to see you any more ". In my opinion, that cannot exonerate him from the necessity of doing something to bring an end to the state of desertion which he started. It requires something far more than that to relieve him of the necessity of doing something to bring the state of desertion to an end. That does not mean, however, that for all time, and in all circumstances, the wife is entitled to take up a non possumus attitude towards the husband. If and when F he makes further efforts at reconciliation those efforts must be tested against the background in which they are made, to judge whether they amount to genuine efforts for reconciliation. I do not think that I need say any more with regard to that aspect of the matter. I think that the appeal fails.

LORD MERRIMAN, P.: I agree with the reasons which COLLINGWOOD, J., G has given for dismissing the appeal, and in particular I wish to add my concurrence with his concluding observations. Although as things stand the wife is entitled to succeed on the ground of desertion, it is not, in my opinion, a case in which she is entitled to take up an obdurate attitude and say that it has been decided that in no circumstances whatever is she obliged to resume cohabitation.

Appeal dismissed. H

Solicitors: *Murray Napier & Co.*, agents for *Andrew, Thompson & Partners*, Swansea (for the husband).

[*Reported by* A. T. HOOLAHAN, *Barrister-at-Law.*]

SCHOFIELD *v.* JONES.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Ormerod and Barry, JJ.), October 20, 1955.]

Licensing—Offences—Supply of liquor on licensed premises after permitted hours—Staff practice—No payment by staff—Whether supply to private friends of licensee—Licensing Act, 1953 (1 *&* 2 *Eliz.* 2 *c.* 46), *s.* 100 (2) (c).

The Licensing Act, 1953, s. 100 (1), which prohibits the sale and consumption of liquor except during permitted hours, does not, by s. 100 (2) (c), prohibit or restrict " the supply of intoxicating liquor for consumption on licensed premises to any private friends of the holder of the licence bona fide entertained by him at his own expense . . . "

The appellant, the licensee of an inn owned by a brewery company, supplied each member of his staff with two drinks on Saturday nights during non-working hours and during non-permitted hours. The staff did not pay for the drinks, one being debited to the brewery company and the other being paid for by the appellant. The only qualification required to receive the drinks was to have been a member of the staff on the particular night. The appellant was convicted of supplying intoxicating liquor in licensed premises out of permitted hours, contrary to s. 100 (1) (a) of the Act of 1953. On appeal,

Held: the appellant was not supplying intoxicating liquor to " private friends " within the meaning of the Licensing Act, 1953, s. 100 (2) (c), since the drinks which he gave to the staff were entirely a business transaction and one of the methods by which he ran his house, nor was the appellant, in supplying the drink debited to the owners, entertaining at his own expense; accordingly the appeal failed.

Dictum of HUMPHREYS, J., in *Jones* v. *Cockcroft* ([1945] 2 All E.R. at p. 335) disapproved.

Appeal dismissed.

[For the Licensing Act, 1953, s. 100, see 33 HALSBURY'S STATUTES (2nd Edn.) 231.]

Cases referred to:

(1) *Jones* v. *Cockcroft*, [1945] 2 All E.R. 333; 30 Digest (Repl.) 79, *609*.
(2) *Parkinson* v. *Barnes* (1947), 177 L.T. 520; 30 Digest (Repl.) 79, *610*.

Case Stated.

This was a Case Stated by the stipendiary magistrate for the city of Manchester in respect of his adjudication as a magistrates' court on fifteen informations preferred on Feb. 9, 1955, by the respondent, Alan Jones, against the appellant, Harold Shaw Schofield, each charging that on Jan. 9, 1955, outside permitted hours, he supplied to one of fifteen persons in licensed premises known as Yew Tree Inn, Wythenshawe, intoxicating liquor to be consumed on the premises, contrary to the Licensing Act, 1953, s. 100 (1) (a). The informations were heard on Feb. 23, 1955, when the following facts were found. The appellant is, and was at all material times, the licensee of the Yew Tree Inn, Wythenshawe, which was owned by a brewery company. The fifteen persons named in the informations as being supplied with intoxicating liquor were all members of the staff of the inn and were all employed and paid by the brewery company, though the appellant engaged the staff. Shortly before midnight on Jan. 8, 1955, two groups of police officers took observations on the inn and at 12.10 a.m. on Jan. 9, 1955, were admitted by the appellant, when they went straight to the " Refreshment Room " of the inn. At the time of their entry there, the fifteen members of the staff were seated in two groups around two tables and each had in front of him or her a partly consumed glass of intoxicating liquor. The members of the staff had been supplied with, and had partly consumed, intoxicating liquor during non-permitted hours and during non-working hours. No intoxicating liquor had been sold to the members of the staff during non-permitted hours. On the Saturday night, Jan. 8, 1955, some twelve hundred customers were served in the inn, and by the time all glasses had been washed and put away and the premises generally made tidy, the time would be at least 11.30 p.m. and even later. Each night of the week when the premises had been tidied up, each member of the staff was provided with one drink which was debited to the brewery company and on Saturday nights Mrs. Schofield provided the staff with pies and the appellant provided them with a second drink at his own expense. The appellant did not allow the staff to drink or smoke whilst on duty, and this period included the time taken in washing and tidying up after closing time. Each member of the staff was given the one drink (or two drinks on Saturday night) if desired irrespective of the capacity in which he or she was employed by the brewery company. The only qualification required to receive the drink, or drinks, was to have been a member of the staff on the particular night. The first drink was supplied by the appellant following a general practice, and because he felt it would be difficult to get staff if he did not do so. The staff expected it as an additional reward for their services, and because of the nature of their employment. The second drink was supplied by the appellant, because on Saturdays the staff worked very hard, and were a long time without food and drink. There was no evidence of any private friendship in the ordinary sense existing between the appellant and any of the fifteen members of the staff.

It was contended on behalf of the appellant that the supply of intoxicating liquor in the circumstances was permitted by the Licensing Act, 1953, s. 100 (2) (c), in that the supply of intoxicating liquor was to private friends of the holder of the licence bona fide entertained by him at his own expense, and that the sub-section aimed at customers and strangers. The staff were his private friends within the meaning of the sub-section. It was contended on behalf of the respondent that the staff were not private friends of the appellant, and that s. 100 (2) (c) was not available to him.

The stipendiary magistrate convicted the appellant who now appealed.

Percy Lamb, Q.C., and *R. H. Mais* for the appellant.
W. G. Morris for the respondent.

LORD GODDARD, C.J.: This is a Case Stated by the learned stipendiary magistrate for the City of Manchester, before whom the appellant was charged that, being the licensee of certain licensed premises, he supplied intoxicating liquor after permitted hours. The facts found by the magistrate were these: These are evidently large licensed premises, and there is considerable staff, and, whether in accordance with a local custom or not, after closing hours the staff stay on and tidy up, and the licensee gives them a drink. He does not pay for it himself, he debits it to the owners of the house because he is only a manager. The manager engages the staff, the owners pay them and the owners are debited with this drink which is given to the staff. Perhaps I had also better mention that, on Saturday nights, the manager himself stands a round of drinks, but that is because they have been on duty a long time. The appellant, apparently very frankly, said in his evidence that

> "The first drink was supplied by the appellant following a general practice and because he felt it would be difficult to get staff if he did not do so. The staff expected it as an additional reward for their services and because of the nature of their employment."

On that, the learned magistrate's opinion was that

> "the drinks given to the staff were entirely a business transaction as one of the methods by which the [appellant] ran his house."

A I entirely agree with him. He is not entertaining them as private friends; he is giving them a drink as servants because, if he did not, he would not be able to get the staff, and they expected it as part of their remuneration. Therefore, as it seems to me, it cannot come within s. 100 (2) (c) of the Licensing Act, 1953, which enables a licensee to supply intoxicating liquor to

> B "any private friends of the holder of the licence bona fide entertained by him at his own expense."

If he were giving a Christmas party to his staff, that might be a different matter. There he is giving entertainment, but one cannot say that this is an entertainment of private friends. It is giving the staff something which they expect and something which, if he did not give it to them, would mean that he would not be able C to get the staff, and that does not seem to be entertainment of private friends. There is no evidence that they were friends, they were simply staff, though I do not think one should be too acute to find the degree of friendship or acquaintanceship between the parties in any case in which a man is giving a little entertainment to somebody. For instance, he might find somebody who had been in the army with him and whom he had not seen for years, and he could D easily say: "Come into my room and I will give you a drink". That would be the entertainment of a private friend, if he paid for the drink.

It seems to me that the magistrate was quite right in finding that this was not the entertainment of private friends; but he does say—

> "the fact that drinks were debited to the brewery company did not prevent them being supplied at the expense of the appellant."

E I am afraid I cannot agree with that. It may be he founded himself on *Jones* v. *Cockcroft* (1) where HUMPHREYS, J., did say ([1945] 2 All E.R. at p. 335):

> "I do not think the fact that the landlord said here: 'As a matter of fact, I shall put down those drinks to the owners of the house afterwards', means that it was not at his own expense. The words in the section 'at his F own expense' are probably merely to emphasise that he must be the person who pays, not the people who get the drink."

The section, with all respect to HUMPHREYS, J., for whose opinion on a matter of this sort I have the greatest regard, says that private friends must be entertained at his own expense. If the expense is falling on somebody else, it seems to me that it clearly does not fall on the licensee—it is not at the licensee's G expense. The passage I have read from the judgment of HUMPHREYS, J., is only a dictum, and I cannot agree with it, and although I did not expressly dissent from it in the later case to which counsel for the appellant called our attention (*Parkinson* v. *Barnes* (2) (1947), 177 L.T. 520), I do not think it can be said I approved it. I did quote it and pointed out that it did not arise in the particular case. It does arise in this case, and I say quite frankly I do not agree H with that dictum in *Jones* v. *Cockcroft* (1). If the expense fell on the owners, it does not seem to me that the case is within sub-s. (2) (c). I mention that because there were in this case two drinks, one of which was at the expense of the licensee, and he cannot bring that within the paragraph because that was not the entertainment of private friends; it was given as part of the remuneration of the staff.

I For these reasons, I think the magistrate came to a right decision, though on one point I differ from him, and the appeal fails.

ORMEROD, J.: I agree, and for the same reasons. In the findings of the magistrate he finds

> "There was no evidence of any private friendship in the ordinary sense existing between the appellant and any of the fifteen members of the staff."

Counsel for the appellant submits that the stipendiary magistrate was in error in that he did not define, or attempt to define, what was meant by " private friendship " in s. 100 (2) (c) of the Licensing Act, 1953. It is not for this court on this occasion to attempt to define what is meant by " private friendship ", and certainly I would not attempt to do so in these circumstances. But the stipendiary magistrate has found that each of the staff was given a drink on this night irrespective of the capacity in which he or she was employed by the brewery company. It is also found that the only qualification required to receive the drink was to have been a member of the staff on the particular night. That, in addition to the other findings that the whole object of this entertainment or hospitality was to enable him to keep his staff, I think makes it quite clear that, whatever should be the definition of " private friendship ", the facts of this case do not bring this particular appellant within it. In those circumstances, I agree that this appeal fails.

BARRY, J.: I agree on both the grounds stated by my Lords, and do not think it is necessary to add anything to what they have said.

Appeal dismissed.

Solicitors: *Meredith Hardy & Hutchison*, agents for *Bullock, Worthington & Jackson*, Manchester (for the appellant); *Sharpe, Pritchard & Co.*, agents for *Town clerk*, Manchester (for the respondent).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

ATKINSON *v.* BETTISON.

[COURT OF APPEAL (Denning, Hodson and Morris, L.JJ.), October 13, 1955.]

Landlord and Tenant—New tenancy—Business premises—Opposition by landlord—Proposed reconstruction of " substantial part of premises "—Primary object use for landlord's own business—Finding that works not such reconstruction—Landlord and Tenant Act, 1954 (2 & 3 *Eliz.* 2 *c.* 56), *s.* 30 (1) (*f*).

A landlord purchased the reversion of a lease of a shop, a building on three floors, and two years later, the tenancy being near its end, the tenant applied to the county court for the grant of a new tenancy under s. 24 (1) of the Landlord and Tenant Act, 1954. Wishing to use the shop for his own jeweller's business, and to put in a new arcaded shop front and to take down a wall at the back for the purpose, the landlord opposed the application under s. 30 (1) (f)* of the Act on the ground that he intended to reconstruct a substantial part of the premises and that he could not reasonably do so without obtaining possession of them. The county court judge found that the work proposed was not the reconstruction of a substantial part of the premises and granted the application for a new tenancy. On appeal,

Held: the landlord's opposition to the grant of a new tenancy failed for two reasons, viz.—

(i) because the landlord's primary purpose was not to reconstruct a substantial part of the premises but to use them for his own business (*J. W. Smart* (*Modern Shoe Repairs*), *Ltd.* v. *Hinckley & Leicestershire Building Society* ([1952] 2 All E.R. 846) applied), and

(ii) because there was evidence on which the county court judge could and did find that the proposed work did not constitute the reconstruction of a substantial part of the premises, which was a question of degree and so of fact, and the court could not, therefore, interfere with his finding.

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* The terms of the sub-section are printed at p. 342, letter B, post.

Palser v. *Grinling* ([1948] 1 All E.R. 1) applied.

Appeal dismissed.

[**Editorial Note.** The right of the landlord to oppose the application on the ground that he required the premises for his own business under s. 30 (1) (g) of the Act of 1954 was excluded by s. 30 (2) and the fact that the landlord's interest in the premises had been created within five years of the termination of the lease. HODSON, L.J., intimates that in this class of case the onus is on the landlord, when he is opposing the grant of a new tenancy, to show that a " substantial " part of the premises is to be reconstructed so as to bring the case within s. 30 (1) (f) of the Landlord and Tenant Act, 1954; see p. 343, letter H, post. The principle that the onus of proof is on the landlord extends, it seems, to all grounds of opposition by a landlord under s. 30, since s. 31 (1) of the Act of 1954 provides that the court shall not make the order if the landlord establishes any of those grounds to the satisfaction of the court.

For the Landlord and Tenant Act, 1954, s. 30 (1), see 34 HALSBURY'S STATUTES (2nd Edn.) 414.]

Cases referred to:

(1) *Smart (J. W.) (Modern Shoe Repairs), Ltd.* v. *Hinckley & Leicestershire Building Society*, [1952] 2 All E.R. 846; 3rd Digest Supp.

(2) *Palser* v. *Grinling, Property Holding Co., Ltd.* v. *Mischeff*, [1948] 1 All E.R. 1; [1948] A.C. 291; [1948] L.J.R. 600; 31 Digest (Repl.) 651, *7541*.

Appeal.

The tenant was the occupier of a shop at 21 West Gate, Mansfield, in the county of Nottingham, under an assignment of a seven-year lease expiring on Sept. 29, 1953, and an order of Mansfield County Court extending the tenancy for a term of one year from that date, the tenancy being further continued for one year from Sept. 29, 1954, by virtue of s. 11 of the Leasehold Property (Temporary Provisions) Act, 1951, and para. 11 of Sch. 9 to the Landlord and Tenant Act, 1954. On Mar. 28, 1955, the tenant applied to the Mansfield County Court for the grant of a new tenancy under Part 2 of the Landlord and Tenant Act, 1954. The landlord, who had purchased the shop on Mar. 31, 1953, opposed the application on the ground that, on the termination of the current tenancy, he intended to reconstruct the premises or a substantial part of them. On June 28, 1955, His Honour JUDGE BACKHOUSE found that the works proposed did not constitute a reconstruction of a substantial part of the premises under s. 30 (1) (f) of the Landlord and Tenant Act, 1954, and made an order granting the tenant a new lease for seven years from July 1, 1955, at a yearly rent of £375. The landlord appealed.

W. A. Sime for the landlord.

J. A. Plowman, Q.C., and *A. R. M. Ellis* for the tenant.

DENNING, L.J.: Mr. Atkinson is the tenant of a grocer's shop in Mansfield. Two years ago the lease of his shop was bought over his head by Mr. Bettison, the present landlord. The lease has now come to an end, and under the Landlord and Tenant Act, 1954*, the tenant is entitled to an extension of it unless the landlord can bring himself within one of the grounds specified in the Act. The ground with which we are here concerned is the ground that the landlord intends to reconstruct a substantial part of the premises. That is provided for in s. 30 (1) (f) of the Act.

In this connection para. (g) of sub-s. (1) is important. It provides that the landlord can also resist the grant of a new lease if he intends to occupy the premises himself for the purpose of a business to be carried on by him. In order to bring himself within that paragraph, he must have owned the premises for the last five years*; the Act does not allow a person to buy a house just when the lease is coming to an end and then get possession on the ground that he requires it for his own purposes. The present landlord is a jeweller, and he wants to get possession of the shop to occupy it himself for his own business; but he cannot rely on para. (g) because he has not been the owner for five years. He can only rely on para. (f), which provides:

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* See ss. 24 (1) (b), 29 (1) of the Landlord and Tenant Act, 1954.

> "that on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding."

The landlord says he wants to do the following work. He wants to take out the existing shop front and to put in a new shop front with a kind of arcade entrance which is suitable for a jeweller's shop, a long entrance flanked with windows where the public can walk in for some fifteen feet before they come to the actual shop door. In addition he proposes to take down a wall at the back. By this work the landlord says that he intends to reconstruct a substantial part of the premises. He says that the ground floor is a substantial part of the premises and that the work proposed is a reconstruction of the ground floor.

On the evidence and on the findings of the learned county court judge, however, there is no doubt that the real purpose of the landlord is to get possession in order to carry on a business of his own. The proposed work is a secondary or ancillary matter. By the decision of this court in *J. W. Smart (Modern Shoe Repairs), Ltd.* v. *Hinckley & Leicestershire Building Society* (1) ([1952] 2 All E.R. 846)—a decision on the Leasehold Property (Temporary Provisions) Act, 1951, but on very similar provisions—it was held that, in order to come within a similar subsection, the landlord's *primary purpose* must be to reconstruct the premises or a substantial part thereof. In the present case that is not his primary purpose. His primary purpose is to get possession for his own business. He cannot get the premises on that ground because he has not owned the premises for five years. He should not be allowed to circumvent that provision by putting forward a secondary purpose as though it were the main purpose.

Assuming that the landlord was able to overcome that difficulty, the next question is whether the proposed work is the reconstruction of a substantial part of the premises. The question what is " substantial " is one of degree, and therefore of fact. If a judge went wrong in that he came to a conclusion which was clearly wrong or to which no reasonable man could come, then this court would interfere. But when it is a matter on which two minds can quite reasonably come to differing conclusions, then it is essentially a question for the county court judge. This seems to me to be such a case. It is a building on three floors. Nothing is proposed to be done with the first and second floors. All that is intended is the fitting of a new shop front, and a new floor. The learned judge said that, if the construction of the Act advanced by counsel for the landlord was right, any landlord could buy premises, and by merely altering the shop front could get the tenant out and go in himself. That shows what the learned judge felt about the case. He thought that this was not the reconstruction of a " substantial part " of the premises. I think that was a decision to which he could properly come, and that this court cannot and should not interfere with his view on the matter. The appeal must be dismissed.

HODSON, L.J.: I agree. I think that this case is governed in principle by the decision in *J. W. Smart (Modern Shoe Repairs), Ltd.* v. *Hinckley & Leicestershire Building Society* (1). Section 12 (3) of the Leasehold Property (Temporary

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* See s. 30 (2) of the Landlord and Tenant Act, 1954.

A Provisions) Act, 1951, which was under consideration in that case, provided:

> "The court shall not order the grant of a new tenancy if it is satisfied . . . (c) that the landlord reasonably requires possession in order that the premises the subject of the expiring tenancy, or a substantial part of those premises, may be demolished or reconstructed."

B In this case by s. 30 (1) of the Landlord and Tenant Act, 1954, the grounds on which a landlord may oppose an application under s. 24 (1) of the Act include, among other grounds, the following ground (provided by s. 30 (1) (f)):

> "that on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding." C

What was said in the earlier case—which I think applies in principle to this case—was concisely put by my Lord ([1952] 2 All E.R. at p. 850):

> "In order that the landlord should bring himself within para. (c), demolition or reconstruction must be the immediate and primary purpose. That is not so here." D

Those words apply to this case on the admitted facts. There is no question of any sharp practice on the part of the landlord: he has been perfectly frank. He has said that he wants occupation of these premises for his own purposes. He is unable to avail himself of the provision contained in para. (g) of s. 30 (1)
E of the Act of 1954, enabling him to obtain possession if he intends to occupy for the purposes of his own business, because of the short length of time since he purchased the property. As SIR RAYMOND EVERSHED, M.R., pointed out in *Smart's* case (1) (ibid., at p. 848), the emphasis under the sub-section which we are now considering has to be put on the premises themselves rather than on the occupation or use to which they are going to be put. Further, he said, repeating
F what the county court judge had said in that case (ibid., at p. 849):

> ". . . this work of adaptation with its structural components is, after all, but ancillary to the desire of the landlords themselves to occupy the shop and to make that occupation more commodious . . ."

The Master of the Rolls then repeated a large part of the judgment of the county
G court judge with approval, that judgment being to the same effect.

So far as the second point is concerned I think that the tenant is right on that also, because this appeal raises the question—on which the county court judge did, I think, hope to get some guidance—how the word "substantial" was to be approached. I am afraid that nothing more can be said by this court than was said by the House of Lords in *Palser* v. *Grinling* (2) ([1948] 1 All E.R. 1), a Rent
H Restrictions Act case, in which the question was whether a substantial portion of the rent was attributable to furniture. In that class of case, as in this, the onus is on the landlord, and VISCOUNT SIMON'S words are applicable. He said (ibid., at p. 11):

> "One of the primary meanings of the word is equivalent to considerable, solid, or big. It is in this sense that we speak of a substantial fortune, a
> I substantial meal, a substantial man, a substantial argument or ground of defence. Applying the word in this sense, it must be left to the discretion of the judge of fact to decide as best he can according to the circumstances in each case, the onus being on the landlord."

I think that the learned county court judge here arrived at a conclusion on the evidence at which he was entitled to arrive, that this was not a reconstruction of the premises comprised in the building or of a substantial part of those premises, nor was it the carrying out of a substantial work of construction. It is not one of those cases where this court can say that there is no evidence on which he could have arrived at such a conclusion. For these reasons, as well as for those which my Lord has expressed, I think that this appeal fails.

MORRIS, L.J.: I also agree. The learned county court judge in his judgment commended the frankness of the landlord, who made it quite clear what his real purpose and intention was. He summarised the matter in these words:

> " He is perfectly frank about it. He says: ' I carry on business as a jeweller, my lease is up in just over a year's time, and I may have to come out. Even if I stop I would like the premises to carry on business there as well. I bought the premises in March, 1953, and I cannot apply for possession for my own occupation because I have not been owner for five years and I would not want to do the proposed reconstruction for [the tenant]'."

Those facts admit of no doubt. The landlord wants these premises for himself to carry on his own business, and no reconstruction is in contemplation if there is a continuation by the tenant of his occupation. It seems to me that the reasoning in *J. W. Smart (Modern Shoe Repairs), Ltd.* v. *Hinckley & Leicestershire Building Society* (1) applies to this case. The learned Master of the Rolls in his judgment expressly affirmed and adopted the wording of the learned county court judge in that case when he said ([1952] 2 All E.R. at p. 849):

> " I think that in the present case the primary and real object for which the landlords require possession of these premises is for occupation by Cockshaw [the agent], and that the reconstruction contemplated by them is only ancillary to that occupation, and is, therefore, not the real reason for requiring possession."

In the present case, the landlord's real reason for wanting possession, and his real intention and purpose would bring him within s. 30 (1) (g) were it possible for him to avail himself of that enactment. His real intention is to occupy the building for the purposes of a business to be carried on by him therein, and the reconstruction contemplated is only ancillary to that desired occupation.

On the other points taken by the tenant, I am also in agreement with the judgments which have been delivered. The matters are largely matters of degree and of fact. I can see nothing in the judgment now under review which shows any wrong approach or wrong appreciation of the evidence or assessment of it, or any omission to consider any evidence. I see no reason for disturbing the conclusion reached by the learned judge.

Appeal dismissed.

Solicitors: *Gibson & Weldon*, agents for *P. A. Foster*, Mansfield (for the landlord); *Taylor, Jelf & Co.*, agents for *Shacklock, Bosworth & Hooton*, Mansfield (for the tenant).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

GIBBONS *v.* KAHL.

[Queen's Bench Division (Lord Goddard, C.J., Ormerod and Barry, JJ.), October 20, 1955.]

Street Traffic—Pedestrian crossing—Uncontrolled crossing—Precedence to foot passenger—Failure of motorist to stop before reaching crossing—Interrupted view of crossing—Liability of motorist—Pedestrian Crossings Regulations, 1954 (*S.I.* 1954 *No.* 370), *reg.* 4.

The driver of a trolley bus approaching an uncontrolled pedestrian crossing saw three children step on to the crossing when he was about twenty to twenty-five yards from the crossing. He immediately gave a slow-down hand signal, gradually braked to a stop close to the kerb and waved to the children to cross the road on the crossing. The respondent, who was driving his car in the same direction as the trolley bus, saw the trolley bus driver's signal and approached the crossing at a speed which was not fast. He passed the trolley bus, which was on the side of his vehicle nearest to the kerb, did not see the children until they passed in front of the trolley bus, and knocked down one of the children. He was charged with failing to accord precedence to a foot passenger who was on the carriageway within the limits of an uncontrolled crossing before the vehicle had come on to the carriageway within those limits, contrary to the Pedestrian Crossings Regulations, 1954, reg. 4. On appeal from the dismissal of this charge by the magistrates,

Held: although the respondent was not guilty of negligence as he approached the crossing, yet he had committed an offence under reg. 4, since it was the duty of any motorist approaching a pedestrian crossing to drive in such a way that he could stop his vehicle before the crossing, if anyone were on the crossing.

Leicester v. *Pearson* ([1952] 2 All E.R. 71) distinguished.

Appeal allowed.

[**Editorial Note.** In the present case there were two charges, the first of which was a charge of driving without due care and attention. The court held that the motorist did not drive without due care and attention, and upheld the dismissal of this charge by the magistrates. The fact that a motorist offends against reg. 4 of the Pedestrian Crossings Regulations, 1954, does not necessarily involve, therefore, the corollary that he must have been driving negligently (see particularly p. 347, letter F, post). *Leicester* v. *Pearson* ([1952] 2 All E.R. 71) should not be regarded as authority that negligence, in the sense of negligent driving, is essential to an offence against the regulation. The duty imposed on the motorist by that regulation is stated above, and it seems that *Leicester* v. *Pearson* is not overruled and remains an authority that the duty is not an absolute duty.]

Case referred to:

(1) *Leicester* v. *Pearson*, [1952] 2 All E.R. 71; [1952] 2 Q.B. 668; 116 J.P. 407; 3rd Digest Supp.

Case Stated.

This was a Case Stated by the justices for the county of Middlesex in respect of their adjudication as a magistrates' court sitting at Tottenham on Apr. 21, 1955. The appellant, Donald Gibbons, preferred two informations on Mar. 9, 1955, against the respondent, Adolph Max Kahl, charging that on Jan. 30, 1955, at Bruce Grove, Tottenham, Middlesex (i) he drove a motor vehicle on the road without due care and attention, contrary to the Road Traffic Act, 1930, s. 12 (1), and (ii) he being the driver of a vehicle failed to accord precedence to a foot passenger who was on the carriageway within the limits of an uncontrolled crossing before the vehicle, or any part thereof, had come on to the carriageway within those limits, contrary to the Pedestrian Crossings Regulations, 1954, reg. 4 and reg. 9. The following facts were found. At about 1.0 p.m. on Sunday, Jan. 30, 1955, a trolley bus driver was driving his bus at about twenty miles per hour northwards along Bruce Grove on his nearside towards Wood Green. When between twenty and twenty-five yards from a pedestrian crossing (which was a correctly marked uncontrolled crossing with flashing beacons within the terms of the Pedestrian Crossings Regulations, 1954), three children stepped on to the crossing. The trolley bus driver immediately gave a slow-down hand signal, gradually braked to a stop in front of the crossing, and waved to the three children to cross the road on the crossing. The three children, aged about ten, five and four years, had stopped but moved forward over the crossing sensibly when waved across. When the children had passed the front of the trolley bus (which was then stationary close to the nearside kerb), the respondent drove his Austin motor car towards Wood Green past the trolley bus at a speed which was not fast and on to the crossing and knocked down one of the children who were about twenty-two feet inside the crossing from the respondent's nearside pavement. The width of Bruce Grove at this point was about thirty-three feet, and the offside of the trolley bus was twelve feet from the nearside kerb. Shortly after the accident, the respondent's car (which had not been moved) was found partly over the crossing with its front two feet from the far side of the crossing, and its nearside seventeen and a half feet, from the nearside kerb. At the material time the road was dry and the weather was good. Two tyre marks were found from the rear of the respondent's car stretching back along Bruce Grove for a distance of eighteen and a half feet. At the time the respondent said to the appellant:

> " I was travelling in the same direction as the bus—he put his hand out and I stopped immediately and the right hand bumper caught them."

The respondent knew he was approaching a crossing, saw the trolley bus driver's hand signal and was able to see everything in front of him clearly, but did not see the children on the crossing until they had passed in front of the trolley bus.

It was contended on behalf of the appellant that the respondent could not have been driving with due care and attention or he would not have had to stop immediately as he claimed at the time, and would have been ready and able to draw up at the crossing. As the children, walking sensibly, had gone at least ten feet past the offside of the trolley bus (that is, twenty-two feet from the pavement) before being hit by his offside bumper, he had ample warning and time in which to apply his brakes if he had been keeping a proper look-out. He was not keeping a proper look-out or he would have seen, or heeded, the trolley bus driver's hand signal given at least sixty feet before the crossing. He had failed to accord precedence to a foot passenger within the meaning of the Pedestrian Crossings Regulations, 1954. It was contended on behalf of the respondent that he had acted with all caution and had braked as soon as he saw the trolley bus driver's hand signal, which was not before he was the length of the bus from the crossing, and, therefore, he had driven with due care and attention. He had not been negligent in his driving in any way and was, accordingly, not guilty of both charges.

The justices dismissed the informations and the appellant now appealed.

The court dismissed the appeal on the charge of driving without due care and attention on the ground that the justices had not been satisfied that the respondent had driven without due care and attention, that the question was one of fact for them and that the court would not interfere with their finding. The case is reported for the judgments of the court on the second charge.

Paul Wrightson for the appellant.

D. Fairbairn for the respondent.

A **LORD GODDARD, C.J.:** The second offence, the pedestrian crossing offence, can be dealt with quite shortly because counsel has agreed that the justices' decision on that cannot be upheld. The offence was failing to give precedence to a foot passenger on one of these crossings. Regulation 4 of the Pedestrian Crossings Regulations, 1954, provides:

> B "Every foot passenger on the carriageway within the limits of an uncontrolled crossing shall have precedence within those limits over any vehicle and the driver of the vehicle shall accord such precedence to the foot passenger, if the foot passenger is on the carriageway within those limits before the vehicle or any part thereof had come on to the carriageway within those limits."

C What happened here was that the respondent failed to pull up in time so that, in fact, he did not give precedence to the people who were on the crossing at the time. If an omnibus or other vehicle is stationary at the crossing and if a person driving another motor vehicle comes up on the offside of the stationary vehicle, it is no answer for the driver of the moving vehicle to say that he did not know that people were on the crossing. He must approach the crossing so that he can D give precedence to people if they are there.

Leicester v. *Pearson* (1) ([1952] 2 All E.R. 71), on which it may be the justices decided this case, was a very special case in which we do not know the full facts. It was a dark night, it was raining, and the road was in bad order. The metropolitan magistrate found that the accident took place because the driver of the vehicle had not seen the pedestrian who came on the crossing, and that he was E not guilty of any negligence in not seeing him. We must suppose, especially as it was a learned metropolitan magistrate, that there were very peculiar facts. The judgments run entirely on the finding that there was no negligence to be attributed to the driver at all; and from that it followed that we could not interfere with the finding.

Here, the respondent, as he approached the crossing, was guilty of no negligence F at all, but when he got to the crossing I think he became under a duty to stop because, as I say, this bus had stopped and, therefore, he should have known, or realised, that pedestrians were on the crossing. I think probably he did realise because he was trying to reduce the pace of his car and came up very slowly, but with regard to pedestrian crossings it is the duty of motorists to be able to stop before they get there unless they can see there is nobody on the G crossing. It seems to me that it would destroy the usefulness of the Pedestrian Crossings Regulations, 1954, if a driver of a vehicle could say that he did not see the people there and could not see them because a stationary vehicle was on his left hand. To that the answer is that, if a vehicle is stationary on the left of the driver of the moving vehicle and he cannot see, he ought to assume that there are people there and that that is the reason the omnibus or the vehicle on the H nearside has stopped. It is for the driver of the moving vehicle to make certain that people are not on the pedestrian crossing. It does not follow, however, and I should be sorry to have to lay it down, that every time a man may commit a breach of the Pedestrian Crossings Regulations, 1954, he necessarily offends against the section for careless driving.

I For these reasons the case must be sent back to the justices on the second information with an intimation that an offence was proved.

ORMEROD, J.: I agree. I agree that, so far as the second offence is concerned, this case should be sent back with the necessary directions to convict. It is the duty of any motorist approaching a pedestrian crossing to approach it in such a way that he can deal with the situation on the crossing when he gets there. He must be in a position, and driving at such a speed, that if anybody is on the crossing he is in a position to stop. If he cannot see by reason of other traffic on the road whether there is anybody on the crossing or not, it is his duty to drive in such a way that he can stop if, in fact, there is somebody whose position on the crossing is masked by other traffic on his nearside. In those circumstances, I think it is clear that the respondent offended; he was not in a position, and did not attempt, to stop quickly enough and was not in a position to stop when he came up to the pedestrian crossing, with the result that this unfortunate accident occurred.

BARRY, J.: I agree. *Leicester* v. *Pearson* (1) depends entirely on the finding that there was no negligence on the part of the motorist. From that, I think, it follows that he was not in breach of any duty imposed by the regulation. Here, for the reasons given by my Lords, I am satisfied that this motorist ought to have anticipated that pedestrians might be emerging in front of this bus; and, indeed, the fact that the bus had slowed down and stopped before the crossing, gave him ample opportunity for taking that view. I am satisfied that in those circumstances there was an offence under the Pedestrian Crossings Regulations, 1954.

Appeal as regards the second offence allowed.

Solicitors: *Solicitor, Metropolitan Police* (for the appellant); *Avery, Son & Fairbairn* (for the respondent).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

UPSONS, LTD. *v.* E. ROBINS, LTD.

[COURT OF APPEAL (Denning, Hodson and Morris, L.JJ.), October 18, 1955.]

Landlord and Tenant—New tenancy—Length of term—Matters to be considered—Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2 *c.* 56), *s.* 33.

The landlord, a small limited company having only one shop, became landlord by purchase of shop premises on Nov. 30, 1950. It opposed the grant of a new lease under the Landlord and Tenant Act, 1954, to the tenant, a limited company owning two hundred and fifty shops, which had been in occupation of the shop since 1927. The opposition was on the ground, among others, under s. 30 (1) (g) of the Act of 1954, that the landlord desired to occupy the premises for its own purposes. This argument was withdrawn at the hearing because the landlord had not been the landlord for more than five years and by virtue of s. 30 (2) the ground of opposition given by s. 30 (1) (g) of the Act of 1954 did not apply. All other grounds of the landlord's opposition to the granting of a new lease were also withdrawn. On the question of the duration of the lease to be granted under the Act,

Held: the court was entitled to consider under s. 33 of the Act of 1954* " all the circumstances ", which included, in this case, the fact that the landlord wished to occupy the premises itself (notwithstanding that the granting of the lease could not be opposed successfully on that ground under s. 30 (1) (g)), the question of greater hardship, the fact that there was a risk that the landlord might have to leave the premises which it at present occupied, and the facts that the tenant was a company owning two hundred and fifty shops while the landlord owned only one and that the tenant had occupied the shop since 1927.

Appeal dismissed.

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* The material provisions of s. 33 are printed at p. 350, letter H, post.

[For the Landlord and Tenant Act, 1954, s. 33, see 34 HALSBURY'S STATUTES (2nd Edn.) 417.]

Appeal.

This was an appeal by the tenant of a shop against an order of His Honour JUDGE BROWN, Southport County Court, dated July 5, 1955, in so far as the new lease ordered to be granted to the tenant under the provisions of the Landlord and Tenant Act, 1954, s. 29 (1), was for the period of one year only. The tenant asked by the notice of appeal that the order be varied by the substitution of seven years for the period of one year or alternatively that the case be sent back to Southport County Court with such directions as the court might deem appropriate.

L. A. Blundell for the tenant.
H. S. L. Rigg for the landlord.

DENNING, L.J.: Messrs. Upsons, Ltd., own a large number of shops where they sell Dolcis shoes. One of these shops is at Nos. 513/515 Lord Street, Southport. The company has been there since 1927, nearly thirty years. Its contractual lease came to an end on July 1, 1954. The lease was extended by the court for a year under the Leasehold Property (Temporary Provisions) Act, 1951, so it was due to come to an end on July 1, 1955. It was then automatically extended by the Landlord and Tenant Act, 1954, for a further period until Sept. 30, 1955, and from that date forward the tenant has a right to a new lease unless the landlord can prove one of the grounds of opposition specified in the Act.

The landlord, Messrs. Robins, Ltd., purchased the premises on Nov. 30, 1950. That company put forward three grounds of opposition to a new lease; first, on the ground that there was alternative accommodation available for the tenant; secondly, on the ground that it intended to reconstruct the premises; and thirdly, on the ground that it intended to occupy them for its own purposes. Those are all permissible grounds under s. 30 (1) of the Act of 1954; but it soon appeared that the landlord could maintain none of them, and all of them were withdrawn at the hearing before the learned county court judge.

The third ground failed because the provision of the Act in favour of a landlord who intends to occupy the premises himself, viz., s. 30 (1) (g), applies only in favour of a landlord who has been landlord for more than five years. This landlord, Messrs. Robins, Ltd., was just two months short of that time, and was thus unable to avail itself of that provision of the Act. When it became clear that the landlord could not resist the grant of a new lease, the only matters for the learned county court judge to determine were the rent and the duration of the new lease. He determined the question of the rent at a figure which is not in dispute; but he decided that the tenant should have only one year's extension, and it is against that decision that the tenant appeals. The tenant says that it should have seven years. The first point taken by counsel for the tenant was that the learned judge ought not to have had regard to the fact that the landlord required the premises for its own purposes. The landlord proved here that it wanted to carry on its business of outfitters on the premises, and it said that there was a risk that it would have to leave its present premises. The landlord asked, therefore, that the term of the lease should be as short as possible. Counsel for the tenant asks us to say that the fact that the landlord wants the premises for its own purposes is an irrelevant consideration, and one which ought not to be taken into account by the learned judge.

I cannot accede to that view. Section 33 of the Act of 1954 provides that the new tenancy

> ". . . shall be such a tenancy as may be determined by the court to be reasonable in all the circumstances, being, if it is a tenancy for a term of

> years certain, a tenancy for a term not exceeding fourteen years, and shall begin on the coming to an end of the current tenancy."

Those words " in all the circumstances " are amply wide enough to cover the present situation. I see no reason for cutting them down by reference to the earlier s. 30 (1) (g) which deals only with rights, and not with matters which come within the discretion of the court.

Counsel referred to s. 31 (2), where a limited extension of the tenancy is in certain circumstances given to the tenant for a definite period, and after that the landlord gets possession. That section, too, deals with rights, and does not affect the scope of s. 33, which says that the court has to consider " all the circumstances ". I think that the learned judge here was entitled to have regard to the fact that the landlord requires the premises for its own purposes.

Counsel then says that the learned judge considered the greater hardship in the case, and that he ought not to do it because (says counsel) that came into the temporary Act of 1951 and does not come in the Act of 1954. In my judgment the words " in all the circumstances " enable the court to consider hardship as well as other circumstances.

Then, says counsel, the learned judge founded himself on the ground that the landlord would have to quit its present premises on Feb. 1, 1957, whereas there was no admissible evidence to that effect. The learned judge did not say that the landlord *would* have to leave its present premises; he said that there was a danger or a real risk that it would have to leave them. There was ample material on which the learned judge could so hold and there was no reason why he should not take that into account.

Counsel then argues that the learned judge was wrong because he took into account the fact that the tenant has a chain of some two hundred and fifty shops, and that the loss of one would be a comparatively small matter for the tenant, whereas the landlord has just one shop, and would suffer much more. I see no reason why the judge should not take that into account.

It seems to me that none of the criticisms is well founded. The learned judge seems to have said to himself: " The landlord bought these premises not quite five years ago. It bought them in order to get possession for its own business purposes. There is a real risk that it may have to leave its own premises. This tenant is a large concern. It has been there, it is true, for a number of years, but it has had one year's extension of the contractual term already. If it has another year I think that is reasonable in all the circumstances ". I see no error in point of law in the learned judge's reasoning. The width of scope of s. 33 is such that he was entitled to take into consideration all the matters which he did, and I would dismiss the appeal.

HODSON, L.J.: I agree with the judgment of the learned county court judge, and with the judgment which my Lord has delivered.

The main ground of appeal was that the learned county court judge had given the wrong interpretation to the Landlord and Tenant Act, 1954, s. 33, which provides:

> " Where on an application . . . the court makes an order for the grant of a new tenancy, the new tenancy shall be such tenancy as may be agreed between the landlord and the tenant, or, in default of such an agreement, shall be such a tenancy as may be determined by the court to be reasonable in all the circumstances, being, if it is a tenancy for a term of years certain, a tenancy for a term not exceeding fourteen years, and shall begin on the coming to an end of the current tenancy."

The argument put before the learned judge and before this court was that he was wrong in taking into account, for the purpose of this section, the desire of the landlord to have the premises for its own occupation in the near future. Counsel argues that the learned judge was wrong because that matter had already been dealt with in an earlier section of the Act (s. 30) under which the landlord was entitled to oppose an application for a new tenancy if he desired the premises for his own occupation, and he was only barred in this case because he had been a landlord for less than five years.

Section 30 of the Act contains a number of grounds on which a landlord is entitled to oppose an application for a new tenancy as of right; and, because the landlord fails (as this landlord did) to establish any right to oppose the new tenancy, it does not seem to me to follow that he is disentitled to rely, in so far as he can, on any of those matters which might be put forward as grounds in order to give the court the circumstances which are to be considered in determining the terms of a tenancy—in particular, as in this case, the duration of the tenancy, because the fact that the landlord desires to occupy the premises itself is obviously a relevant circumstance to be considered. As the learned county court judge put it in his judgment, it would indeed be an anomaly to be avoided (if proper to do so) that a landlord who acquired a reversion for four years and ten months before the date of the termination of the existing tenancy might be kept out of his property for fourteen years, whereas if he had acquired it two months earlier, he would not be out of it at all.

I appreciate the force of the argument based on s. 31 (2), which was really, I think, relied on principally by counsel in support of his main argument, that whereas a landlord who nearly attains his object of achieving a successful opposition under s. 30 (1) (d), (e) and (f) is given some protection by s. 31 (2), yet the landlord who nearly attains his object under s. 30 (1) (g)—e.g., the man who has four years and ten months instead of five years—is not given a similar extended protection under s. 31 (2). But I do not think that reference to that sub-section takes counsel for the tenant any real distance on his road because he is still quite unable to displace the plain meaning of the words of s. 33 which show that all the circumstances of the case are proper to be taken into consideration in determining, amongst other things, the duration of the lease.

I come back to the notice of appeal. The second ground in the notice of appeal is:

> "That the learned judge treated the question of the length of term to be granted as if it were an issue of greater hardship between the applicants and the respondents and thereby erred in point of law."

I do not quite follow that, because the learned judge, in my opinion, was clearly right in considering the question of hardship. Hardship was one of the "circumstances" to be considered. This case emphasised the hardship on the landlord if it did not get the premises—there are already empty flats in the upper floors—as it was at risk of losing its existing premises and had no other shop. Nevertheless, the learned judge did take into account other matters, viz., the matter chiefly relied on by the tenant, that it had been in occupation of this shop in Southport since 1927.

The next point relied on is that the learned judge founded his decision (at any rate in part) as to the period of the new tenancy on the assumption that the landlord would have to quit its present premises on Feb. 1, 1957, whereas there was no evidence, or at any rate no admissible evidence, to that effect. The learned judge did not put it as high as that. He said (and I think rightly said) that there was a risk in the future that the landlord might have to vacate its premises on that date, and there was evidence before him to that effect. It is quite true there was no certainty that it would, and it is quite true, as counsel said, that the landlord's managing director indicated in evidence that he did not mind being turned out if he could get possession of the premises which he now seeks to get on behalf of his company because he prefers the Lord Street site to the old shop. The fact that the landlord expresses that view does not seem to me to make it irrelevant that the landlord might be turned out of his existing shop.

Finally the argument was addressed to us on the footing that the learned judge wrongly took into consideration the fact that the tenant was a large and powerful company with many branches in contrast to the landlord who had only one shop. I am bound to say that I cannot see that that is an irrelevant consideration. My Lord pointed out in the course of the argument that it might well be that the situation might be reversed; and the fact that the applicant for the new lease was a retail company in a small way of business would obviously, I should have thought, be a relevant consideration in determining whether a new lease should be granted, and the duration and the terms of a new lease. Similarly, if that is right, it would seem to me to follow that the argument would work the other way. I cannot say, therefore, that it is an irrelevant consideration that the tenant here is a large organisation, whereas the landlord appears to be relatively small.

I reject, therefore, all the grounds on which this appeal is based, and agree that the appeal should be dismissed.

MORRIS, L.J.: I also agree. If a landlord opposes an application for a new tenancy, and opposes it on the grounds set out in s. 30 of the Act, and if he establishes any of those grounds, then the court must not make an order for the grant of a new tenancy. But the mere fact that a landlord is not able to oppose an application for a new tenancy, does not seem to me to limit the ambit of the words " in all the circumstances " in s. 33 of the Act. A consideration of " all the circumstances " of the case, if it is careful and complete (as it appears to me was the consideration by the learned judge in the present case) may inevitably involve considering how the " circumstances " tell on the fortunes of those concerned.

I do not find in this case that the learned judge has erred in his approach, and I agree that this appeal fails.

Appeal dismissed.

Solicitors: *Waltons & Co.* (for the tenant); *Pritchard, Englefield & Co.*, agents for *W. & R. Hodge & Halsall*, Southport (for the landlord).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

HAWKSLEY *v.* MAY AND OTHERS

[QUEEN'S BENCH DIVISION (Havers, J.), July 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 18, 19, 20, 21, 22, 25, 26, October 5, 6, 1955.]

Joint Tenancy—Severance—Infants jointly entitled—Right to receive income on attaining majority.

Trust and Trustee—Duty of trustee—Duty to inform beneficiary of his benefits under trust instrument—Duty to disclose to beneficiary on demand documents relating to the trust—Duty to pay income and capital without demand by beneficiary.

In exercise of a special power of appointment given to her by a settlement made in 1893, Mrs. M. by her will, appointed property to the plaintiff and C. (without words of severance). In 1930 Mrs. M. died, and the plaintiff and C. (both of whom were then infants) became immediately jointly entitled to the fund appointed to them. In 1934 counsel gave a written opinion to the trustees that the plaintiff and C. took as joint tenants. The plaintiff attained his majority in February, 1939, and C. in February, 1942. The trustees of the settlement did not inform the plaintiff of his rights under the settlement and appointment and no part of the capital or income was paid to him. On Mar. 19, 1942, C. wrote to the solicitor to the trustees of the settlement of 1893: "Thank you for your letter . . . with the particulars of the investments. I should like the dividends to be paid into my account at Martin's Bank, 208 Kensington High Street." In September, 1942, C.'s share of the trust funds was transferred to her.

Held: (i) immediately on his attaining the age of twenty-one years the plaintiff became entitled to receive one-half share of the income as it became payable notwithstanding that the joint tenancy had not, as regards the capital, been severed (see p. 357, letter D, post).

Walmsley v. *Foxhall* (1870) (40 L.J.Ch. 28) followed.

(ii) the joint tenancy was severed by C.'s letter dated Mar. 19, 1942, or, if not then, by the transfer to her of her share in September, 1942 (see p. 357, letter E, post).

(iii) the trustees of the settlement of 1893 were under a duty to inform the plaintiff on his attaining the age of twenty-one that he had an interest in the capital and income of the funds subject to the settlement of 1893 (*Re Lewis*, [1904] 2 Ch. 656 distinguished; dictum of KEKEWICH, J., in *Re Mackay*, [1906] 1 Ch. at p. 32 considered); but there was no duty on the trustees to give the plaintiff legal advice or to inform him of his right to sever the joint tenancy, although they would be bound to disclose on demand any document relating to the trust including the opinion of counsel (see p. 362, letter H, post; and p. 363, letter F, post).

(iv) the trustees were under a duty to pay the income of the plaintiff's share to the plaintiff on his attaining the age of twenty-one years without any demand by him; and also to pay the capital to the plaintiff and C. as joint tenants on C.'s attaining the age of twenty-one years without any demand by them, or, after severance of their respective shares, to each of them without any demand (see p. 364, letter D, post).

Dictum of LINDLEY, L.J., in *Low* v. *Bouverie* ([1891] 3 Ch. at p. 99) applied.

Wroe v. *Seed* (1863) (4 Giff. 425) considered.

[**Editorial Note.** Among the duties of trustees of a settlement are those of obeying lawful directions in the settlement and of paying trust moneys, whether income or capital, to the persons entitled thereto (see, e.g., UNDERHILL ON TRUSTS (10th Edn.), pp. 251, 340). The performance of these duties will normally have the consequence that the beneficiary learns of the existence of beneficial interests in his favour, and his remedy for failure to carry out the duties lies in equity. The present case is exceptional in that the points in relation to trustees' duties arose in an action at law for damages for conspiracy.

In the administration of solvent estates personal representatives are bound to pay legatees of whose existence they know. They are not, however, strictly bound to notify the legatees of the terms (in particular of conditions) of the gifts (*Re Lewis* ([1904] 2 Ch. 656), see p. 362, letter F, post). HAVERS, J., when saying that he is bound by this decision, adds that the doctrine has no attraction for him on the merits. In practice the better course may seem to be that indicated in *Re Mackay* ([1906] 1 Ch. at p. 33, cf. p. 361, letter I, post), to put before the legatee the relevant passage in the will, leaving it to the legatee to take advice if needed.

As to duty of trustees to give accounts and information, see 33 HALSBURY'S LAWS (2nd Edn.) 229, para. 410; and for cases on the subject, see 43 DIGEST 861-863, *3067-3096*.

As to payment by trustees of income and corpus, see 33 HALSBURY'S LAWS (2nd Edn.) 226, para. 408; and for cases on the subject, see 43 DIGEST 854, 855, *3015-3026*.

As to severance of a joint tenancy, see 27 HALSBURY'S LAWS (2nd Edn.) 661-665, paras. 1143-1147; and for cases on the subject, see 38 DIGEST 692, *356*, *358-361*.]

Cases referred to:

(1) *Williams* v. *Hensman*, (1861), 1 John. & H. 546; 30 L.J.Ch. 878; 5 L.T. 203; 70 E.R. 862; 44 Digest 1025, *8832*.
(2) *Walmsley* v. *Foxhall*, (1870), 40 L.J.Ch. 28; 37 Digest 167, *95*.
(3) *Burrows* v. *Walls*, (1855), 5 De G.M. & G. 233; 25 L.T.O.S. 18; 43 E.R. 859; 43 Digest 848, *2961*.
(4) *Brittlebank* v. *Goodwin*, (1868), L.R. 5 Eq. 545; 37 L.J.Ch. 377; 24 Digest 630, *6571*.
(5) *Re Lewis*, [1904] 2 Ch. 656; 73 L.J.Ch. 748; 91 L.T. 242; 44 Digest 476, *2947*.
(6) *Chauncy* v. *Graydon*, (1743), 2 Atk. 616; 26 E.R. 768; 44 Digest 475, *2937*.
(7) *Re Mackay*, [1906] 1 Ch. 25; 75 L.J.Ch. 47; 93 L.T. 694; 44 Digest 476, *2948*.
(8) *Low* v. *Bouverie*, [1891] 3 Ch. 82; 60 L.J.Ch. 594; 65 L.T. 533; 43 Digest 852, *3002*.
(9) *Lloyd* v. *Attwood*, (1859), 3 De G. & J. 614; 29 L.J.Ch. 97; 33 L.T.O.S. 209; 44 E.R. 1405; 43 Digest 1001, *4424*.
(10) *Re Emmet's Estate*, (1881), 17 Ch.D. 142; 50 L.J.Ch. 341; 44 L.T. 172; 43 Digest 974, *4142*.
(11) *Derbishire* v. *Home*, (1853), 3 De G.M. & G. 80; 43 E.R. 32; 27 Digest (Repl.) 113, *839*.
(12) *Wroe* v. *Seed*, (1863), 4 Giff. 425; 9 L.T. 254; 66 E.R. 773; 43 Digest 862, *3075*.

Action for damages for conspiracy.

This action was originally brought by writ issued on Jan. 28, 1952, by the plaintiff against Mr. Charles Henry May, Sir Henry Letheby Tidy and Mr. Arthur Collins. The defendant Arthur Collins, who is referred to throughout as the defendant Collins, died subsequently and the action was continued by order to carry on against his executors.

The defendant Tidy and the defendant Collins were at all material times trustees of a settlement made on June 19, 1893, hereinafter called the Musgrave settlement. The defendant May was from January, 1940, solicitor to the defendants Tidy and Collins in their capacity as trustees of the Musgrave settlement. By para. 3 of the statement of claim the plaintiff alleged:

"Under the Musgrave settlement in the events which had by early 1939

> A occurred, upon his attaining the age of twenty-one years as aforesaid as the defendants May and Tidy and Collins and each of them at all material times well knew [the plaintiff] (a) had become entitled to a share amounting to approximately £6,450 in nominal value of securities held on the trusts of the Musgrave settlement together with the income from the said share thereafter arising, and (b) was ignorant of his entitlement as aforesaid."

B By para. 4 the plaintiff alleged:

> "In the premises it was the continuing duty as trustees of the Musgrave settlement of the defendants Tidy and Collins to the plaintiff upon his attaining the age of twenty-one years and thereafter (a) to inform him of his rights and interest under the Musgrave settlement (b) to transfer to the C plaintiff his share of the capital funds held on the Musgrave settlement trusts (c) to pay to him thereafter any income arising from such share to which the plaintiff had become so entitled."

The substance of the alleged conspiracy was that the defendants May, Tidy and Collins and each of them from about February, 1940, conspired together D and with the plaintiff's father, Leonard Thomas Hawksley (who died in 1948), and with each other, to injure the plaintiff by keeping him in ignorance of his rights under the Musgrave settlement and by withholding from him his share in the trust funds and in the income therefrom, and to commit or cause to be committed by the defendants Tidy and Collins on the procurement of the defendant May and the plaintiff's father or one of them breaches of trust and E duty owed by the defendants Tidy and Collins to the plaintiff. Further or alternatively the plaintiff claimed that the defendants Tidy and Collins committed breaches of trust and duty owed by them to the plaintiff as trustees of the Musgrave settlement; alternatively that they wrongly converted the plaintiff's property; and as against the defendant May the plaintiff alleged that these breaches of trust and duty and acts of conversion were from January, F 1940, counselled and procured by the defendant May. Further or alternatively it is alleged that the defendants May and Tidy and Collins and each of them, in respect of all of these matters, conducted themselves in fraud of the plaintiff. The plaintiff claimed damages for conspiracy and an account or other relief.

The defendant May, by para. 3 of his defence, admitted that the plaintiff, on attaining the age of twenty-one years, became entitled to a moiety of certain G securities comprised in the Musgrave settlement and held in trust for the plaintiff and his sister as joint tenants, and that from January, 1940, the defendant May was aware of such entitlement; otherwise he denied each and every allegation contained in para. 3 of the statement of claim, and he denied each and every allegation contained in para. 4 of the statement of claim. He further denied the allegations of conspiracy and fraud. The defence of each of the other H defendants was substantially the same. All the defendants relied on s. 2 (1) (a) or alternatively s. 19 (2) of the Limitation Act, 1939. The plaintiff, in his reply, relied on s. 19 (1) or alternatively s. 26 of the Limitation Act, 1939.

By the Musgrave settlement property was settled by Thomas Hawksley (great-grandfather of the plaintiff) on his daughter, Mrs. Florence Musgrave, and in the events which happened was held after her death on trust for the I issue of Charles Hawksley (grandfather of the plaintiff) as Mrs. Musgrave should appoint. By her will dated June 10, 1927, she appointed to her great-nephew, the plaintiff and his sister Cicely Hawksley, such trust funds as she was compelled to leave to the family. Mrs. Musgrave died on Dec. 8, 1930. On the hearing of an originating summons in the Chancery Division on Feb. 15, 1934, the court declared (*Re Hawksley's Settlement*, [1934] Ch. 384) that the special power of appointment given to Mrs. Musgrave by the Musgrave settlement was effectually exercised by her said will and that the plaintiff and his sister took an absolute interest in the property subject to that power immediately on the death of Mrs. Musgrave. An opinion of counsel was taken in 1934 by the trustees on the question whether the plaintiff and his sister took as joint tenants, and counsel expressed his opinion that they did. The plaintiff's sister attained twenty-one years of age on Feb. 27, 1942.

The defendants Tidy and Collins transferred the capital and accumulated income to which the plaintiff was entitled under the Musgrave settlement to the trustees of a voluntary settlement alleged to have been made by the plaintiff by deed on or about July 3, 1942, which settlement the plaintiff alleged to have been void or not to have comprised the said capital and income and to have been executed by him at a time when he was ignorant of his interests under the Musgrave settlement.

The judgment is reported solely on the points raised by para. 4 of the statement of claim.

N. Lawson, Q.C., and *R. J. Parker* for the plaintiff.

K. Diplock, Q.C., and *H. P. J. Milmo* for the first defendant.

H. V. Lloyd-Jones, Q.C., F. Whitworth and *P. W. E. Taylor* for the second, third and fourth defendants.

Cur. adv. vult.

Oct. 5, 6. **HAVERS, J.**, read the following judgment in which after having reviewed the pleadings and the history of the case, he continued as follows:

The joint tenancy of the plaintiff and his sister was capable of being severed by the plaintiff on attaining the age of twenty-one on Feb. 28, 1939. There are a number of ways by which a joint tenancy may be severed. In *Williams* v. *Hensman* (1) (1861) (1 John. & H. 546), SIR W. PAGE WOOD, V.-C., in the course of his judgment said (ibid., at p. 557):

> "A joint-tenancy may be severed in three ways: in the first place, an act of any one of the persons interested operating upon his own share may create a severance as to that share. The right of each joint-tenant is a right by survivorship only in the event of no severance having taken place of the share which is claimed under the jus accrescendi. Each one is at liberty to dispose of his own interest in such manner as to sever it from the joint fund—losing, of course, at the same time, his own right of survivorship. Secondly, a joint-tenancy may be severed by mutual agreement. And, in the third place, there may be a severance by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common. When the severance depends on an inference of this kind without any express act of severance, it will not suffice to rely on an intention, with respect to the particular share, declared only behind the backs of the other persons interested."

The first method indicated there, an act of any one of the persons interested operating on his own share, obviously includes a declaration of intention to sever by one party. The position, therefore, of the plaintiff and his sister as joint tenants under the Musgrave settlement, was this. The right of each of them in a joint tenancy is a right to take by survivorship only in the event of the severance not having taken place. As to capital, the plaintiff on attaining twenty-one was entitled to sever by one of the methods which I have indicated and to be paid his share. If the plaintiff did not exercise this right before his sister attained twenty-one, then on his sister attaining twenty-one each had a right to sever. If, then, there had been no severance, on the sister attaining twenty-one the plaintiff and his sister were entitled to have the trust funds transferred to them jointly. As to income, there has been some controversy as to the true position in law. I was told by learned counsel engaged in this case that they had made an exhaustive search for authority, but there seemed to be, as it turned out, some curious dearth of authority on this subject. Only one case was cited to me, *Walmsley* v. *Foxhall* (2) (1870) (40 L.J.Ch. 28), which is reported very briefly. The headnote is:

> "Joint tenancy—Income—Right of survivors. A joint tenancy in income is severed as to each instalment as it becomes payable, without actual payment. A fund was settled upon trust to pay the income thereof to a number of infants during their joint lives. During their infancies the income for many years was accumulated. One of them having died, the question was raised whether his personal representative was entitled to a share of the accumulations or whether the whole belonged to the survivors. Mr. Nalder submitted the question, and that the infants were joint tenants of the income, and there had been no severance. Mr. Cates appeared to support the contrary view but was not heard. The Master of the Rolls was clearly of opinion that as soon as any part of the income became payable, the joint tenancy in that part was severed, and consequently that the personal representative of the deceased was entitled to a share of the accumulations."

This being the state of the authorities, I hold that on the plaintiff attaining the age of twenty-one he was entitled to the income of his share of the fund. As regards the severance, I hold that when the sister wrote the letter in which she said: "Thank you for your letter of 17th instant with the particulars of the investments. I should like the dividends to be paid into my account at Martin's Bank, 208 Kensington High Street" (which was a letter in reply to the first defendant), that was a sufficient act on her part to constitute a severance of the joint tenancy. If I am wrong about that, there clearly was a severance when her share of the trust funds was transferred to her in September, 1942.

Some argument was addressed to me on the question whether or not the plaintiff was entitled to income on attaining twenty-one. I can see nothing in s. 31 of the Trustee Act, 1925, which lays down, or by inference indicates, that the trustees ought not to pay income to the plaintiff on attaining twenty-one, or the capital to him and his sister on both attaining twenty-one.

There has been acute controversy between the parties as to the duties which the defendants Tidy and Collins as trustees of the Musgrave settlement owed to the plaintiff as the cestui que trust. I regret that these questions, which are peculiarly within the province of the Chancery Division, should fall to be determined by me, especially as I am told by counsel who have made an exhaustive search that there is a lack of authority on some of them. The plaintiff contends that it was the duty of the trustees, first, to disclose to the plaintiff on attaining twenty-one that he had an interest in the capital and income of the trust funds; secondly, to disclose to the plaintiff on attaining twenty-one that he had a legal right to sever the joint tenancy; thirdly, to pay to the plaintiff interest on his share of the trust funds on attaining twenty-one whether demanded or not by him; fourthly, to pay to the plaintiff on severance of the joint tenancy his share of the capital of the trust funds whether demanded or not. The first defendant challenges contentions (1), (2) and (4). He concedes that the plaintiff was entitled to income of his share on attaining twenty-one, but contends that the trustees were only bound to pay it to him on demand. The defendants Tidy and Collins challenge contentions (1), (2), (3) and (4).

On these questions my attention has been drawn to a number of authorities and to passages in the leading text-books. I was referred to HALSBURY'S LAWS OF ENGLAND (2nd Edn.), Vol. 33, p. 228, para. 410. The paragraph concerned is in regard to the duties of a trustee with regard to keeping an account, and it says:

> "He [the trustee] is also bound to allow a cestui que trust to inspect the

> trust accounts and all documents relating to the trust, and ought to explain to the cestui que trust what his rights are."

That is the passage relied on, and the authority which is cited in HALSBURY'S LAWS OF ENGLAND in support of that passage is *Burrows* v. *Walls* (3) (1855) (5 De G.M. & G. 233).

There is also a passage in GODEFROI ON TRUSTS AND TRUSTEES (5th Edn.), at p. 527. That passage says:

> "It is, moreover, incumbent upon trustees to acquaint persons who have just attained majority of their rights . . .";

and *Burrows* v. *Walls* (3) is again cited as authority for that.

In his judgment in *Burrows* v. *Walls* (3), LORD CRANWORTH, L.C., said (5 De G.M. & G. at p. 253):

> "I do not, therefore, proceed on a doubt that such an arrangement was entered into; but the question is, whether that arrangement so entered into, which, if it had been by persons entirely sui juris, cognizant of their rights, and who had not the protection of infancy continued after majority, would undoubtedly have absolved the other debtors (whether principals or sureties is immaterial), can, under the particular circumstances of this case, have any binding operation whatever in favour of these trustees ? I am of opinion that it cannot, and for this reason—it is perfectly obvious on the face of all the documents, that all the children, as they successively came of age, were entirely ignorant that they had any rights against any person except Newsham. It was undoubtedly the duty of the three trustees to have had the money in their hands, but not having it in their hands to have explained to the infants as they came of age what their rights were. They not only did not do that, but the correspondence which takes place afterwards—I will not say necessarily leads the cestuis que trust to suppose but fortifies them in the supposition which they must have entertained, that they had no claim except against Newsham."

It has to be borne in mind that the court there was considering the question whether there had been acquiescence on the part of the cestui que trust, and I think the words which I have already read are significant:

> "It was undoubtedly the duty of the three trustees to have had the money in their hands, but not having it in their hands to have explained to the infants as they came of age what their rights were."

I was also referred to *Brittlebank* v. *Goodwin* (4) (1868) (L.R. 5 Eq. 545) to a passage in which GIFFARD, V.-C., says (ibid., at p. 550):

> "It is plain that Sarah Goodwin was a trustee of John Brittlebank's bond, and that on her death her administrator became a trustee just as much as Sarah Goodwin was, for Ann Brittlebank did not die till September, 1836, a period of eighteen years or nearly so after the death of her mother. Until her death nothing was or could be payable to the person or persons legally entitled to take out administration to her. It is, I think, questionable whether it was intended by the will to interpose any person who was not one of the next of kin in a due course of administration, as a person entitled to receive the £5,000. Assume, however, that it was—and assume that administration had been taken out, which does not appear to be the case. This would have afforded no defence at law to an action on the bond, and most assuredly no suit in equity for the purpose of an injunction could for one moment have been maintained except on the terms of John Brittlebank paying the £5,000 and interest into court. The legal interest in the bond after the death of Sarah Goodwin was in her administrator. I am

> satisfied from the evidence that George Goodwin the younger knew all the facts with reference to the breach of trust and bond. Neither Sarah Goodwin nor he could ever have been heard to say that they were not trustees of the bond, or that they had not, as such trustees, duties to perform towards their cestui que trust. One of those duties most unquestionably was to put the bond in suit, that is, if by so doing payment of any part of it could have been obtained. Another duty was to have informed the persons interested, when they attained twenty-one, of the position of the fund and of their rights. This was not done, nor was the bond put in suit . . .".

On the other hand, I was referred to *Re Lewis* (5) ([1904] 2 Ch. 656). The headnote to that case is:

> " Where a legacy is given upon a condition, an executor who takes a beneficial interest in the legacy on the breach of the condition owes no duty to the legatee to give notice of the terms of the legacy. Dictum of LORD HARDWICKE in *Chauncy* v. *Graydon* (6) (1743) (2 Atk. at p. 619) considered. A testatrix appointed her son A. her executor and bequeathed a leasehold house to her son B., then abroad, and directed that in case he should not return and claim it it should go to A. After the death of the testatrix, A. wrote to B.: ' A house has been left you and according to the will it is to be in my hands until you claim it '; but he did not inform him of the gift over. B. died abroad without having claimed the house:—*Held* (affirming JOYCE, J.) that A. was not estopped by the letter from claiming under the gift over, because (1) there was no sufficiently precise representation that B. was absolutely entitled; (2) it was not proved that the non-return of B. was the consequence of the representation."

VAUGHAN WILLIAMS, L.J., says ([1904] 2 Ch. at p. 661):

> " This is a very hard case; but one must not because it is a hard case lay down principles which are not in accordance with the law. Mr. Rowlands has argued this case with a full recognition on his part of the real difficulties which lay in his way, which in my opinion is the best form of advocacy. He had to start with this admission—that prima facie there was no duty on the executor to disclose; and then he had also to admit that the mere fact that Evan Lewis had no notice of this provision in the bequest of the leasehold house to himself would not of itself have relieved him of the consequence, to use the very words of the will, of his not having returned from abroad and claimed the said house . . . We have got thus far—that there is no duty on the executor to disclose, and that prima facie, inasmuch as Evan Lewis never did, and now never can, return from abroad and claim the house, his administrator cannot successfully claim it unless there is something else to assist. It is said, however, that, though generally there is no duty on the executor, yet in this particular case there is a duty, because by reason of the gift over the executor will get an advantage; and for that proposition reliance is placed upon an observation of LORD HARDWICKE in *Chauncy* v. *Graydon* (6) . . . It is said of that passage that, although it assumes that generally there is no duty on the executor to give notice, it puts an exception to that rule where a testator has by the terms of his will laid an obligation upon the executor, or where the executor takes some beneficial interest. If one were sure that LORD HARDWICKE intended to decide anything of the sort, one would give further consideration to the contention founded on that passage. But the question which we have to decide was not raised in that case, and there was no argument based on the assumption that an executor who took a beneficial interest had a special obligation to give notice. That being so, it seems to me we

must start with the assumption that there is no duty to give notice imposed on the executor either by the general law or by the special provisions of the will."

Romer, L.J., says (ibid., at p. 663):

> "It is clear that if the executor in this case had not also been the person entitled under the gift over it could not have been contended since *Chauncy* v. *Graydon* (6) that there was any such duty cast upon him. It is also clear that if the defendant had not been the executor it could not have been said that there was any duty cast upon him in his position of devisee under the gift over. That being so, it is difficult to see how you can imply a duty because these two positions coalesce when neither of the positions involves such duty. I cannot see any sufficient reason for holding that such a duty is cast on the defendant as is contended for here, and, unless the exigencies of the case require it, I think that we ought not to imply a duty not recognised by the law as it stands. There is no authority for implying such a duty, and there would be great difficulty in considering what kind of duty could be implied. It could not be said that there was an absolute duty. The appellant's counsel naturally shrank from so contending. It could not be said, for example, that there was any duty cast on an executor in a case where he did not know and could not find out where the legatee was living. If the court cannot imply an absolute duty, it is difficult to see in what case it can imply a duty. But it was said that there was a duty to take reasonable care. Reasonable with regard to what? It must be reasonable, I suppose, having regard not only to the position of the absent legatee, but to the position of the executor. I should think that the difficulties in the way of the court implying such a duty as is contended for are such that certainly the court ought not to imply a duty unless bound to do so by authority—and there is no such authority. I think, therefore, that the main contention urged on the part of the appellant entirely fails."

Cozens-Hardy, L.J., agrees and goes on to say (ibid., at p. 664):

> ". . . That being so, we start with this—that it is plain there is no prima facie duty resting on an executor to give notice. But it is said that although that is so, there is an exception in the case of an executor having himself an interest in the legacy. For that there is no trace of authority in the way of decision, and no trace of an opinion by any text-writer. There is nothing but the passage in Lord Hardwicke's judgment which the industry of counsel has succeeded in unearthing. I do not regard that as anything more than the sort of observation which a judge might make upon a point which was not argued before him and which did not arise in the case. There is no suggestion that it did. I cannot regard that as making an exception to the general rule as to the necessity of communicating."

That case was followed in *Re Mackay* (7) ([1906] 1 Ch. 25). The headnote to that case is as follows:

> "A testator bequeathed all his property to his wife and children, and appointed his wife sole executrix. He left him surviving his wife and two infant children, viz., a son, long since deceased, and a daughter, who attained twenty-one in 1876. The widow married again, and during her daughter's infancy she, in her character of executrix, advanced all the testator's estate to her second husband upon the security of a mortgage which proved insufficient. She survived her second husband, and died in 1885, having left all her property away from her daughter. The daughter, as sole surviving beneficiary under her father's will, claimed the whole of her mother's estate, upon the ground that it represented moneys retained by her mother

A under an order of the court in part satisfaction of the mortgage, and in 1903 she commenced an action against her mother's executors for an account on this footing:—*Held*, that the mother was not an express trustee of these moneys for the plaintiff, that this was an action to recover a legacy within s. 8 of the Real Property Limitation Act, 1874, and that the claim was statute-barred. Whether the mother was under any legal obligation B to inform her daughter upon attaining twenty-one of the benefit conferred on her under her father's will, quaere."

KEKEWICH, J., says ([1906] 1 Ch. at p. 32):

"But then it is said in answer to that that she had a duty to disclose to her children upon their attaining their majority their rights under the will. C For that a passage is cited from the judgment of GIFFARD, V.-C., in *Brittlebank* v. *Goodwin* (4). I do not propose to go into that case fully, and therefore I will merely read the passage which has been cited, and which, strange to say, seems to have escaped the notice of counsel and of the court in another case to be mentioned presently, in which it would have been particularly apposite. The Vice-Chancellor, speaking of an administrator of an D executor, said (L.R. 5 Eq. at p. 550): 'Another duty was to have informed the persons interested, when they attained twenty-one, of the position of the fund and of their rights'. It may be that at some future date it will be necessary to examine those words more closely in order to ascertain exactly what the Vice-Chancellor meant, and how far his language ought to be taken E literally and applied to a case such as that with which we are now dealing, but for the moment I do not think that is necessary. But before I give my reasons for so thinking let me look at the case of *Re Lewis* (5), where it was said, apparently, that there was no such duty. There VAUGHAN WILLIAMS, L.J., in giving judgment, referring to certain necessary admissions made by the plaintiff's counsel in the course of the argument, said ([1904] 2 Ch. F at p. 661): 'He had to start with this admission—that prima facie there was no duty on the executor to disclose'; and I observe that that was concurred in by the other lords justices. Thus, COZENS-HARDY, L.J., said ([1904] 2 Ch. at p. 664): '. . . we start with this—that it is plain there is no prima facie duty resting on an executor to give notice'. That is, to give G notice of the rights of those who could make claims against them. Having regard to that decision, it is a question whether the language of the Vice-Chancellor, which deserves the most respectful consideration, may not require to be examined more closely hereafter. I see very great difficulty in saying that an executor is bound to give notice to a legatee or to any one else who is entitled to claim against the estate of the benefits conferred H upon him by the will—I mean bound in the sense that any consequences follow from his not performing the obligation. Bound in one sense he may be. There may be an imperfect obligation to disclose, but a perfect obligation, i.e., an obligation to which a sanction is attached, seems to me to be very difficult to hold. But it is not necessary to go into that, because I have held that the plaintiff knew her claims under her father's will I perfectly well throughout. It is quite possible that she did not know whether she was a joint tenant or a tenant in common, but it could not have been the duty of the executrix to explain the law to her. All the duty that could have been put upon the mother was to say: There is your father's will, under which you take an interest, and what that interest is your lawyer will explain to you. I have not the slightest doubt that the mother did tell her. She could not have known it from any other source. Therefore, if there was any duty cast upon the mother, that duty has been performed."

I should also refer to the decision of the Court of Appeal in *Low* v. *Bouverie* (8) ([1891] 3 Ch. 82). The headnote is:

> " Although it is the duty of a trustee to give his cestui que trust, on demand, information with respect to the dealings with and position of the trust fund, it is no part of his duty to assist his cestui que trust in selling or incumbering his beneficial interest by telling him what incumbrances he, the cestui que trust, has created, nor which of his incumbrancers have given notice of their respective charges; and it follows that the trustee is under no obligation to answer the inquiries of a stranger about to deal with the cestui que trust."

LINDLEY, L.J., at the beginning of his judgment, said (ibid., at p. 99):

> " The duty of a trustee is properly to preserve the trust fund, to pay the income and the corpus to those who are entitled to them respectively, and to give all his cestuis que trust, on demand, information with respect to the mode in which the trust fund has been dealt with, and where it is. But it is no part of the duty of a trustee to tell his cestui que trust what incumbrances the latter has created, nor which of his incumbrancers have given notice of their respective charges. It is no part of the duty of a trustee to assist his cestui que trust in selling or mortgaging his beneficial interest and in squandering or anticipating his fortune; and it is clear that a person who proposes to buy or lend money on it has no greater rights than the cestui que trust himself."

Another case to which I was referred was *Lloyd* v. *Attwood* (9) (1859) (3 De G. & J. 614). It is to be observed that the court was there considering the validity or invalidity of a release. In the course of his judgment TURNER, L.J., said (ibid., at p. 649):

> " The principles by which we are to be guided in determining on the validity or invalidity of these releases admit of no doubt. Cestuis que trust cannot be bound by releases given to their trustees, if given in ignorance of their rights, for it is the duty of the trustees to apprise them of those rights."

So far as an executor is concerned, I am bound by the decision of the Court of Appeal in *Re Lewis* (5) to hold that there is no legal duty on him to give notice of the terms of the legacy to the legatee. I see no reason, however, to extend this doctrine, which has no attraction for me on the merits, to a trustee under an express trust. The position of an executor and a trustee, although now, for many purposes, they have been assimilated under the Law of Property Act, 1925, is still not an identical one and there is a distinction between a will, which is a public document in the sense that anybody can go to Somerset House and see it, and a trust deed, which is a private document to which the cestui que trust has no access. In the absence of any authority to the contrary I decline to extend this doctrine to trustees under an express trust.

I hold, therefore, that there was a duty on the defendants Tidy and Collins, as trustees of the Musgrave settlement, to inform the plaintiff on attaining twenty-one that he had an interest in the capital and income of the trust funds of the Musgrave settlement. A fortiori, if the trustees did not hand over income to the plaintiff on attaining twenty-one to which he was entitled, it would be their duty to explain to him that he was entitled to call for and have the interest paid to him. The authority which was cited to me in support of that proposition was *Re Emmet's Estate* (10) (1881) (17 Ch.D. 142).

The authorities which were relied on in support of the proposition of the plaintiff that it was the duty of the trustees to inform him on attaining the age of twenty-one that he had a legal right to sever, seemed to me to be cases in which the trustees had parted with the trust funds and the question was whether a cestui que trust had precluded himself from his remedy against his trustees by acquiescence or release. Different considerations apply where a court is considering problems of that character, and Lewin on Trusts (15th Edn.), at p. 769, makes this clear.

> "Acquiescence, release and confirmation, to have the effect we have mentioned, must be understood to be accompanied with the following conditions:—As in the case of concurrence, the cestui que trust must be sui juris, and not a married woman or infant; as regards infants, the court continues its protection even after they have attained twenty-one, till such time as they have acquired all proper information, and infants on coming of age must, in the case of a formal release being executed by them, where it is required have proper legal advice. A married woman is clearly sui juris with regard to her own property where there is no restraint against anticipation, and her covenant not to sue may, in some cases, have the effect of a release. But where a married woman was entitled to separate estate with a clause against anticipation, it is difficult to see how she could be affected by acquiescence. In a case in 1853 *Derbishire* v. *Home* (11) (3 De G.M. & G. 80) however, Turner, L.J., intimated his leaning to be in favour of the affirmative, but the language of Knight Bruce, L.J., in the case alluded to, was more guarded. The restraint on anticipation could impose no fetter as respects income accrued due before the acts of acquiescence relied upon. If a suit be instituted for relief against a breach of trust, the court has jurisdiction to sanction a compromise on behalf of a married woman even though her interest be reversionary. The cestui que trust must be fully cognisant of all the facts and circumstances of the case; and if the release is executed by the cestui que trust in ignorance of his rights, it may be set aside after the death of the trustee, and after a long interval, as, for instance, twenty years. The cestui que trust must not only be acquainted with the facts, but also to a certain extent apprised of the law, or how those facts will be dealt with if brought before a court of equity."

On the other hand, I hold that there was no duty on the trustees to give the plaintiff legal advice or to inform him of his right to sever, though they would be bound, in my opinion, to disclose on demand any document relating to the trust, including the opinion of counsel.

As to the second question, no authority was cited to me by any of the defendants in support of their proposition that the only obligation on the trustees was to pay income, if income was payable to the plaintiff on attaining twenty-one (as I hold it was), only on demand. It seems to me that the passage ([1891] 3 Ch. at p. 99) in *Low* v. *Bouverie* (8) which I have cited is contrary to that view, and no authority has been cited in support of the defendants' proposition.

My attention was called to another case, *Wroe* v. *Seed* (12) (1863) (4 Giff. 425). The headnote to that case reads:

> "Executors and devisees in trust to sell, having an option of postponing the sale for five years were directed in such case to pay the income to the tenant for life. At the end of five years, they had paid no legacies, rendered no account, though frequently requested so to do, nor dealt with the estate, but claimed remuneration for their services."

In giving judgment, Sir John Stuart, V.-C., said (ibid., at p. 429):

> "Here were executors with a very large estate; £11,000 of it is said to have been in advance, ready to be distributed at the death of the testator. What conduct can be more grossly improper than that of executors, who were to pay legacies and to distribute the residue, with a direction to pay the income of the residue immediately, but who did not pay the income; who can suggest no difficulty as to knowing who the legatees were; who for five

> years after the testator's death left legacies unpaid, the residue almost wholly undealt with, no account ready that can be produced, and no account taken until this bill is filed; and who, when this bill is filed, bring forward demands against the estate on their own behalf, which the court has found it to be its duty wholly to disallow. The questions to be disposed of with regard to them now are the question of the costs of this litigation, and that of the interest on their balances. One part of the conduct of these executors, which their counsel has endeavoured to show was laudable and discreet, was that each of them took £1,000 to his own house. One of them says he kept this sum in gold, and applied it for no purpose. They say that they kept these sums for the purpose of paying legatees if they should expectedly or unexpectedly come to demand any money. That is gross misconduct. It is highly culpable and gross misconduct for any executor who has a legacy immediately payable to take into his own house money for the purpose of paying it, and to keep it five years, there being no difficulty in ascertaining who the legatee is, and producing it only in consequence of a decree made against him by this court."

A B C

I do not accept the defendants' contention on this issue. I hold that it was the duty of the trustees to pay income of his share to the plaintiff on attaining the age of twenty-one without any demand by him; and also to pay the capital to the plaintiff and his sister as joint tenants on the sister attaining twenty-one without any demand by them, or after severance of their respective shares to each of them without any demand. D

[HIS LORDSHIP then proceeded to review the evidence and held that the only causes of action which had been sustainable on the part of the plaintiff were in respect of breaches of trust by the trustees Tidy and Collins, but that these breaches of trust were not fraudulent concealment or other fraud within the meaning of the Limitation Act, 1939, s. 19 (1) and s. 26, and accordingly the plaintiff's claims were barred by the Limitation Act, 1939, s. 19 (2).] E

Judgment for the defendants. F

Solicitors: *Ward, Bowie & Co.* (for the plaintiff); *May, May & Deacon* (for the first defendant); *Tucker, Hussey & Clare* (for the second, third and fourth defendants).

[*Reported by* A. P. PRINGLE, ESQ., *Barrister-at-Law.*]

HILLS (PATENTS), LTD. *v.* BOARD OF GOVERNORS OF UNIVERSITY COLLEGE HOSPITAL.

[COURT OF APPEAL (Denning, Hodson and Morris, L.JJ.), October 7, 10, 1955.]

Landlord and Tenant—New tenancy—Business premises—Opposition by landlord—Intention to use premises for purposes of a business to be carried on by him therein—Board of governors of hospital as landlord—Premises to be conveyed by board to Minister of Health—Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2 *c.* 56), *s.* 23 (2), *s.* 30 (1) (*g*).

National Health Service—Hospital—Occupation of property—Whether board of governors occupy premises of teaching hospital—National Health Service Act, 1946 (9 *&* 10 *Geo.* 6 *c.* 81), *s.* 12 (3).

By s. 30 (1) (g) of the Landlord and Tenant Act, 1954, a landlord may oppose an application by a tenant of business premises for the grant of a new tenancy, if " the landlord intends to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by him therein . . .". By s. 23 (2) of the Act, business includes " any activity carried on by a body of persons, whether corporate or unincorporate ".

In 1947 a hospital authority bought the reversions of four leases of business premises with a view to using the premises for hospital purposes on the termination of the leases. By virtue of the National Health Service Act, 1946, s. 6, the property in use for purposes of the hospital was transferred to the Minister of Health. The hospital was designated as a teaching hospital for which a board of governors was constituted, and accordingly the reversions of the leases vested (as the premises were not in use for hospital purposes but were endowments of the hospital) in the board under s. 7 of the Act of 1946. The leases expired in 1955 and the tenants applied for the grant of new tenancies under s. 26 of the Act of 1954. The board intended, if they obtained possession, to sell the freehold to the Minister and to use the premises for a works department, accounts department, laboratory and in other ways for the purposes of the hospital. The board were a body corporate entrusted with the task of managing and controlling the hospital on behalf of the Minister, and in accordance with regulations and such directions as he might give; this task could not be taken out of their hands or be carried out by the Minister himself. The board appointed their own officers and staff, and were entitled to enforce rights acquired and were liable in respect of liabilities incurred as if they were principals. The board opposed the application on the ground, pursuant to s. 30 (1) (g) of the Act of 1954, that they intended to occupy the premises for the purposes of a business to be carried on by them therein. The tenants contended (i) that the governors acted as agents for the Minister and could not, therefore, occupy the premises themselves, but that the Minister would be the occupier; and (ii) that the board of governors would not be carrying on a business therein.

Held (HODSON, L.J., dissenting): the objection of the board of governors to the grant of the new tenancies succeeded because (i) the wide extent of the delegation of duties to them and the responsible nature of their position under the Act of 1946 were such that the premises would be occupied by them if they obtained possession, and (ii) the management of the hospital was an activity carried on by the board of governors and would be carried on by them in the premises, and accordingly they would be in occupation of the premises for business purposes carried on by them therein within s. 30 (1) (g) of the Act of 1954.

Appeal dismissed.

[For the National Health Service Act, 1946, s. 3 (1), s. 7 (1), s. 12 (3), s. 14 (1), see 15 Halsbury's Statutes (2nd Edn.) 337, 341, 351, 352.

For the Landlord and Tenant Act, 1954, s. 23 (2), s. 30 (1) (g), s. 57, see 34 Halsbury's Statutes (2nd Edn.) 408, 414, 434.]

Cases referred to:

(1) *Pegler* v. *Craven*, [1952] 1 All E.R. 685; [1952] 2 Q.B. 69; 3rd Digest Supp.

(2) *Moore* v. *Robinson*, (1831), 2 B. & Ad. 817; 1 L.J.K.B. 4; 109 E.R. 1346; 41 Digest 255, *968*.

Appeal.

The tenants, Hills (Patents), Ltd., appealed against an order of His Honour Judge Pugh dated July 4, 1955, at Bloomsbury County Court, dismissing four applications by them for the grant of new tenancies of business premises under the Landlord and Tenant Act, 1954, Part 2.

In 1947 the University College Hospital bought the reversions of four leases of premises, namely, 57, 59, 61, 63, 65 and 67 Chenies Mews, with a view to using them, on the termination of the leases, for hospital purposes, viz., works department, physics laboratory, engineer's office and accounts department.

By the National Health Service (Designation of Teaching Hospitals (No. 2)) Order, 1948 (S.I. 1948 No. 979) the hospital was designated as a teaching hospital and by an order dated June 16, 1948, the Minister of Health constituted a board of governors for the hospital. On July 5, 1948, the appointed day for the National Health Service Act, 1946, the property of the hospital was transferred to the Minister under s. 6 of that Act, but the reversions of the leases, being endowments, were vested in the board of governors under s. 7. Three leases expired on Mar. 25, 1955, and one lease expired on Sept. 29, 1955, and the board of governors served notices under the Landlord and Tenant Act, 1954, s. 25, on the tenants terminating their tenancies. The tenants applied under s. 26 for grants of new tenancies. By their answers the board of governors pursuant to s. 30 (1) (g) opposed the applications and stated in each case:

> " We intend, on the termination of the current tenancy, to occupy the premises for the purposes of activities carried on by us (being a body corporate under the National Health Service Act, 1946)."

At the hearing of the applications it was stated that, if possession of the premises were obtained, the board of governors would sell the freehold to the Minister, but that this would not affect the proposed user of the premises, and the purchase price would become part of the endowments vested in the board of governors. His Honour Judge Pugh dismissed the applications and the tenants appealed.

Roy Wilson, Q.C., and *A. W. Hamilton* for the tenants.

Tristram Beresford, Q.C., and *J. D. F. Moylan* for the board of governors.

DENNING, L.J.: The Landlord and Tenant Act, 1954, Part 2, gave to tenants of business premises an automatic extension of their leases unless on particular grounds the landlords could refuse it. The premises in Chenies Mews were occupied by the tenants, Hills (Patents), Ltd., for business purposes; and, therefore, when their leases came to an end in 1955 they were automatically extended. The Board of Governors of University College Hospital, as landlords, however, oppose the grant of new tenancies. They have given the necessary statutory notices and rely on s. 30 (1) (g) which says that the landlord may oppose a new lease on the ground that

> ". . . the landlord intends to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by him therein . . ."

A The governors say that they want possession of the premises because they intend to occupy them for hospital purposes which they intend to carry on upon the premises. The tenants say that the governors cannot bring themselves within that sub-section, because it is not the governors who intend to occupy these premises, but the Minister of Health.

The intentions of the governors and the Minister are plain. The Minister has B agreed to purchase from the governors the freehold interest in these premises for a sum of £30,000. The intention is that the Minister should own the premises but that the governors should run them for hospital purposes, just as they run the rest of the hospital. We are told that the premises are urgently needed for these purposes of the hospital. The sole question in the present case is whether the governors intend to occupy the premises for the purposes of a C business to be carried on by them. This depends on the relationship of the governors to the Minister under the National Health Service Act, 1946. The material sections for present purposes are s. 12, s. 13 and s. 14. Under s. 12 (3) of the Act the board of governors are entrusted with the task of managing and controlling the hospital " on behalf of " the Minister, and in accordance with regulations and such directions as may be given by the Minister. Counsel for D the tenants says that when the governors use the premises for hospital purposes, they will be acting only on behalf of the Minister. They will be his agents. He will occupy it by them. It will be his business and his activity, and that therefore it is quite impossible for the governors to say that they intend to occupy it for the purpose of a business to be carried on by them.

E In support of his argument, counsel referred us to *Pegler* v. *Craven* (1) ([1952] 1 All E.R. 685). Could it be argued, said counsel, that the owner of a shop could resist an application for a new lease on the ground that he intended to occupy it as manager of a chain store to which he wished to sell it ? Counsel would have us treat the present as a parallel case and say that the governors are but agents for the Minister, and cannot resist a new lease, seeing that they F require it, not for themselves, but for the Minister. I cannot accept this argument because, in my opinion, the board of governors of a teaching hospital are in a far superior position to that of an ordinary agent. They are a body corporate and are entrusted with the task of managing the hospital and of running it themselves. The Minister himself cannot take that task out of their hands. G He is not allowed by the Act of Parliament to run the hospital himself. The board of governors do that. Furthermore, they appoint the officers and staff of the hospital, who by s. 14 (1) become the officers of the board of governors, not the officers of the Minister. The governors are, of course, accountable to the Minister for the way in which they carry out their task, and he can give directions to them in much the same way, I suppose, as the Minister of Transport H and Civil Aviation can give directions to the British Transport Commission. But, as I read this Act of Parliament, the Minister must leave the actual running of the hospital to the governors themselves. Counsel for the tenants says that the Minister will occupy these premises. That may be true, but I think that the board of governors will occupy them also. Possession in law is, of course, single and exclusive; but occupation may be shared with others or had I on behalf of others. I think that the board of governors are in such a responsible position in regard to this hospital that they are occupiers. It has been held in an old case that the master of a ship has himself possession such that he in his own name can bring an action of trespass as on his own possession: see *Moore* v. *Robinson* (2) (1831) (2 B. & Ad. 817). I rank the occupation of the governors at least as high as that of the master of a ship. I feel no doubt that the governors are in occupation of the existing hospital premises, and that they intend to occupy the additional premises, if they can get possession of them.

Counsel then raised a second point: Not only must the governors intend to occupy the premises, but they have to do so for the purpose of a business to be carried on by them therein. On this point, MORRIS, L.J., drew attention to the definition of " business " in s. 23 (2) of the Act of 1954 which says:

> ". . . the expression ' business ' includes a trade, profession or employment and includes any activity carried on by a body of persons, whether corporate or unincorporate."

Reading those words into s. 30 (1) (g), it seems to me plain that the governors intend to occupy these premises for the purposes of an activity to be carried on by them therein. Their activity is managing the hospital, and they intend, if they obtain possession of the premises, to occupy them for the purpose of that activity. It is difficult to think of a parallel case. One that occurs to me, though not an exact analogy, is that of a building owner who employs a contractor to build a house. It is a proper use of language to say that the contractor is building the house " on behalf of " the owner, but equally it is proper to say that the contractor " occupies " the site, and the contractor is carrying on his activity of building on the site. The last point taken by counsel for the tenants was that the right remedy of the governors was under s. 57 of the Act of 1954 and that that section applied exactly to the present case. He asked the rhetorical question: If the governors can say that they intend to occupy the premises for the purposes of their activity, what is to be the position if the Minister grants a lease and, when it comes to an end, he wants to resist a new lease ? To that argument I would say first that that is a hypothetical case which is not before us. Next I would suggest that in such a case the Minister himself might well be held to intend to occupy the premises for the purposes of an activity to be carried on by him therein, namely, his activity of providing hospital accommodation.

In the result, therefore, I find myself in agreement with the decision of the learned county court judge. The premises were bought originally by the hospital authorities with a view to using them for hospital purposes. In spite of the various statutory changes it appears to me that, now that the leases have come to an end, the governors require the premises for hospital activities to be carried on by them therein, and that the appeal should accordingly be dismissed.

HODSON, L.J.: My view of the matter is that the judgment of the learned county court judge cannot be sustained. It is obvious that the premises in question are sorely needed for the hospital. They were acquired with the idea that when the leases expired they should be used for an extension of the hospital premises. The question is a narrow one: Have the right steps been taken by anyone to prevent the tenants from getting a new lease? I have been unable to see the answer to the tenants' argument. It was pointed out that, since the National Health Service Act, 1946, the function of providing hospital services is in the Minister of Health, and that the Minister had power under s. 57 of the Landlord and Tenant Act, 1954, to step in and prevent a new lease being granted where premises were required for hospital purposes. He did not do that. The tenants have applied for a new lease, as they were entitled to do under the Landlord and Tenant Act, 1954, Part 2, which provides that in the circumstances they shall have a new lease unless the landlords can bring themselves within certain heads of objection.

The first point taken on behalf of the tenants is that the form of the notice was insufficient, but I think that it is enough to say that in my judgment the form of the notice given in the present case by the landlords was apt to draw

A the attention of the tenants and of the court to the specific ground on which the landlords relied under s. 30 (1) (g) of the Act of 1954, which reads:

> " subject as hereinafter provided, that on the termination of the current tenancy the landlord intends to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by him therein, or
> B as his residence."

The board of governors have agreed to sell the property to the Minister for a named sum. As I understand the matter, the intention is not that the board of governors shall occupy the premises for the purposes, or partly for the purposes, of the business to be carried on by them therein, but that the Minister is to C occupy the premises for the purposes of the business to be carried on by him therein. Section 23 (2) of the Act of 1954 gives an extended meaning to the word " business " so as to include " any activity carried on by a body of persons, whether corporate or unincorporate ". It has been argued on behalf of the governors that they are seeking to carry on the business, that they are intending to occupy the premises, and that, therefore, they fall within the four corners D of this sub-section. I have been unable to see the way out of the difficulty presented by s. 12 and s. 13 of the National Health Service Act, 1946. Section 12 (3) sets out in detail the functions of boards of governors:

> " It shall be the duty of the board of governors of every teaching hospital, as from the appointed day, in accordance with regulations and such directions
> E as may be given by the Minister, generally to manage and control the hospital on behalf of the Minister . . ."

Particular examples are given in the sub-section showing the extensive powers of the board acting, nevertheless, on behalf of the Minister. Perhaps the strongest illustration of the extensive nature of those powers [under s. 12 (3) (b)] was F pointed out by MORRIS, L.J., in the course of the argument:

> " to appoint officers required to be employed at or for the purposes of the hospital."

Section 14 shows that, in regard to the conditions of service and appointment of officers, they are to be treated as servants of the board and not as servants G of the Minister. That is said to be inconsistent with the position of the board as merely occupying the position of an agent acting on behalf of the Minister, according to the ordinary use of that language. Nevertheless the board always acts on behalf of the Minister (see s. 12 (3)).

Furthermore, s. 13 (1) provides that the board of governors of a teaching H hospital

> " . . . shall, notwithstanding that they are exercising functions on behalf of the Minister . . . be entitled to enforce any rights acquired, and shall be liable in respect of any liabilities incurred (including liabilities in tort), in the exercise of those functions, in all respects as if the board . . .
> I were acting as a principal . . . "

That language also supports the view that the board of governors, in exercising their extensive and important powers under the statute, are not acting as principals; otherwise it would not be said that they were to act as if they were principals. I am unable to see in what respect they are other than agents of the Minister; and if they are merely the agents of the Minister, the occupation is the occupation of the Minister, and not the occupation of the board of governors. As I see it there cannot be two occupations. Similarly, the business or activity, to use the word introduced by s. 23 (2) of the Act of 1954, is the activity of the Minister, and not the activity of the board of governors in their own right. They are merely the representatives of the Minister. That position seems to be intelligible when one appreciates that there is an agreement to sell the property to the Minister. The property will be in the Minister's name, and he will be in a position to lease it to other persons if he finds that it is not needed for the purposes of the hospital. There is a real dilemma if one visualises a case in which the Minister seeks to rely on s. 30 (1) (g) as the occupier of the land. Faced by the decision of this court it might be argued that this court had already held that the board of governors were the occupiers, and I find difficulty in fitting the two entities—the Minister on the one hand and the board of governors on the other—into such a scheme.

In conclusion I may add that the view which I have expressed seems to be consistent with the view expressed by this court in a similar case under another Act, namely, *Pegler* v. *Craven* (1), a case which had to do with the occupation of a shop under the Leasehold Property (Temporary Provisions) Act, 1951. Applying to the present case the reasoning in *Pegler* v. *Craven* (1), and particularly of JENKINS, L.J., it seems to me that there is an analogy which makes the decision of the court in the present case difficult to reconcile with the view taken by the court in *Pegler* v. *Craven* (1). Therefore, although I say it with regret, since the result would be unfortunate, if the matter had rested with me I should have felt bound to allow the appeal.

MORRIS, L.J.: The wording employed by the board of governors in the answer presented by them to the application for a new tenancy has reference to the language of s. 30 (1) (g) of the Landlord and Tenant Act, 1954, together with the definition of the word " business " in s. 23 (2). At first sight it would seem that if the governors of a hospital want to use premises, which they own, for hospital purposes, the wording of s. 30 (1) (g) is satisfied. The matter is, however, by no means so simple as that. The governors own the premises in their capacity as trustees of the endowments of a hospital which has been designated as a teaching hospital. Section 7 of the National Health Service Act, 1946, reads as follows:

> " (1) Where any voluntary hospital to which the last foregoing section [relating to transfer of hospitals to the Minister] applies is, before the appointed day, designated by the Minister under this Part of this Act as a teaching hospital or is one of a group of hospitals so designated, all endowments of the hospital held immediately before the appointed day shall on that day, by virtue of this Act, be transferred to and vest in the board of governors constituted under the following provisions of this Part of this Act for the teaching hospital. (2) All such endowments shall vest in the board free of any trust existing immediately before the appointed day and shall be held by the board on trust for such purposes relating to hospital services or to the functions of the board under this Part of this Act with respect to research as the board think fit, and the board may dispose of any property comprised in those endowments and hold the proceeds thereof on trust for any of the said purposes."

If the board of governors get possession of the premises, they propose to sell them to the Minister of Health for a sum of £30,000. That sum will then form part of their endowments. Thereafter, in their capacity as managers and controllers of the hospital, they propose to convert the premises for use as part of the hospital, not for the actual reception of patients, but for use as a works department and in other ways. Some part of the main hospital building (as appears from the correspondence before us) is at present used by the works department, and will, if the plans are carried out, become available for direct hospital services. In the proposed new premises there will be, amongst other things, workshops, a physics laboratory, the engineer's office and the accounts department of the hospital. The board of governors, on behalf of the Minister, will have to spend a considerable sum of money (estimated at £15,000) in making the alterations. The Minister appears to have approved of the plans, for indeed he has said in a letter of Feb. 12, 1955:

> " The Minister wishes to be informed when the property has been brought into use for hospital purposes, and if it is not fully used by Apr. 1, 1956, he should be notified of the circumstances."

The duties of the board of governors of a teaching hospital are laid down in s. 12 (3) of the Act of 1946. If then the board of governors get possession, and if the plans that are projected are carried out, in the first place the question will be whether the board are occupying, and in the second place, whether they are occupying for the purposes of, or partly for the purposes of, a business to be carried on by them therein. The definition of " business " is important. The words of s. 23 (2) of the Landlord and Tenant Act, 1954, are:

> " In this Part of this Act the expression ' business ' includes a trade, profession or employment and includes any activity carried on by a body of persons, whether corporate or unincorporate."

Counsel for the tenants submits that if the plans proposed are carried out, the board of governors would not be in occupation; and further he submits that even if the board could be said, as managers, in some sense to " occupy ", the true purpose of their occupation would not be the exercise of their own functions, but the exercise of the Minister's functions under s. 3 (1) of the Act of 1946, and that the board of governors would be occupying the hospital for those purposes. Section 3 (1) of the Act of 1946 refers to the provision of services by the Minister, and provides:

> " As from the appointed day, it shall be the duty of the Minister to provide throughout England and Wales, to such extent as he considers necessary to meet all reasonable requirements, accommodation and services of the following descriptions, that is to say:"

first, hospital accommodation, then medical, nursing and other services required at or for the purposes of hospitals, and thirdly, services of specialists, the whole being referred to as " hospital and specialist services."

It seems to me reasonable to regard the duties of the board of governors which are defined by s. 12 (3) of the Act of 1946 as comprising their activities. The question under s. 30 (1) (g) of the Landlord and Tenant Act, 1954, as applied to the present case can, therefore, be posed as follows: Do the board of governors intend to occupy the premises for the purposes, or partly for the purposes, of generally managing and controlling University College Hospital and for the purposes of maintaining the premises as part of or to be used in connection with that hospital, or for the purposes of acquiring on behalf of the Minister equipment, furniture and other movable property required for the purposes of the hospital ?* The further question arises whether they propose to carry on those purposes or activities in the premises. As regards the purposes which I have mentioned, it appears to me to be beyond question that they are the purposes of the governors. It is, of course, true that everything is done on behalf of the Minister, but the governors, in the course of their duties of generally managing, controlling and maintaining the hospital, require to have the premises. The premises are to form a part of or to be used in connection with the hospital.

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* See s. 12 (3) (c) and (d) of the Act of 1946.

The works department is a necessary part of the hospital; so is the accounts department.

The next question is whether the governors intend to carry on their activities or to carry out their purposes " in " the premises. One of their statutory duties is to maintain any premises forming part of or used in connection with the hospital. It is desired to use the premises in connection with the hospital or as part of the hospital. The activity of maintaining and of equipping and providing these premises seem to me something which will be carried on in the premises. It is, in my view, artificial to regard the activities and functions of the board of governors as being by way of remote control, and as not to be carried on in the premises. The last question, therefore, is whether the board of governors will be in occupation. It is said that it is the Minister who will be in occupation, and that the board of governors will be merely his agents, and *Pegler* v. *Craven* (1) is referred to. The position of the board of governors in the present case seems, however, to be entirely different from that of an agent for a limited company. Though the governors are subject to the directions of the Minister, they have a special position. The decision in the present case depends on its own facts, and on an examination of the position and functions of a board of governors as prescribed under s. 12 (3) of the Act of 1946. They manage and control the hospital. They maintain it. They do all the providing. They appoint officers and servants who may be their officers and servants. They are a body corporate. Their status, and the amplitude of the delegation to them are such that I think it can properly be said that they can be regarded as occupiers of the hospital. Their occupation is, I think, necessary for the discharge of their duties of maintaining, controlling, managing, equipping, providing and running the hospital. For these reasons, therefore, I consider that the appeal should be dismissed.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Underwood & Co.* (for the tenants); *Pennington & Son* (for the board of governors).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

COTTON *v.* WALLIS.

[COURT OF APPEAL (Denning, Hodson and Morris, L.JJ.), October 14, 17, 1955.]

Architect -Negligence -Scamped work—House built down to a price—Whether work so done that architect might pass it as done to his reasonable satisfaction.

A contract for the building of a house at a cost of £1,910 in the standard R.I.B.A. form specified that " The whole of the materials and workmanship is to be the best of their respective kinds and to the full satisfaction of the surveyor who shall be at liberty to reject any materials " and could require any unsatisfactory work " to be carried out to his full satisfaction ". It required the building contractor to carry out the works " in accordance with the directions and to the reasonable satisfaction of the architect," and provided that " any defects, shrinkage or other faults which shall appear within the defects liability period [the six months following completion of the works] . . . and shall be due to materials or workmanship not in accordance with this contract . . . shall within a reasonable time after receipt of the architect's written instructions in that behalf be made good by the contractor . . . at his own cost." The plastering and paintwork of the house were found to be " not as good as they could be, or perhaps as they should be," and tiles on the floor of the hall and dining room had stains on them up to three inches in diameter or the size of half-a-crown made through the contractor's men dropping paraffin there. The architect drew the contractor's attention to the defective plastering and paintwork and wrote two letters asking him to put right the marked tiles, but, after the builder had attempted to replace the marked tiles and had found that new tiles did not match, at the end of the defects liability period, the architect wrote to the building owner saying that he understood that all these matters had been made good and asking him to pay the builder the final instalment of the price. In an action by the architect for his fees in which the building owner counterclaimed for damages for failing to exercise skill in supervising the erection of the house, the county court judge found that the work had been scamped, but that, as the builder had to build down to a price, a certain tolerance was to be expected and the passing of the defects did not amount to professional negligence or breach of duty on the architect's part. On appeal,

Held (DENNING, L.J., dissenting): although the architect had no dispensing power to pass bad work, yet the low price of the building was a material factor in determining whether the architect could properly pass work as having been done to his reasonable satisfaction in accordance with the contract; and accordingly the decision of the county court judge that negligence on the part of the architect had not been established should stand.

Appeal on the counterclaim dismissed.

[**Editorial Note.** The standard of work required by a building contract depends on the terms of the contract. If, as in the present case, the contract provides that the works are to be carried out to the reasonable satisfaction of the architect, then the low price of the building is a factor which may be taken into consideration in determining whether work may be passed by the architect as reasonably satisfactory, at any rate in relation to matters which, as here, are small or trifling. In an action for negligence an architect's skill may, perhaps, be measured by considering whether other experienced members of the profession would have acted similarly (see 3 HALSBURY'S LAWS (3rd Edn.) 531); so that, although in the present case it was not held against the architect that others might have applied a stricter standard (see p. 378, letter D, p. 381, letter E, post), yet the question of tolerance in building down to a low price must always be a question of degree.

As to an architect's liability to his employer in respect of work done not being up to the standard required by the contract, see 3 HALSBURY'S LAWS (3rd Edn.) 534, para. 1066; and for cases on the subject, see 7 DIGEST 437-439, *419-425*.]

Appeal.

The defendant building owner was the owner of a house and garage, 93 Gilhams Avenue, Banstead, in connection with the building of which he had employed the plaintiff as architect. The plaintiff orally agreed to accept £90 for fees. After the house was built he claimed an extra £35 for fees and £4 17s. for out-of-pocket expenses. In an action by the architect for the recovery of these amounts for fees and out-of-pocket expenses, the building owner set up payment or tender of £90 before action, admitted liability for £4 17s., and counterclaimed for damages, alleging that the architect had failed to exercise proper skill, care and knowledge in the execution of the contract and failed to supervise in a skilful manner the erection of the house and garage and failed to ensure that it was constructed of proper materials and with good workmanship in accordance with plans and specifications. On June 29, 1955, His Honour JUDGE GORDON CLARK in Epsom County Court found on the counterclaim that the work has been " scamped " and that the architect had perhaps applied a lower standard than another architect might have done, but that, as the builder had to build down to a price, a certain tolerance was to be expected and the passing of certain defects by the architect did not amount to professional negligence. He dismissed the architect's claim for additional fees but allowed a claim for out-of-pocket expenses, and he dismissed the counterclaim. He ordered both parties to pay their own costs. The building owner appealed against the dismissal of the counterclaim and the order as to costs.

F. Hallis for the building owner.
Stephen Stewart for the architect.

DENNING, L.J.: In 1952 the building owner determined to build a house at No. 93 Gilhams Avenue, Banstead, for which purpose he employed Mr. Hillman as the builder, and he also employed the architect, carrying on business in New Malden, to do the architect's work. The architect is a Fellow of the Auctioneers' and Estate Agents' Institute, but he has a qualified architect on his staff. A contract was drawn up in the ordinary R.I.B.A. form, whereby the builder agreed to build the house for £1,910, nominating the architect as his architect. There was an oral arrangement between the building owner, the owner of the house, and the architect, that the architect would charge £90 for his fees.

The house was built, and at the end of 1952 the building owner went into occupation, the house then being practically complete. A period of six months was allowed in the contract for making good defects; it is described in the contract as " the defects liability period ". During those six months, from January to July, 1953, the architect called the attention of the builder to some things which required attention. In particular there were some stains on the tiles of the floor. The builder's men had been careless and dropped paraffin on the tiles, and they had become stained. The architect in two letters drew the attention of the builder to that defect, but the builder did not remedy it. It is fair to say that, on one occasion, the builder took some new tiles to the house so as to replace the stained ones, but they were not the same colour and did not match, so he did not put them in and he did nothing more about it. Another defect was that the plastering and the paintwork were not so good as they might have been, or perhaps as they should have been. The architect drew the builder's attention to it, but that defect also was not made good.

When the defects liability period expired, the architect wrote to the building owner that he understood that all these matters had been made good, and requested him to pay the builder the final instalment. The building owner did not agree that they had been made good, so he did not pay the whole of the bill, but deducted £25 from the builder's account. The architect also put in his own account, and in it he claimed, not only the sum of £90 which had been agreed, but also an extra £35. In so doing he was departing from the oral arrangement that had been made. He put in also a claim for £4 17s. for out-of-pocket expenses.

I do not think that anything more would have been heard of all these defects, if it had not been for the architect putting in those extra amounts of claim. When the building owner was faced with these additional claims by the architect he said: " You have passed a lot of work which is not up to standard ", and he said that the architect had been negligent. That was the issue in the county court, the architect suing for his extra fees, and the owner saying that the architect had passed a lot of bad work.

On the claim itself, the learned judge has found that the architect was not entitled to the extra £35 which he sought to charge. He said that the agreement was for £90, and the architect must stand by that. He said, however, that the architect was entitled to his out-of-pocket expenses of £4 17s. The owner had paid or tendered the £90 before action, and he admitted the £4 17s. in the defence.

On the counterclaim, the learned judge thought that the work had been " scamped ", to use his own word. He held that the architect had applied a lower standard than another architect might have done. He said that a number of items, for instance, were not so good as they might have been or should have been. Nevertheless, he said:

> " One must remember that . . . they were building down to a price. That must mean that a certain tolerance must be expected."

He said that on that account, because the price for the house was a low price, the builder could not be expected to do the work in a perfect manner, or as well as might otherwise be expected. He held, therefore, that the passing of these defects did not amount to any negligence or breach of duty on the part of the architect.

On this aspect of the case I would draw attention to three clauses in the R.I.B.A. form of contract. The first is:

> " The contractor shall carry out and complete the works in accordance with this contract in every respect in accordance with the directions and to the reasonable satisfaction of the architect."

I observe on that clause that the directions of the architect were not observed, as for instance, in regard to the tiles. Clause 12 provides:

> " Any defects, shrinkage or other faults which shall appear within the defects liability period stated in the appendix to these conditions and shall be due to materials or workmanship not in accordance with this contract or to frost occurring before completion of the works, shall within a reasonable time after receipt of the architect's written instructions in that behalf be made good by the contractor and (unless the architect shall otherwise direct) at his own cost."

Clause 24 (f) provides:

> " Upon expiration of the defects liability period . . . or upon completion of making good defects under cl. 12 of these conditions, whichever is the later, the architect shall . . . issue a final certificate of the value of the works executed by the contractor."

In my opinion the duty which the architect owes to the building owner is to see that the builder does his work, and does it properly. The specification required that the whole of the materials and workmanship were to be the best of their respective kinds, and to the full satisfaction of the architect. The architect is employed by the building owner and paid by him to see that the builder does his work properly. If the architect allows shoddy work to pass or work that is scamped, he does not do his duty to the owner. The contract provides that, if there are defects which appear, it is the duty of the architect to call on the builder to make them good. The architect has no dispensing power. He must hold up the final certificate until the defects are made good. That was not done in this case. The architect called the attention of the builder to these defects, but did not insist on their being put right, but nevertheless called on the owner to pay the full amount. It does not matter that the price is a low one. He must see that the contract is properly carried out.

I think that the judge misdirected himself in giving a dispensing power to the architect. I should have thought that the decision on the counterclaim was wrong and that the matter should be remitted to the learned judge to find the quantum of damages; but as I believe my brethren are of a different opinion, their view will, of course, prevail.

HODSON, L.J.: This is an appeal from part of a judgment of His Honour JUDGE GORDON CLARK delivered on June 29, 1955. The appellant is the defendant who was the owner of a house, and the respondent is the plaintiff who acted as architect for that house, and who claimed in the action for his fee. The building owner was found to be right in substance on the claim, and the only appeal in connection with the claim is in relation to the costs.

Having been sued by the architect for his fees, the building owner counterclaimed against the architect that he had not exercised due skill, care and knowledge in the performance of his duty as an architect, had not supervised in a skilful manner the erection of the house and garage and had not ensured that it was constructed with proper materials and good workmanship in accordance with the plans and specification. On that matter the learned judge found in favour of the architect.

Counsel for the building owner recognises that he must accept the findings of fact of the learned judge, but said that, on the facts as found, the building owner was entitled to judgment on the counterclaim, because the judge had found that there was some evidence of scamped workmanship, and that the decoration, painting, plastering, etc., were not so good as they should have been. Counsel accordingly submits that there was a misdirection on the part of the learned county court judge in this sense, that he had treated the architect as entitled to disregard the specification as to how the work was to be done, and what was to be done, and had really given the architect a dispensing power to pass bad work, whereas good work (and good work only) was necessary for the performance of the contract by the builder, it being the duty of the architect, as the watch-dog on behalf of the building owner, to see that the work was carried out properly.

Having read and re-read the judgment of the learned county court judge, I am of opinion that that criticism is not well founded. I do not think that the learned judge misdirected himself, nor did he regard the architect as having a dispensing power to cut down the standard which was required of the builder. He did use expressions in his judgment which show that the work of the builder might have been better. I do not find, however, in the note prepared on behalf of the architect, which was accepted by the learned judge as being an accurate representation of what he said, anything which justifies the main criticism which counsel for the building owner has put forward.

Counsel's main complaints were as follows. He said that the architect had been treated as being entitled to a measure of neglect at the building owner's expense; that the learned judge had wrongly thought that substantial performance of major matters relieved the architect of his duty as to minor matters; that the fact that the remedy was a troublesome and expensive one did not mean that one could let the builder off repairs; that the architect had no business in the matter of the tiles to excuse the builder from putting right what was wrong; and, finally, that the learned judge wrongly considered that, as the building owner had got good value, he was not entitled to complain of breaches by the builder, and accordingly the architect could disregard the breaches. As I read them, the observations of the learned judge about the good value which the building owner obtained were inserted in his judgment, not as ground for his decision, but in the hope perhaps of consoling the building owner for losing his claim against the architect in respect of these pieces of defective work done by the builder, as the building owner no doubt thought them.

One really comes back to the question: What was it that was complained of, and what were the learned judge's findings on those matters? They come mainly I think under four heads: Tiles, pipes, woodworm and paint. [HIS LORDSHIP reviewed the evidence as to the pipes and woodworm and held that the county court judge had on the evidence properly found the architect not to be liable in respect of either. He continued:] The third major matter was the paintwork and the plastering. That requires consideration. The learned county court judge, having seen the house and having taken into account the fact that the paint had been on for two years, and that there were only two coats of paint, undoubtedly took the view that the standard of paintwork was moderate. He said:

> "There are certain complaints that are made which complaints really amount to this, that the architect did not supervise properly and allowed the builder to get away with a certain amount of shoddy work. I think that there is no complaint that does not come under that head in one way or another—at any rate the painting, plastering and exterior is not admittedly as good as it could be, I am not at all sure one might not say 'not as good as it should be'. One must remember that, as [the architect] very properly put it to me, they were building down to a price. That must mean that a certain tolerance must be expected. I think that this accounts for a very great deal of the complaints, if not indeed for all of them . . . Very much the same story extends all the way through—the leaded lights, and so on. There are imperfections in the house, as I think there are in practically every house, but in very few matters does it seem to me that there is anything like the point where I can say: 'Their architect failed here—he ought to have noticed this—or he ought to have ordered the builder to put this right'."

I draw attention to the phrase "as good as it could be" and also the expression: "In very few matters does it seem to me that there is anything like the point where I can say: 'Their architect failed here'."

Taking a broad view on the paintwork, etc., I think the learned judge has come to the conclusion, not that the architect failed, but that he had not (except in a few cases) even approached failure. The question remains, what is the standard which had to be applied. Here, I think, is the crux of the case, because counsel for the building owner eventually conceded that one could not leave out of account altogether the price at which the work was to be done. The house was not a very expensive one. Even taking into account and giving proper weight to the language of the specification:

> "The whole of the materials and workmanship is to be the best of their respective kinds and to the full satisfaction of the surveyor who shall be at liberty to reject any materials . . . and any work he may consider done in an unsatisfactory manner to be carried out to his full satisfaction"

bearing in mind the terms of the building contract and in particular what I have said about the paintwork—that there were to be only two coats—and not leaving out of account the price, I cannot see that the learned judge was wrong in taking the view that there must be some tolerance (to use his word) in building down to a price. The question of the adequacy of the work, provided the architect used his skill and acted reasonably, was a matter for the learned county court judge coming within the limits of questions of degree which were in his province.

I have in mind in particular the contract between the building owner and the builder, which was a standard R.I.B.A. contract with the standard conditions attached thereto. The first of these conditions is as follows:

> " The contractor shall carry out and complete the works in accordance with this contract in every respect in accordance with the directions and to the reasonable satisfaction of the architect."

I think that the learned county court judge's finding is to the effect that the work was carried out in accordance with the reasonable satisfaction of the architect in so far as the matters with which I have so far dealt are concerned. He undoubtedly came to the conclusion that this architect was not as hard on the builder as he might have been, or as another architect might have been. But he was quite clear in his opinion that no case of professional negligence had been made out against the architect. The learned county court judge concluded his judgment by saying that they (including no doubt not only the plaintiff, who was not a professional architect, but his servant, who was):

> " applied perhaps a lower standard than another architect might have done under different circumstances, but they never passed anything ' rank bad ', and I cannot find them guilty of professional negligence."

The case of the tiles stands on a different footing. The architect was obviously not simply backing up the builder at every stage and doing nothing for his client, because the correspondence shows that he was drawing the attention of the builder to the work which needed doing to put things right. He drew the attention of the builder to these stained tiles. They were Marley tiles which were stained no doubt by paraffin dropped by the builder's men when working in the house. These stains were not very bad, but they were noticeable, and the sort of thing which a housewife would naturally object to. When the attention of the architect was called to this defect, he drew the attention of the builder to it with a view to having the matter put right. There is no specific evidence as to the number of tiles, but the county court judge saw the stains, and there was evidence to the effect that the largest of them was about the size of half-a-crown or of a tennis ball.

The question arose what was to be done to put the matter right. Apparently these tiles mark very easily, and even a rug put on them and taken up after an interval leaves a mark where it has been. The builder went round with some other tiles with a view to replacing those that were marked but according to his evidence the new tiles did not match, and they were taken away and nothing more was done. The architect, as I again infer from the correspondence, did issue his final certificate on the basis that the tile work was to be charged for. Accordingly counsel for the building owner says: " In regard to this the position is clear, because my client was entitled to have the whole floor taken up and put down again. It is no good to say that the remedy is out of proportion. If the builder was wrong he has to put the matter right, and the architect has to see to that."

I think that this matter came within the province of the architect. He did say that the tiles which were marked should be replaced, and when they could not be replaced by matching tiles it appears that nothing further was done, and the architect passed the matter through. Although I agree that the situation is rather different from the matters which I have so far found perfectly clear, in this respect again, he was in my view not going outside the scope of cl. 1 of the conditions attached to the agreement, providing for the architect being reasonably satisfied with what had been done by the builder in accordance with his directions, although the builder had only done his best to match the

A tiles previously laid. As my Lord pointed out, it seems a little odd that there were no tiles left over, or that it was not possible to match tiles of a well-known make, like Marley tiles, without difficulty. However, I think that this was a matter which was passed to the reasonable satisfaction of the architect, and therefore that this point does not enable the building owner to succeed on the counterclaim. For these reasons I think that the appeal fails.

B

MORRIS, L.J.: I agree with the judgment of the learned county court judge, and I share the conclusions reached by HODSON, L.J. Reading the notes of the judgment of the learned judge as a whole, I do not think that he erred in any way in principle. I hope that nothing that I say will give any countenance to the view that a sort of general dispensing power was given to the
C architect. He entered into a contract with the man who employed him. The terms of that contract are known, and he must carry out that contract. The first sentence of cl. 1 of the conditions of the contract between the building owner and the builder reads:

> "The contractor shall carry out and complete the works in accordance with this contract in every respect in accordance with the directions and
> D to the reasonable satisfaction of the architect."

As I read the judgment of the learned county court judge, he takes the view that it is reasonable to have in mind that the price of the house being built was £1,910. The evidence satisfied the learned judge that that was a low price, and I think he did not err in taking the view that, when measuring the finish of the work, it was proper to have in mind the kind of house that was being
E built and the price of that house. It seems to me only natural that, if one house is being built at a great expense, and another at a very moderate price, different quality in the work would be expected. Of course, everything must depend on the exact contract made. If someone contracts to give the best possible workmanship for the lowest possible price, the contract must be carried out. I do not find that the learned judge here erred in any way in principle
F when he said that the price here was a low one, and when he tested the conduct of the architect by considering whether he acted reasonably, and whether he performed his contract with the building owner in what he did. Did he wrongly let the builder off, or did he apply his mind to deciding whether in his judgment the builder had done what he had contracted to do ? It seems to me the learned judge said: "Each architect might have a different perception. Each architect
G might come to a slightly different conclusion on the one set of facts". The learned judge thought that this architect had not failed to do what he had contracted to do.

I think the passages in the judgment of the learned judge referred to by HODSON, L.J., show the way in which the learned judge's mind was working, and I do not see any error in principle at all. He said: "One must remember
H that, as [the architect] very properly put it to me, they were building down to a price." The architect had said that in his evidence. He said: "Building down to a price and not up to a standard." The learned judge went on:

> "That must mean that a certain tolerance must be expected. I think that this accounts for a very great deal of the complaints, if not indeed for all of them . . . [The architect] and his assistant, Mr. Lofthouse, might well
> I have been rather more hard on [the builder] than they were, but they knew that this was being done as a cheap job and could not afford any very expensive work. They applied perhaps a lower standard than another architect might have done under different circumstances, but they never passed anything 'rank bad', and I cannot find them guilty of professional negligence."

Counsel for the building owner not unnaturally referred to certain phrases in the judgment, one or two of which can perhaps be looked at critically, and may form the basis of an argument. But I think that this judgment must be read as a whole, and I see no fault in it. The learned judge tried the case for three days and spent two and a half hours examining the house. It is reasonable to remember that the architect's account sent in on Nov. 4, 1953, was for £129 17s. That came as a shock to the building owner, who thought that there was an agreement for a charge of £90, and he wrote back on Nov. 10, 1953, to that effect. He said:

> " On May 11, 1951, you agreed to do a job for £90, you confirmed the agreement in a letter, which I still retain, you also knew when the agreement was made that the amount was all we could afford. Now you calmly ask for more, is it a habit to break agreements ?"

In the course of a subsequent interview there was no suggestion then that the architect had been negligent. Indeed, it seems clear that, had there not been the claim for a larger sum than the £90, this counterclaim, or a claim on the lines of this counterclaim, would never have been presented. Though recognising that fact, the learned judge nevertheless proceeded carefully to deal with the counterclaim on its merits. That there is a bad reason for putting forward a claim does not necessarily invalidate the claim if it can be shown to be a good one. The learned judge spent a long time in investigating the claim.

As regards the tiles the contract provided by cl. 12:

> " Any defects, shrinkage or other faults which shall appear within the defects liability period stated in the appendix to these conditions and shall be due to materials or workmanship not in accordance with this contract or to frost occurring before completion of the works, shall within a reasonable time after receipt of the architect's written instructions in that behalf be made good by the contractor and (unless the architect shall otherwise direct) at his own cost."

It was not that the tiles in the hall or in the dining room were bad tiles, or were badly put in. Apparently everything was done perfectly correctly. But after it had all been done, by some mischance paraffin was spilt on the tiles. This occurrence may not at first sight seem to come within the phrase " workmanship " in cl. 12, but I think that cl. 12 probably does cover it, because I suppose " workmanship " covers everything that may be done or left undone by the workmen, until the time when the house is handed over. But it is a rather special circumstance which was an unfortunate mischance.

This is not a case in which the architect did nothing. He wrote the letter of Jan. 9, 1953, asking that the tiles be dealt with, and on June 21, 1953, he again wrote to the contractor asking that attention should be given to the matter. Then it was found that they could not rub the paraffin stains off (although there is some suggestion that steel wool might have achieved that purpose) but that the tiles would have to be taken up. Tiles could not then be found that matched, with the result that the builder had either to leave the stains, or else to take the whole of the floor up, although it had been quite properly put down in the first place. I think the architect was entitled to have regard to the sort of stains that they were. In the evidence Mr. Gray said: " Slight discolouration. Largest size of half-a-crown"; and he said he thought that in the hall there were five marks, the largest about three inches in diameter. He said he thought that they could be removed by rubbing with steel wool. He said:

> " In the hall, the marks did not hit me in the eye. I saw five, maybe six or seven, some perhaps no more than half-a-crown."

Mr. Armstrong said: " When rug was moved, defects were perfectly obvious. I think paraffin "—that would be in the dining room. So the evidence shows that these marks were in fact covered by a rug in the dining room when the

A room was in use. In the hall he said that, with the mat up, the stains there were " a penny to a tennis ball ". The builder said:

> " I agree marks on floor may have been made by paraffin by my men's stove. True that complaints made when house was occupied. I took some Marley tiles round, but they were not fitted because of difference in colouring."

B The architect said: " Tiles were wrong colour replacement."

On that evidence it seems to me that it was within the competence of the architect, having regard to all the circumstances and the size and number of these stains, to say that he could pass the work as being reasonably within the standard of what was to be done, and I do not think that the learned judge C erred in principle. The tests of a reasonable standard and of reasonable conduct are after all very good tests, and it may be that the learned judge thought that this matter—on which so much time has been spent, and of which nobody would ever have heard a word had it not been that a wrong claim was put in for more fees—was de minimis. It appears to me trifling.

The money amount of this claim I do not know. Apparently the whole D claim was put forward on the basis of indicating, not the particular sum required to put any specific matter right, but how the value of the house had diminished because of the totality of these complaints. It was said that the house was worth £200 less than it ought to have been, a figure which the learned judge thought in any case would have to be critically examined.

The tiles have perhaps assumed a major importance, and I will not take up E time dealing with other matters. It seems to me that they come within the principle primarily enunciated by the learned judge that the architect was entitled to apply his mind fairly and honestly to the question whether this work had reasonably been done so as to satisfy the contract, and he came to the conclusion that it had. Whether someone else in similar circumstances might have come to a different conclusion does not seem to me to matter. It F appears to me that the learned judge considered the evidence before him with great care, and I do not feel that this court should interfere with his judgment.

Appeal on counterclaim dismissed.

[THEIR LORDSHIPS then considered the question of costs and ordered that there should be judgment for the architect for £4 17s. and that the building owner should have the general costs of the claim less an amount appropriate to the G recovery of £4 17s. if there had been a plaint for that amount admitted in a defence. The building owner was to pay to the architect £10 towards his cost of the appeal, such liability for costs being assessed under the Legal Aid and Advice Act, 1949. *Appeal as to costs allowed.*]

Solicitors: *Gard, Lyell & Co.*, agents for *Theodore Bell, Cotton & Curtis*, Sutton (for the building owner); *Gregsons* (for the architect).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

O'REILLY *v.* IMPERIAL CHEMICAL INDUSTRIES, LTD.

[COURT OF APPEAL (Singleton, Jenkins and Parker, L.JJ.), October 12, 13, 1955.]

Master and Servant—Loan of servant—Long-standing arrangement—Hirer's duty to servant—Whether that of invitor or employer—Hire of lorry driver—Driver working for hirer full time—Driver injured through unsafe method of unloading adopted by hirer.

The plaintiff was a lorry driver employed by British Road Services. A number of their lorries and drivers, of whom the plaintiff was one, were, by arrangement made between British Road Services and the defendants, put at the defendants' disposal on a full-time basis. The lorries bore the name of the defendants but the drivers were paid by British Road Services and could be dismissed only by them. Over a period of years the plaintiff in accordance with this arrangement had taken his lorry from the British Road Services' depot in the morning, had driven to one of the defendants' depots, had loaded the lorry and then had taken the goods to another of the defendants' depots where he unloaded. The defendants controlled and assisted in the loading and unloading in a general way; they made suggestions and requests and supplied unloading gear, but it was not established that British Road Services had in any sense delegated to the defendants the right to give orders how the work was to be done and the plaintiff was not bound to take orders in that regard from the defendants. On Jan. 1, 1953, the plaintiff was unloading from his lorry drums of Terylene at the defendants' plant on to a tiering truck provided by the defendants. Owing to the relative heights of the platform of the tiering truck and the top tier of drums on the loaded lorry, to the size of the platform and to other factors, the method of unloading thus adopted was unsafe. One of the drums fell on to the plaintiff who suffered injuries. In an action for damages for negligence against the defendants,

Held: the defendants did not owe to the plaintiff the duty of providing a safe system of work, because the contractual relationship of master and servant was between British Road Services and the plaintiff, and because the heavy onus of proving that a relationship of employer and employee pro hâc vice, viz., for the occasion of unloading the lorry, existed between the defendants and the plaintiff, had not been discharged, as the plaintiff had failed to show that the defendants had the right to direct how the unloading was to be carried out by him; accordingly the defendants were not liable in damages.

Principle stated in *Mersey Docks & Harbour Board* v. *Coggins & Griffith* (*Liverpool*), *Ltd.* ([1946] 2 All E.R. at p. 351 per LORD PORTER and at p. 352 per LORD SIMONDS) applied.

Decision of OLIVER, J. ([1955] 2 All E.R. 567) reversed.

[**Editorial Note.** This case may be compared with the decision of the Court of Appeal in *Denham* v. *Midland Employers' Mutual Assurance, Ltd.* ([1955] 2 All E.R. 561), where DENNING, L.J., emphasised that the liability of a master, with whom the servant is in contractual relationship, is not transferred to a temporary employer unless, at any rate, the temporary employer has the right to dictate not only what a servant is to do but also how he is to do it (see [1955] 2 All E.R. at p. 564, letter E). In the present case the question of any liability of British Road Services, as the general employer, remains open (see p. 388, letter A, post).

As to a master's duty to his servant, see 22 HALSBURY'S LAWS (2nd Edn.) 187, para. 314; and for cases on the subject, see 34 DIGEST 194-198, *1583-1620*.

As to the existence of the relationship of master and servant, see 22 HALSBURY'S LAWS (2nd Edn.) 112, para. 191; and for cases on the subject, see 34 DIGEST 22-27, *24-55*.]

Cases referred to:

(1) *Mersey Docks & Harbour Board* v. *Coggins & Griffith (Liverpool), Ltd.*, [1946] 2 All E.R. 345; [1947] A.C. 1; 115 L.J.K.B. 465; 175 L.T. 270; 2nd Digest Supp.

(2) *Donovan* v. *Laing, Wharton & Down Construction Syndicate*, [1893] 1 Q.B. 629; 63 L.J.Q.B. 25; 68 L.T. 512; 57 J.P. 583; 34 Digest 26, *49*.

(3) *M'Alister (or Donoghue)* v. *Stevenson*, [1932] A.C. 562; 1932 S.C. (H.L.) 31; 101 L.J.P.C. 119; 147 L.T. 281; Digest Supp.

(4) *London Graving Dock Co., Ltd.* v. *Horton*, [1951] 2 All E.R. 1; [1951] A.C. 737; 2nd Digest Supp.

Appeal.

The defendants appealed from an order of OLIVER, J., at Manchester Assizes dated May 9, 1955, and reported [1955] 2 All E.R. 567, whereby he awarded the plaintiff the sum of £2,341 as damages for personal injuries against the defendants.

The facts appear in the judgment of Parker, L.J.

R. H. Forrest, Q.C., and *R. G. Clover* for the defendants.

H. I. Nelson, Q.C., and *C. M. W. Elliott* for the plaintiff.

PARKER, L.J.: This is an appeal from a judgment of OLIVER, J., given at Manchester Assizes on May 9, 1955, by which he awarded the plaintiff, John Thomas O'Reilly, the sum of £2,341 as damages for personal injuries suffered by him in an accident on Jan. 1, 1953.

The facts concerning the accident itself are simple. The plaintiff was a lorry driver employed by British Road Services. He was in one of their lorries in the course of delivering drums of a chemical known as Terylene to an experimental plant of the defendants, Imperial Chemical Industries, Ltd., at Thornton-le-Fylde. The Terylene was packed in metal drums three feet long and two feet in diameter, and when filled with the chemical they weighed some three hundred pounds. There were no handles or lugs on the drums and quite clearly a drum would be an awkward thing to handle, at any rate single-handed. At Billingham the plaintiff had loaded on to his lorry twenty-three of these drums. They were stacked in three tiers, the bottom tier being stacked in the upright or vertical position and the other two tiers horizontally. The plaintiff carried on his lorry no ropes, pulleys or any form of chute or gantry for the purpose of unloading and when he arrived at the defendants' premises he was supplied with a piece of equipment known as a tiering truck. When I say he was supplied with it, I mean that an employee of the defendants drove out the truck and put it in position at the rear of the lorry to enable the plaintiff to stack the drums on it. In appearance the truck was not unlike the ordinary truck one sees at stations used for carrying goods; but its platform which was five feet by three feet was constructed in such a way that it could be raised, the idea being that it should be raised flush with the floor of a lorry so that any goods stacked on the lorry could be slid or rolled, as the case may be, on to the platform. The platform, however, at its maximum height was only some five feet two inches above the ground, a distance which in the case of this lorry would only bring the platform a matter of inches above the floor of the lorry and, certainly, would not bring it anywhere near the height of either the second or third tiers of drums. It was clearly necessary, therefore, in the case of a fully laden lorry of this kind, for the driver to stand in the first instance on this platform to manoeuvre the top tier of drums down towards himself and on to the platform.

In the present case the plaintiff had manoeuvred the first horizontal drum from its position in the top tier down on to the platform and he was in the process of doing the same with another horizontal drum at the rear of the lorry. He stood on the platform, twisted the drum round slightly and attempted to slide it down in the groove formed by two drums on the bottom tier and while so doing the drum suddenly " kicked ", as the plaintiff described it, by which I understand him to mean that it came down rather fast. He overbalanced and fell to the ground and, most unfortunately, the drum followed him and struck him in the back. Pausing there, it seems to me that this method of unloading these drums was clearly an unsafe method. The platform was not big enough to enable more than one person to work from it, and a reference to the plan before the court shows that at least three, and possibly more, drums would have to be unloaded before the driver could safely stand on the lorry itself to continue the unloading. I entirely agree with the learned judge's finding on this point which was in these terms:

> "Now, as I have already indicated, I find the operation by this method which was adopted was clearly dangerous. I doubt even if evidence about this was necessary, but, if it was, it was given in no uncertain terms, and it was clearly unshaken. Mr. Faris said: 'In view of the weight of the drum, the size of the platform, and the difference in height between the load and the platform'—that, of course, is very important—'I think that this was not a safe system'. The evidence of the plaintiff himself—not that he himself has to decide it any more than Mr. Faris—was this: 'Before the accident I thought it was wrong. The platform was not big enough. I agree that these deficiencies were obvious and I agree I made no complaint about them'."

The real question, however, in this case is: What, if any, duty was owed by these defendants to the plaintiff? If he was merely an invitee his claim would be bound to fail since on the evidence he was well aware of the danger. If, on the other hand, he had become a servant of the defendants then it is clear, in my view, that they had failed in their duty of care towards him and, as the learned judge found, there is no evidence of contributory negligence on his part. It is necessary in considering this question of duty to go further into the facts. For a number of years the defendants had an arrangement with British Road Services. The exact terms of the arrangement were not in evidence, but it was one whereby British Road Services set aside certain of their lorries for almost exclusive use on the defendants' business, and in addition to the lorries, some of their drivers were employed almost exclusively in carrying goods from one depot of the defendants to another depot, or from a depot to a plant, or for delivering to customers. Indeed the lorries were painted in a special colour and carried the name of the defendants and their trade mark. The plaintiff had been one of these drivers for a number of years. He carried no equipment for loading or unloading his lorry; but the defendants, to put it quite generally, would assist in both operations. At first the drums of Terylene were delivered to the main stores at Thornton-le-Fylde where there was a proper unloading bay and there was no trouble there in unloading drums stacked in this way. Later when the experimental plant, which was situated some four hundred yards away was opened, it became more convenient to deliver the drums direct to the plant. At this plant there was no unloading bay and the evidence, which the learned judge accepted, was that the defendants would there supply the driver in question with sacks, straw, and old motor tyres on which the drums could be dropped off the lorry. Later still, and for about a year before the accident in question the defendants had this tiering truck at the plant.

It is, I think, clear that the learned judge accepted the evidence called by the plaintiff in preference to that called by the defendants. For instance, there was an issue, whether the defendants had supplied sacks, straw and motor tyres and had given instructions about the unloading. On that the learned judge accepted the evidence of the plaintiff and his witnesses and his findings were as follows:

> "Having reached the appropriate depot of the I.C.I. the plaintiff (I am taking it merely as an example; there were many other men doing the same thing) would load his lorry under the supervision and direction of whoever was in charge of the I.C.I. depot. They would decide what load was to be taken. The driver, of course, would decide how that load was to be stowed,

> and I suppose if he thought the load was so big as to be dangerous he could have refused to load. The same could be said of his ordinary employers; if they told him to do a thing that he thought was dangerous he could refuse to do it, but subject to that he was entirely under the direction of whoever was in charge of the I.C.I. depot . . . Each of those methods [i.e., methods of unloading at the bay, unloading on to the sacks of straw and unloading on to the tiering truck] as counsel for the plaintiff pointed out, was inaugurated by the I.C.I. It was their method. Just as they were in control of the loading, so they were in control of the unloading to that extent, always bearing in mind that this plaintiff could have said: ' I am not going to use that machine; I am going to take my load back home to Kearsley ', which was about fifty miles away, and waste the day, and probably get the sack when he got there for not doing what the I.C.I. told him . . . With considerable hesitation I have come to the conclusion that the plaintiff is right and that in this case, by reason of all the circumstances, the defendants owed him the same duty as regards appliances and system of work as if he had in fact been their own employee. They were his employers in every respect except that they did not pay him and could not dismiss him."

It seems to me that the learned judge is there finding that, although undoubtedly the plaintiff always remained in the general employment of British Road Services, yet in the circumstances of this case he became the servant of the defendants at the moment of unloading.

That such a position can occur is shown by a series of cases of which the most recent authority is *Mersey Docks & Harbour Board* v. *Coggins & Griffith* (*Liverpool*), *Ltd.* (1) ([1946] 2 All E.R. 345). It is unnecessary to consider the actual facts of that case. The importance of it is that their Lordships there lay down the test which has to be applied in considering the question whether at any moment a workman, although in the general employment of A, for certain purposes comes into the special employment of B. Viscount Simon emphasises the difficulty of proof. He says this ([1946] 2 All E.R. at p. 348):

> " It is not disputed that the burden of proof rests upon the general or permanent employer—in this case the board—to shift the prima facie responsibility for the negligence of servants engaged and paid by such employer so that this burden in a particular case may come to rest on the hirer who for the time being has the advantage of the service rendered. And, in my opinion, this burden is a heavy one and can only be discharged in quite exceptional circumstances."

It is perfectly true that that was a case in which both the general employers and what I may call the temporary employers were both sued and the burden there referred to is the burden on the general employer. It seems to me, however, that if, as in this case, a workman chooses to sue not his general employers but the persons whom he says temporarily owed him as servant the duty of master there is a considerable burden on him to show that those temporary employers have come under that duty.

Lord Porter said (ibid., at p. 351):

> " Many factors have a bearing on the result. Who is paymaster, who can dismiss, how long the alternative service lasts, what machinery is employed —all these questions have to be kept in mind. The expressions used in any individual case must always be considered in regard to the subject-matter under discussion, but among the many tests suggested I think that the most satisfactory by which to ascertain who is the employer at any particular time is to ask who is entitled to tell the employee the way in which he is to do the work upon which he is engaged. If someone other than his general employer is authorised to do this, he will, as a rule, be the person liable for the employee's negligence. But it is not enough that the task to be performed

> should be under his control, he must also control the method of performing it. It is true that in most cases no orders as to how a job should be done are given or required. The man is left to do his own work in his own way, but the ultimate question is not what specific orders, or whether any specific orders, were given, but who is entitled to give the orders as to how the work should be done. Where a man driving a mechanical device, such as a crane, is sent to perform a task, it is easier to infer that the general employer continues to control the method of performance since it is his crane and the driver remains responsible to him for its safe keeping. In the present case, if the appellants' contention were to prevail, the crane driver would change his employer each time he embarked on the discharge of a fresh ship."

LORD SIMONDS said (ibid., at p. 352):

> "In the cited case [*Donovan* v. *Laing, Wharton & Down Construction Syndicate* (2) ([1893] 1 Q.B. 629)] the court held upon the facts that the burden of proof had been discharged and I do not question the decision. But it appears to me that the test can only be satisfied if the temporary employer (if to use the word 'employer' is not to beg the question) can direct not only what the workman is to do but also how he is to do it."

In considering whether the judge's findings, to which I have referred, are justified by the evidence it is proper, I think, to refer only to the evidence of the plaintiff and his witnesses which the judge preferred to that of the defendants. The plaintiff was asked:

> "Having put the thing there [i.e., having put the tiering truck at the back of the lorry] was anything said about what you were to do? A.—Just to put the drums on the platform of the tiering truck. Q.—Who told you that? A.—The person in charge of the tiering truck."

He described the methods which had been employed and he was asked questions in cross-examination specifically on this point.

> "Q.—Mr. O'Reilly, you were employed by British Road Services ? That is right, is it not ? A.—That is correct. Q.—And they were the people who could give you orders ? That is right, is it not ? A.—Yes. Q.—And tell you who it was could tell you where you were to go, for example ? A.—Yes. Q.—Who ? British Road Services ? A.—British Road Services in the second place. Q.—And as regards the way you were to do your job ? They were the People who could tell you how to do your job, weren't they ? A.—No, sir. Not always. Q.—Let me put it this way. The only people who could sack you if you did not do your job properly were British Road Services ? That is right, is it not ? A.—That is correct. Q.—And you need not take orders from anybody else at all, need you ? A.—No, not really. Q.—And the method of loading your lorry—loading it—was entirely under your control ? That is right, is it not ? A.—That is correct. Q.—And the method of unloading your lorry was entirely under your control, was it not ? A.—No. Q.—Don't you agree with that ? A.—No. Q.—I will have to follow that last question up in that case. If a factory to which you went suggested to you a dangerous way of unloading your lorry you could refuse to do it, could you not, that way ? A.—If I were aware of it being dangerous I could refuse."

I have very grave doubts whether, accepting those answers in that form, it can possibly be said that the rigorous test laid down by the House of Lords in the *Mersey Docks & Harbour Board* case (1) is satisfied in this case. The answers of that witness leave the matter in doubt to say the least, and, bearing in mind the heavy burden of proof and the rigorous test to be applied, I do not think it is possible on the facts of this case, accepting as the learned judge did, the evidence given for the plaintiff, to say that that test has been satisfied.

No doubt the defendants would in a general sense control and assist in the operations of unloading and loading; they might make suggestions; indeed they might make requests and when there was no other way they would supply, as they did here, some platform on which they desired the carrier to unload the goods. It seems to me, however, that one of the difficulties, in suggesting that the plaintiff went into the special employ of the defendants is to be seen at once when one realises that except for certain periods in the defendants' business it is beyond argument that the plaintiff was acting for British Road Services and for British Road Services only. From the moment he left their depot with their lorry he was clearly acting as their servant. What is being suggested here is that at some undefined moment of time, on arriving at a depot or at this experimental plant, and presumably at a time when he had dismounted from the driving seat, he became temporarily the servant of the defendants; and equally at the moment the unloading ceased and the plaintiff rolled up his tarpaulins and got back into the driving seat he ceased to be in any relationship of servant to the defendants and reverted to the position of being the servant solely of British Road Services. It seems to me on the facts of this case that the test laid down by the House of Lords cannot be said to be satisfied. I should add this: no doubt British Road Services as general employers give their drivers, including the plaintiff in this case, instructions to do what the defendants, I.C.I., want; but throughout, it seems to me, British Road Services remained sub-contractors of the defendants using their own lorry and their own driver and had in no sense delegated to the defendants the right to give orders how the work was to be done. I think it is unfortunate that the learned judge was not referred specifically to the *Mersey Docks & Harbour Board* case (1) and to the passages to which I have referred. I am not blaming anybody because there is considerable doubt exactly how the case was put below, and indeed if one looks at the pleadings it is hardly surprising that the learned judge himself did not have this case in mind as relevant to the argument or that counsel for the defendants did not refer the learned judge specifically to it. I think it may well be that if the learned judge had been referred to that case he would have come to a different conclusion.

The matter does not rest there, however, because counsel for the plaintiff puts his case in a much broader way. He says in effect that even if he cannot satisfy the test laid down in the *Mersey Docks & Harbour Board* case (1) yet he is entitled to succeed and he puts forward this proposition: that if, in the case of a carrier delivering goods to a consignee, the consignee interferes, and a fortiori if he gives instructions to the carrier, he comes under a duty; and having got to that stage, counsel says that where that interference and instruction assume the form of control not only is there a duty, but there is a duty akin to or of the same nature as that between master and servant. On that basis, as I understand it, he would say that there may well be two people, the employers, British Road Services, and the defendants, both of whom owe the plaintiff a similar duty, the duty of master to servant. I confess that it does seem to me that counsel is putting forward a completely new and novel claim, something, so far as I know, unknown to the law. If the duty of master to servant is to be found in any case it can exist only where there is either a true relation of master and servant or a relationship of master and servant of a temporary character as that envisaged in the *Mersey Docks & Harbour Board* case (1). Unless one or other of those features be proved I cannot see any possibility of maintaining a claim for a breach of the duty owed by a master to his servant. I understand that below a reference was made to the principle in *M'Alister* (*or Donoghue*) v. *Stevenson* (3) ([1932] A.C. 562). That has not been developed in this court and it is sufficient for me to say that I see no possibility of presenting the case on those lines. Indeed a similar argument based on *Donoghue* v. *Stevenson* (3) was advanced in the House of Lords in *London Graving Dock Co., Ltd.* v. *Horton* (4) ([1951] 2 All E.R. 1) and was specifically rejected.

Sorry as I am for the plaintiff in this case, I am not satisfied that he has shown a breach of any duty owed to him by these defendants. It may well be that he may yet have a perfectly good claim against British Road Services. For these reasons I would allow the appeal.

JENKINS, L.J.: I agree. It is not in dispute that if the relationship between the plaintiff and the defendants in this case were merely that of invitor and invitee, the plaintiff's case must fail owing to his knowledge of the danger, as is shown by *Horton's* case (4). It has, however, been argued for the plaintiff that in all the circumstances of this case the defendants owed to him a duty amounting to the duty owed by an employer to an employee; that is to say, the duty on the employer to provide the employee with adequate plant, to devise a safe system of work for the employee and not to do anything to expose the employee to unnecessary risk. Had it been established that the defendants were under such a duty in this case, it is clear from the learned judge's findings and from the evidence that the plaintiff would be entitled to succeed, for the tiering truck was not an adequate apparatus for unloading a lorry having on it three tiers of three hundred pound drums. The duty owed by an employer to his employee, however, is a contractual duty and prima facie, therefore, it can only exist in a case in which the contractual relationship of employer and employee exists between the parties. For instance, as was shown by *Horton's* case (4), the fact that A enters the premises of B for the purpose of rendering services to B pursuant to a contract between the employer of A and B, the occupier of the premises, does not give A any higher right than that of an invitee, because there is no contract of service between him and B, and it matters not what arrangement may have been made between his employer and B, that being an arrangement to which he is not a party.

There is, however, a rare exception to that rule which has been referred to sometimes as the case of employment pro hâc vice. That is the kind of case in which an employer hires out to some other person the services of his employee and the transfer of the control and direction of the actions of the employee is so complete and puts his temporary employer in such close control of the situation that for the purposes of liability either to a third party, or equally I think to the employee himself, the temporary employer is to be regarded in law as his master. As PARKER, L.J., has said, the onus on those who seek to establish a relationship of employer and employee pro hâc vice is a heavy one, and in my view the range of cases in which that relationship should be held to have been set up ought not to be extended; notwithstanding the learned judge's findings in the present case I cannot agree that the facts here suffice to establish the existence of such a relationship. I say that with the greatest respect to the learned judge, and I note that he arrived at his conclusion with, as he said, " considerable hesitation". When one adds to that hesitation the fact that the leading case on this subject *Mersey Docks & Harbour Board* v. *Coggins & Griffith* (*Liverpool*), *Ltd.* (1), was not cited to the learned judge, I think it is easy to understand how he reached the conclusion that he did; it seems to me that had that case been cited to him and had he applied his mind to the facts in the light of that authority he might well have come to a different conclusion.

If there is here no relationship of master and servant in the ordinary sense, as I hold there is not (indeed it could not be contended that there was), and if the facts here do not suffice to discharge the heavy onus lying on those who seek to make out a case of employment pro hâc vice, as in my view they do not suffice, then it seems to me that the plaintiff's case must necessarily fail. I decline to erect in cases of this kind a new duty which is neither the duty subsisting between invitor and invitee nor the duty arising from the relationship of employer and employee. For these reasons and for the reasons given by PARKER, L.J., I agree that this appeal should be allowed.

A **SINGLETON, L.J.:** I am in full agreement with the judgments which have been given and there is nothing that I wish to add.

Appeal allowed.

Solicitors: *J. W. Ridsdale* (for the defendants); *Fielding & Fernihough*, Bolton (for the plaintiff).

B [*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

Re DORING (*deceased*).
DORING *v.* CLARK AND OTHERS.

C [CHANCERY DIVISION (Wynn-Parry, J.), October 19, 1955.]

Family Provision—Provision for widow—Provision of annuity payable under testator's partnership deed—Payment of annuity contingent on partner's survival and on profits exceeding fixed sum—Whether reasonable provision—Inheritance (Family Provision) Act, 1938 (1 *&* 2 *Geo.* 6 *c.* 45), *s.* 1, D *amended by the Intestates' Estates Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 64), *s.* 7 *and Sch.* 3.

By his will the testator bequeathed to his widow for her life one-half of his residuary estate, which would furnish her with an income of about £600 per annum. In addition he exercised an option under a partnership deed whereby his surviving partner, his brother, became liable to pay an annuity E of £500 to her during their joint lives (making a total provision for her of about £1,100 per annum while the testator's brother lived); but the annuity of £500 was to abate proportionately if the annual profits of the partnership business fell below £3,000. On an application by the widow under the Inheritance (Family Provision) Act, 1938, as amended by the Intestates' Estates Act, 1952, that reasonable provision should be made for her maintenance, F the court found that £1,100 per annum was reasonable provision as regards amount, but

Held: it was not reasonable to make nearly one-half of the widow's future income, i.e., the annuity of £500, subject to the contingencies of ceasing on the death of the testator's partner and of abating if the annual business profits fell below £3,000; and, accordingly, the court would secure G to her the receipt of the annual sum of £1,100 by ordering that she should be paid out of the income of the residuary estate an annuity of £500 per annum during widowhood provided that neither that annuity nor any part of it was to be payable except to the extent that £500 per annum was not received under the partnership deed.

Re Franks ([1947] 2 All E.R. 638) distinguished.

H [For the Inheritance (Family Provision) Act, 1938, s. 1, as amended by the Intestates' Estates Act, 1952, see 32 HALSBURY'S STATUTES (2nd Edn.) 139.]

Cases referred to:

(1) *Re Borthwick*, [1949] 1 All E.R. 472; [1949] Ch. 395; [1949] L.J.R. 752; 2nd Digest Supp.

I (2) *Re Inns*, [1947] 2 All E.R. 308; [1947] Ch. 576; [1947] L.J.R. 1207; 177 L.T. 165; 2nd Digest Supp.

(3) *Re Franks*, [1947] 2 All E.R. 638; [1948] Ch. 62; [1948] L.J.R. 345; 2nd Digest Supp.

Adjourned Summons.

The applicant made application by originating summons under the Inheritance (Family Provision) Act, 1938, as amended by the Intestates' Estates Act, 1952, that such reasonable provision as the court might think fit should be made for her maintenance out of the net estate of the testator.

The applicant was the testator's wife by his second marriage; at the time of the marriage she was thirty-nine years of age and he was fifty-six. By his will dated Mar. 31, 1949, the testator bequeathed to his wife, the applicant, all his personal chattels, a pecuniary legacy of £250, and a life interest in one-half of his residuary estate, which it was agreed, if invested would produce approximately £600 per annum. The testator bequeathed the remaining half of his residuary estate between his brother, the second defendant and his sister, the third defendant, giving the latter two-thirds of that half. The testator died on Mar. 13, 1954, leaving a net estate, after payment of death duty and liabilities and legacies, of about £30,000. During his life the testator had carried on a prosperous business in partnership with his brother, the second defendant. Under the terms of the partnership deed the testator was given an option the exercise whereof made the surviving partner liable to pay the applicant an annuity of £500 per annum during their joint lives. It was provided, however, that if in any one year the net profits of the business should be less than £3,000, the annuity for the year next following was to abate proportionately. Before his death the testator exercised this option thus providing the applicant with an additional annual income of £500, contingent on the continuation of the business, and on the profits of that business being not less than £3,000 per annum.

J. Monckton for the applicant.
R. B. S. Instone for the first defendant.
H. E. Francis for the second and third defendants.

WYNN-PARRY, J.: His Lordship stated the facts and reviewed the evidence. He then considered the question whether the testator had made reasonable provision for his widow, citing *Re Borthwick* (1) ([1949] 1 All E.R. at p. 475 per Harman, J.), and *Re Inns* (2) ([1947] 2 All E.R. at p. 311 per Wynn-Parry, J.), and came to the conclusion that in so far as the amount of the provision made by the testator (viz., an aggregate annual sum of £1,100) was concerned he could not interfere. His Lordship continued: There remains the second point which, from the point of view of the applicant, is the most important point in the case. The annuity of £500 is liable to cease altogether on certain contingencies, for example, on the death of the surviving partner, the second defendant, and it is liable to abate if the net profits of the business out of which it is payable fall below £3,000 per annum. The question arises whether the testator, who had obviously given careful consideration to the amount of income to be received by the applicant, was reasonable in making the source of approximately one-half of that income subject to such contingencies. He could safely have achieved his object of leaving her in receipt of an income of £1,100 a year if, for instance, he had given her the income of the whole of his residuary estate. I assume, however, and I think I am entitled to assume, on the facts, that his reason for not doing that was that he intended to benefit as well as the plaintiff not only his brother but also his sister and, in order to benefit his sister, he so to speak threw the burden of the other half of his intended provision on the profits of the business, which is now owned by his brother. That, no doubt, is a perfectly laudable intention, but is it reasonable to subject so much of the applicant's future income to the contingencies I have mentioned? I have come to the conclusion that it is not reasonable, and that on this part of the case I should interfere. I propose therefore to make the necessary declaration that further provision ought to be made for the applicant. I propose to order that there shall be paid out of the income of the residuary estate an annuity at the rate of £500 per annum during widowhood, with a proviso that neither that annuity nor any part of it is to be payable except to the extent that it is not received under the provision in the partnership deed.

It was urged on me by counsel for the second and third defendants, that if I should accede to any extent to the application of the widow I should do no more than make a declaration that she should have further maintenance, and stand the matter over generally to a future date, with liberty to apply on the authority of *Re Franks* (3) ([1947] 2 All E.R. 638). In my view, however, that case is entirely distinguishable from the present case. In this case I am able to say that I think the widow ought to have £1,100 per annum, and all I am designing to do is to see that there is set up the necessary machinery whereby she will receive that sum during her widowhood. In *Re Franks* (3) it was not possible at the date of the hearing to quantify the amount of provision which should be made for the infant, Peter Franks. As I pointed out in the course of my judgment (ibid., at p. 640):

> "It is clear that Richard Brandt, the son of the first marriage, requires, and will for some time require, a substantial part of the income of the estate for his maintenance and education, while on the other hand, the infant, Peter Franks, requires nothing now, but will require something later."

In my view, the reasonable view is that the widow requires now, and will continue to require, £1,100 per annum as income: therefore, I cannot regard *Re Franks* (3) as being a guide to me in this case.

Order accordingly.

Solicitors: *Wright, Son & Pepper* (for the applicant); *Edwin E. Clark & Son* (for the first defendant); *John Bartlett & Son*, agents for *Aldrich, Crowther & Bartlett*, Brighton (for the second and third defendants).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

R. *v.* RENT TRIBUNAL FOR PADDINGTON NORTH AND ST. MARYLEBONE, *Ex parte* PERRY AND OTHERS.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Ormerod and Glyn-Jones, JJ.), October 18, 1955.]

Rent Control—Rent tribunal—Certiorari—Whether excess of jurisdiction—Services increase determined—Procedure—Evidence—Housing Repairs and Rents Act, 1954 (2 *&* 3 *Eliz.* 2 *c.* 53), *s.* 40 (1) (*b*), (2) (*b*), (5).

Rent Restriction—Services increase—"Services" exemplified—Maintenance of lifts and boilers—Floor coverings to common parts—Housing Repairs and Rents Act, 1954 (2 *&* 3 *Eliz.* 2 *c.* 53), *s.* 40 (1) (*b*).

Certain flats were let at pre-Sept. 2, 1939, rentals under tenancies to which the Rent Restrictions Acts applied. Services, including both services required under the terms of the lettings and services not required by those terms, were provided by the landlords. The landlords applied to the rent tribunal for a determination under the Housing Repairs and Rents Act, 1954, s. 40 (2) (b) that they were entitled to an increase of rent in respect of a rise in the cost of the services over the period beginning Sept. 3, 1939, and ending Aug. 30, 1954. The tribunal duly gave the landlords and the tenants an opportunity of being heard. At the hearing the evidence adduced by the landlords relating to the amount of the rise of costs was unreliable. The tribunal determined that the landlords were entitled to an increase of rent and in their notification of determinations they set out in a schedule the services in respect of which the determinations were made. These included (a) contractual services, viz., central heating, constant hot water, passenger and service lifts, lighting and heating of lounge, hall, passages and staircases, and (b) non-contractual services, viz., porterage, cleaning common parts, removal of refuse, pest control, and floor coverings to common parts. The tenants applied for an order of certiorari to quash the determinations on the grounds (i) that there was no evidence of a rise in the cost of services during the relevant period and (ii) that the tribunal took into account items which were not services.

Held: the tribunal had jurisdiction to make determinations of services increases because the three conditions of the tribunal's jurisdiction, viz., (i) a controlled tenancy, (ii) a standard rent being the rent before Sept. 2, 1939, and (iii) services provided by the landlords, were satisfied in each case; and as it did not appear on the face of the determinations that the tribunal had exceeded their jurisdiction, but appeared therefrom that the matters which the tribunal took into consideration as services were services under s. 40 (1) (b) of the Act of 1954, certiorari did not lie.

Per LORD GODDARD, C.J.: every one of the contractual services seems to me to be a service [within s. 40 (1) (b) of the Housing Repairs and Rents Act, 1954]. If a landlord has provided a lift, the maintenance of it is a service because the lift has to be worked. Among the non-contractual items the only questionable one is the " floor coverings to common parts ". That is, however, as much a service as heating and lighting the staircase (see p. 395, letter D, post).

Observations on the position of rent tribunals when exercising jurisdiction under the Act of 1954 (see pp. 394, 395, post); *R.* v. *Brighton & Area Rent Tribunal, Ex p. Marine Parade Estates* (*1936*), *Ltd.*, [1950] 1 All E.R. 946, considered.

[**Editorial Note.** Certiorari is a remedy for excess of jurisdiction or acting without jurisdiction, but is not a remedy for an error in a tribunal's determination; for that the remedy is appeal, if the statute confers a right of appeal, which in this instance it does not. Thus there was no remedy if the tribunal had made an error in reaching their determination. The decision in the present case depends on the scope of the remedy by prerogative order rather than on the law of landlord and tenant, but the case is also of particular interest for the illustration which it affords of what are services within s. 40 of the Housing Repairs and Rents Act, 1954. The term services is not defined in the Act, and the definition in s. 12 (1) of the Furnished Houses (Rent Control) Act, 1946, 13 HALSBURY'S STATUTES (2nd Edn.) 1092, is not incorporated in the Act of 1954 (see p. 396, letter G, post).

As to certiorari not lying where the proceedings are regular on their face and the inferior tribunal had jurisdiction, see 11 HALSBURY'S LAWS (3rd Edn.) 62, para. 119; and as to certiorari in relation to issues which are collateral, see ibid., p. 59, para. 116; and for cases on the subject, see 16 DIGEST 417-419, *2763-2788*.

For the Housing Repairs and Rents Act, 1954, s. 40, see 34 HALSBURY'S STATUTES (2nd Edn.) 367.]

Cases referred to:

(1) *R.* v. *Brighton & Area Rent Tribunal, Ex p. Marine Parade Estates* (*1936*), *Ltd.*, [1950] 1 All E.R. 946; [1950] 2 K.B. 410; 114 J.P. 242; 31 Digest (Repl.) 676, *7702*.

(2) *R.* v. *Grimsby Borough Quarter Sessions, Ex p. Fuller*, ante, p. 300.

(3) *R.* v. *Lincolnshire JJ., Ex p. Brett*, [1926] 2 K.B. 192; 95 L.J.K.B. 827; 135 L.T. 141; 90 J.P. 149; Digest Supp.

Motion.

By this motion Rhoda Perry, Ronald Hart Drury and Alfred Caplan, tenants of flats known as Nos. 44, 81, 124, Ivor Court, London, N.W.1, applied for an order of certiorari to remove into the High Court three determinations of services increases made by the Rent Tribunal for Paddington North and St. Marylebone on the application of the landlords under s. 40 (2) (b) of the Housing Repairs and Rents Act, 1954, concerning the three flats of the tenants.

The hearing took place on Apr. 19 and May 2, 1955. The landlords were represented by a Mr. Patterson, from the office of estate agents who acted in connection with the management of Ivor Court, which was a large block containing more than 150 flats, on behalf of the landlords. The tenants were represented by counsel. The witnesses on behalf of the landlords were Mr. Patterson, two expert witnesses who were called in connection with the lifts and boiler maintenance and repairs, and the head porter of Ivor Court. On behalf of the tenants some nine tenants gave evidence. On May 6, 1955, the tribunal made their determinations and by notifications of determinations of that date it was stated:

> ". . . the tribunal determined that it is just that the landlord should be entitled to an increase of rent of [£23 0s. 2d., £37 0s. 4d. and £37 14s. 9d. respectively] per annum in respect of the increase in costs over the period from Sept. 3, 1939, to Aug. 30, 1954, in providing the services set out in the schedule below.

SCHEDULE

Services in respect of which the determination was made.

1. Services which are to be provided by the landlord under terms and conditions of the letting.	Central heating; constant hot water; passenger and service lifts; lighting and heating of lounge, hall, passages and staircases.
2. Services which are provided by the landlord *not* under the terms and conditions of the letting.	Porterage; cleaning common parts; removal of refuse; pest control; floor coverings to common parts."

After being notified of those determinations the solicitors of the applicants wrote a letter to the clerk to the tribunal dated May 13, 1955, in which they suggested that in view of the evidence before the tribunal and the submissions made on behalf of the tenants there the tribunal might perhaps have made a clerical error. They stated that the tribunal had allowed increases representing about eighty-three per cent. of the amounts claimed by the landlords; and that in view of the entire absence of evidence of 1939 values and the virtually admitted decrease in some of the services the solicitors suggested that that might not have been the real intention of the tribunal. By a letter dated May 18, 1955, the clerk to the tribunal informed the solicitors of the applicants that no error was committed by the tribunal, and that since the landlords had been unable to substantiate their figures of costs for 1939 it was in the discretion of the tribunal to arrive at their own valuation.

The grounds for the application were (i) a denial of natural justice, (ii) that the determinations were or must have been made and based on grounds with which the applicants were afforded no opportunity of dealing; (iii) that there was no evidence or other material before the tribunal on which the tribunal could determine as they did; (iv) that the determinations were in respect of matters which were not within the jurisdiction of the tribunal or were not within the meaning and purport of s. 40 of the Housing Repairs and Rents Act, 1954; (v) that the determinations were contrary to the evidence; (vi) that it was not competent in law for the tribunal to award the increases which they purported to award and (vii) that the tribunal failed to act judicially in their determinations.

J. G. Wilmers for the tenants.
Rodger Winn for the rent tribunal.
J. H. Gower for the landlords.

LORD GODDARD, C.J.: The landlords applied under the Housing Repairs and Rents Act, 1954, s. 40, to the tribunal set up under the Furnished Houses (Rent Control) Act, 1946, for a determination that they were entitled to an increase of rent in respect of the increased cost of services provided by them for the tenants. It is necessary to consider what jurisdiction the tribunal had, how it has been exercised and what order has been made. As to jurisdiction, s. 40 (1) provides:

> " The following provisions of this section shall have effect where a dwelling-house is let under a controlled tenancy or is occupied by a statutory tenant, and—(a) the standard rent of the dwelling-house is the rent at which it was let on a letting beginning on or before Sept. 1, 1939 . . . and (b) services for the tenant are under the terms and conditions of the letting to be provided, or are provided, by the landlord."

That is to say, first, there must be a controlled tenancy, secondly the standard rent must be the rent at which it was let on or before Sept. 1, 1939, thirdly, the landlord may be contractually bound to provide services, or he may in fact provide them, although he is under no covenant to provide them, as is often done. If those three conditions are fulfilled it is provided:

> " (2) If . . . (b) on an application by the landlord the tribunal constituted under the Act of 1946 for the district in which the dwelling-house is situated has at any time after the commencement of this Act determined as respects the said services that in all the circumstances it is just that the landlord should be entitled to an increase of rent, of an amount specified in the determination, in respect of any such rise as aforesaid,* the landlord shall be entitled to recover the amount of the increase agreed or determined as aforesaid notwithstanding anything in the terms of the tenancy or statutory tenancy or any enactment . . . (5) Before determining any application under sub-s. (2) (b) of this section the tribunal shall make such inquiries (if any) as they think fit and shall give the landlord and the tenant an opportunity of being heard or, at the option of the party, of submitting representations in writing."

In the present case the applications were made to the tribunal, and the landlords were represented by a Mr. Patterson from the office of an estate agent. I do not think he understood the Act. If he did, he got most of his figures wrong, and at the end of the cross-examination by counsel for the tenants Mr. Patterson said: " I have never thought of that ", or " I have not the proper information about that." If I had been a member of the tribunal, I should not have paid any attention to what Mr. Patterson said or to his figures. The tenants were called to say how very bad the flats were, and I have no doubt they may have had legitimate grounds of complaint. The only other evidence given for the tenants was to the effect that there was no rise in costs of some of the services. There need not, however, be any evidence given before the tribunal. The tribunal has jurisdiction if the three requisites mentioned at the beginning of this judgment are fulfilled, and, having got jurisdiction, it is for them to proceed in the way laid down in the Act and to decide whether there has been a rise of costs and, if so, what in all the circumstances it is just that the landlord should be entitled to as an increase of rent in respect of that rise.

In *R.* v. *Brighton & Area Rent Tribunal, Ex p. Marine Parade Estates* (*1936*), *Ltd.* (1) ([1950] 1 All E.R. 946), a case in which the court would certainly have interfered if they could have done so, it was pointed out (at p. 950) that the tribunals were given by Parliament wholly peculiar powers. They are not bound to act on evidence, nor to act on any particular principles. Provided that the property into which they have to inquire is within their jurisdiction, all that has to be done is to make such inquiries as they think fit. They can act on their own opinions, their own views, and their own knowledge. They do not have to hear evidence, but they must give the tenant and the landlord an opportunity to lay their views before them. They need not even hear the landlord or the tenant, but can receive their views in writing. The tribunal must consider their views but can act as they think fit. Counsel for the tenants urged that on matters collateral, that is to say, matters which go to show whether or not a tribunal had jurisdiction, it is open to this court to review the findings of the tribunal. The three conditions with which I dealt at the opening of my judgment having been fulfilled in the present case, the tribunal had power to consider whether there had been a rise in the cost of the services. The tribunal gave a decision in which they set out in detail the services in respect of which they made their award. They divided the services into two classes, the contractual services and the non-contractual services. It was not suggested that they included any services which were not in fact rendered, or which were not contracted to be rendered. Counsel for the tenants submitted that some of the services ought to be regarded as maintenance, and not services. I cannot agree with him on that. The contractual services set out are: central heating, constant hot water, passenger and service lifts, lighting and heating of lounge, hall, passages and staircases. Every one of these seems to me to be a service. If the landlords contracted to provide a lift, the maintenance of it is a service, because the lift has to be worked. It is one of the most important services for the tenants. The non-contractual services provided are: porterage, cleaning common parts, removal of refuse, pest control, floor coverings to common parts. The only questionable item is the floor coverings to common parts. That, however, is as much a service as heating and lighting the staircase; it is an amenity which gives a better appearance to the place.

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* The Housing Repairs and Rents Act, 1954, s. 40 (2) (a), provides—

(2) If—(a) by an agreement in writing relating to the services mentioned in para. (b) of the last foregoing sub-section and made after the commencement of this Act between the landlord and the tenant or a former tenant of the dwelling-house it has been agreed that the landlord shall be entitled to an increase of rent, of an amount specified in the agreement, in respect of any rise, over the period beginning with Sept. 3, 1939, and ending with the commencement of this Act, in the cost of the provision of the services, or . . .

The reference in s. 40 (2) (b) to " any such rise as aforesaid " refers to the rise mentioned in para. (a) above.

Counsel for the tenants wished to go behind the tribunal's notification of their determinations and to show that the tribunal awarded too large a rise. He said that he could show by an analysis of the figures that they must have taken into account matters which they ought not to have taken into account, particularly matters relating to the upkeep of the boilers, etc., which were properly maintenance. Where the tribunal had jurisdiction, and in the exercise of that jurisdiction made what a party considers an error, that is not a ground for certiorari; that is a ground of appeal. I have often thought that it would have been a good thing if Parliament had provided for an appeal, but Parliament has not so provided. The remedy of certiorari, however, is a remedy granted by this court where the tribunal has exceeded its jurisdiction. If one goes into the history of certiorari to quash, which is different from certiorari to remove, it is shown to be a matter of jurisdiction. If certiorari is moved because of the bias of a justice, that is because if a justice is biased, he is in effect a judge in his own cause; and on that basis the justice would have had no jurisdiction as he would have been sitting in a matter in which he was interested. In *R.* v. *Grimsby Borough Quarter Sessions, Ex p. Fuller* (2) (ante, p. 300) we applied the same principle. It was alleged that information had been given to the recorder which he ought not to have received. Therefore, the case was one of prejudice; the recorder, if he was prejudiced, would not be sitting as an impartial judge.

In the present case, the tribunal had jurisdiction because the conditions precedent to jurisdiction were all fulfilled. Whether they were right or wrong in the exercise of their jurisdiction is not a matter which can be brought up before this court. It may be that if on the face of the notification of determinations we could see that they had taken something into account that was not a service at all, or if they had put in some remark that they increased the amount because they thought it was only fair that the tenants should pay more money now than they did before, it may be the court could say that the tribunal were acting without jurisdiction. On the face of the order, and in so far as it is a speaking order, it appears that increases were awarded in respect of the rise in cost of the two different classes of services. For these reasons, whether or not the tribunal came to a right conclusion is not a matter with which this court can deal by certiorari. We cannot sit here as a court of appeal because Parliament has not chosen to give an appeal from the decision of these tribunals. These tribunals, one may say, are a law unto themselves. They do not sit as courts. They are called tribunals, because in some respects they are the antithesis of courts. The tribunal said that on their inquiry and in their experience they have come to the conclusion that a certain sum should be allowed in respect of the matters set out and, in my opinion, we cannot interfere with that, and the application must be refused.

ORMEROD, J.: I agree. Counsel for the tenants, in the course of his argument, took two points on the face of the notification of determinations itself. In the first place, he said the matters referred to in the document as services, could not be regarded as services, because, having regard to the result at which the tribunal arrived, they must have included certain repairs which were not within the terms of the inquiry of the tribunal. That is certainly not a matter with which this court can deal on certiorari. On the face of the document those matters are services and, therefore, the document is sufficient in itself. Counsel argued, further, that some of the matters set out in the document could not be services, because by s. 12 (1) of the Furnished Houses (Rent Control) Act, 1946:

> " ' services ' includes attendance, the provision of heating or lighting, the supply of hot water and any other privilege or facility connected with the occupancy of a house or part of a house, not being a privilege or facility requisite for the purposes of access, cold water supply or sanitary accommodation."

He argued that the items of lighting and heating of the lounge, hall, passages and staircases did not come within that definition and therefore could not be services within the meaning of s. 40 (1) (b) of the Housing Repairs and Rents Act, 1954. I think that it is extremely doubtful on any showing, that those items would come within the words " not being a privilege or facility requisite for the purpose of access . . ." In any event, the Act of 1946 is a different statute passed to deal with a different matter. It is true that both the Act of 1946 and the Act of 1954 relate to furnished houses, but I see no reason why the definition in the Act of 1946 should be incorporated into the Act of 1954 in order to exclude from the schedule to the notification of determinations items which are there described as " services ". On the face of the document all these items appear to be services and are, therefore, within the jurisdiction of the tribunal to consider. In those circumstance, I agree that this application must be refused.

GLYN-JONES, J.: I agree. Counsel for the tenants argued that it was a condition precedent to the jurisdiction of the tribunal that it should be established that there has been a rise in the cost of the services between Sept. 3, 1939, and Aug. 30, 1954. He even goes further and contends that the amount of the rise must be capable of assessment as an exact sum of money before the tribunal makes an order as to what the increase of rent should be in respect of the increase in the cost of those services. Assuming that he were right in saying that it was a condition precedent that those facts should be ascertained, I cannot see why the facts are not facts into which the statute directs the tribunal to inquire. If they are facts into which the tribunal should inquire, it seems to me that the situation is covered by a sentence taken from 10 HALSBURY'S LAWS OF ENGLAND

A (1st Edn.) 375,* approved by ATKIN, L.J., in *R.* v. *Lincolnshire JJ.*, *Ex p. Brett* (3) ([1926] 2 K.B. at p. 202):

> ". . . if the fact in question [on which the jurisdiction of the tribunal depends] be not collateral, but a part of the very issue which the lower court has to inquire into, certiorari will not be granted, although the lower court may have arrived at an erroneous conclusion with regard to it."

B It seems to me to be clear that it must be the intention of Parliament that the tribunal should consider whether or not there has been a rise in the cost, and if there has been a rise what increase of rent it is just that the landlords should be entitled to. I agree that the three facts which give jurisdiction to the tribunal are contained in s. 40 (1) and, those facts being established on the C application by the landlords, the tribunal may inquire into the question whether or not there has been a rise and may arrive at whatever conclusion they think just, and their decision cannot be interfered with by certiorari.

As to the second limb of counsel for the tenants' argument, there is a great deal of force in the submission of counsel for the tribunal, namely, that in the absence of any definition in the Act of 1954 of " services ", it may well turn out that the D cost of keeping a lift in running order, that is to say, the cost of running the lift, is part of the cost of providing the service. I agree with the judgments delivered.

Rodger Winn: My Lords, I ask that the Minister's costs should be paid by the tenants. This is not a mere case of challenging the jurisdiction; it was said quite flatly that the tribunal had with less than proper frankness tried to cover up the reasons for their decision by their letter dated May 18, 1955.

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LORD GODDARD, C.J.: I do not think that the tenants ought to pay two sets of costs. If the landlords come forward to support the orders, I am not at all sure that the Minister is required to come forward, except he chooses to do so in the position of amicus curiae. It is true that the tribunal have to be served because their order has been challenged, and of course they can come F forward if they like. In the present case we order only one set of costs, namely the landlords'.

Application dismissed.

Solicitors: *T. F. Peacock, Fisher, Chavasse & O'Meara* (for the tenants); *Solicitor, Ministry of Health* (for the tribunal); *Parker, Sloan & Pinsent* (for the landlords).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

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* See now 11 HALSBURY'S LAWS (3rd Edn.) 143, para. 270 text to note (s).

STRATH *v.* FOXON.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Ormerod and Glyn-Jones, JJ.), October 19, 28, 1955.]

Criminal Law—Brothel—Keeping a brothel—Premises used by one woman for purposes of prostitution—Criminal Law Amendment Act, 1885 (48 *&* 49 *Vict. c.* 69), *s.* 13 *para.* (3).

The respondent, as agent of the lessor of premises which comprised three floors, let the first and second floors and the third floor respectively to two women whom she knew to be prostitutes. Access to the premises was obtained by the same street door and there was a common staircase on which a substantial door fitted with a Yale lock divided the whole of the third floor from the lower floors, thus making it completely self-contained. A kitchen on the second floor was used by both the women. The respondent was charged with letting the premises with the knowledge that they were to be used as a brothel, contrary to the Criminal Law Amendment Act, 1885, s. 13 (3). The magistrate, having found that there were separate lettings of the two flats and no common user other than a joint user of the kitchen, dismissed the charge. On appeal,

Held: the premises did not constitute a brothel since premises used by only one woman could not be regarded as a brothel and, there being evidence to justify the magistrate's findings, the court would not interfere with them.

Singleton v. *Ellison* ([1895] 1 Q.B. 607) followed.

Appeal dismissed.

[As to the use of premises as a brothel, see 10 HALSBURY'S LAWS (3rd Edn.) 672, 673, paras. 1286, 1288; and for cases on the subject, see 15 DIGEST 756, 757, *8140-8143.*

For the Criminal Law Amendment Act, 1885, s. 13, see 5 HALSBURY'S STATUTES (2nd Edn.) 912.]

Cases referred to:

(1) *Singleton* v. *Ellison*, [1895] 1 Q.B. 607; 64 L.J.M.C. 123; 72 L.T. 236; 59 J.P. 119; 15 Digest 756, *8140.*

(2) *Durose* v. *Wilson*, (1907), 96 L.T. 645; 71 J.P. 263; 15 Digest 757, *8143.*

(3) *Caldwell* v. *Leech*, (1913), 109 L.T. 188; 77 J.P. 254; 15 Digest 756, *8142.*

Case Stated.

This was a Case Stated by a metropolitan magistrate in respect of his adjudication at Bow Street Magistrates' Court on Mar. 11 and 23, 1955. On Mar. 1, 1955, the appellant, Charles Strath, a superintendent of the Metropolitan Police, preferred an information against the respondent, Dorothy Foxon, that on or about Sept. 27, 1954, she, being the agent of the lessor or landlord of premises comprising the first, second and third floors of 45, Curzon Street, W.1, let those premises with the knowledge that they were to be used as a brothel, contrary to the Criminal Law Amendment Act, 1885, s. 13 (3), and the Criminal Law Amendment Act, 1912, s. 4. Evidence for the prosecution was heard and, at the close of the case for the prosecution, the following facts were found to be prima facie established. Since July 17, 1954, the lease of the upper part of the premises had been vested in one Helen Norah Tracey. Access to the three floors of the premises was obtained by the same street door from Curzon Street, and there was a common staircase on which a substantial door fitted with a Yale lock divided the whole of the third floor from the lower ones, and, therefore, the third floor was completely self-contained. The first and second floors comprised a sitting room, bedroom, bathroom and kitchen, while the third floor consisted of a bedroom, another room which was indeterminately furnished and a bathroom. At all material times the respondent was employed as a negotiator by a firm of estate agents, Blake & Partners, of Queen Street, W.1, and at all such times she was authorised by Miss Tracey to act through the estate

A agents as agent in the letting of the premises. On Sept. 27, 1954, the respondent met by independent appointment, but at the same time, one Frances Curtis and one Anne Bussutil at a café in Shepherds Market, W.1, and, as a result of a discussion which then took place, the first and second floors of the premises were let to Mrs. Curtis at a furnished rental of £25 per week, and (as a separate letting) the third floor (with the use of the kitchen on the second floor) to Mrs. Bussutil B at a furnished rental of £25 per week. Each tenant received a key to the street door and Mrs. Bussutil received a key for the door to the third floor. At the time of the lettings the respondent knew both Mrs. Curtis and Mrs. Bussutil to be prostitutes and that each of them proposed and intended to use her flat for the purposes of prostitution. Except as regards the kitchen, which it appeared that both the tenants used for normal purposes and in which each tenant had a C cupboard containing crockery and kitchen utensils, there was no intention of a common user of either flat by its tenant with any other person. Mrs. Curtis and Mrs. Bussutil went into occupation under the respective tenancies on Sept. 29, 1954, and thereafter and in particular on Oct. 18, 19 and 20, 1954, when observation was kept by police officers, both of them took a number of men into the premises for the purpose of prostitution. For such purposes, the first and D second floors were used exclusively by Mrs. Curtis and the third floor only by Mrs. Bussutil.

It was contended on behalf of the respondent at the close of the case for the prosecution that, as there were separate lettings to each of the two prostitutes concerned and there was no evidence of common user, the premises did not constitute a brothel. It was contended on behalf of the appellant that, not- E withstanding that there were separate lettings, the premises in their entirety did constitute a brothel in the circumstances disclosed prima facie by the evidence of the prosecution.

The magistrate dismissed the information without hearing evidence for the defence, and the appellant now appealed.

F *Sebag Shaw* for the appellant.

F. S. Bresler for the respondent.

Cur. adv. vult.

Oct. 28. **LORD GODDARD, C.J.:** ORMEROD, J., will give the judgment of the court, with which GLYN-JONES, J., agrees.

G **ORMEROD, J.,** read the following judgment in which he stated the facts and continued: The learned magistrate found the facts after hearing the evidence for the prosecution and making a personal examination of the premises. He came to the opinion that, since there were separate lettings and no common user, the said premises could not, in law, constitute a brothel and dismissed the information without hearing evidence for the defence. Section 13 (3) of H the Criminal Law Amendment Act, 1885, provides that any person who

> " being the lessor or landlord of any premises, or the agent of such lessor or landlord, lets the same or any part thereof with the knowledge that such premises or some part thereof are or is to be used as a brothel, or is wilfully a party to the continued use of such premises or any part thereof I as a brothel "

shall, on summary conviction, be liable to penalties as provided by the section.

The question of what is a brothel under the section first came up for consideration by this court in *Singleton* v. *Ellison* (1) ([1895] 1 Q.B. 607). In that case, a woman occupied a house frequented day and night by a number of men for the purpose of committing fornication with her. No other woman lived in the house, or frequented it for the purpose of prostitution. It was held that she had not committed the offence of " keeping a brothel " within the meaning of s. 13 (1) of the Act. WILLS, J., in a short judgment said ([1895] 1 Q.B. at p. 608): A

> "A brothel is the same thing as a 'bawdy house'—a term which has a well-known meaning as used by lawyers and in Acts of Parliament. In its legal acceptation it applies to a place resorted to by persons of both sexes for the purposes of prostitution. It is certainly not applicable to the state of things described by the magistrates in this case, where one woman receives a number of men." B

The question was further discussed in *Durose* v. *Wilson* (2) (1907) (96 L.T. 645), a case where twelve of a block of eighteen flats were let to known prostitutes. There was no evidence to show which flat was occupied by which woman. The porter in charge of the flats knew the purpose for which the women were using them, and after midnight when the street door was closed, it was his practice C to unlock the door to admit the women and the men they had brought with them. The magistrate found that the building as a whole constituted one set of premises, and the building as a whole was used as a brothel. This court upheld the magistrate's decision on the magistrate's findings of fact, and, because of these findings, was able to distinguish the case from that of *Singleton* v. *Ellison* (1). D It was further held in *Caldwell* v. *Leech* (3) (1913) (109 L.T. 188), that, as only one woman was using the premises in question for the purposes of prostitution, the premises were not a brothel.

In view of these authorities, it is clear that premises cannot be regarded as a brothel if they are used by only one woman. The only question, therefore, is whether the two flats in question were separate premises. Each of these cases E must depend on its own facts, and it might well be that, in some cases, the evidence might be such that the court would find that the arrangements made were a subterfuge to avoid the consequences of s. 13. In this case, however, the learned magistrate, after hearing the evidence, and making a personal inspection of the premises, has found that there were separate lettings of the two flats, and no common user other than a joint user of the kitchen. There was evidence F to justify his findings, and this court cannot, therefore, interfere with his decision. In my opinion, this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Allen & Son* (for the appellant); *Bernard Samuel Berrick & Co.* (for the respondent).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

BURDEN *v.* HANNAFORD.

[COURT OF APPEAL (Denning, Hodson and Morris, L.JJ.), October 20, 1955.]

Agriculture—Agricultural holding Repairs—Fences and hedges—Incorporation by statute of clause into tenancy agreement—Conflict with contractual clause—Agricultural Holdings Act, 1948 (11 *&* 12 *Geo.* 6 *c.* 63), *s.* 6 (1)*—Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations,* 1948 (*S.I.* 1948 *No.* 184), *schedule, para.* 5.

A tenancy agreement made in 1935 relating to a farm provided: "The tenant shall not be liable to the landlord for dilapidations on quitting for any of the hedges and fences on the farm and shall not be entitled to any compensation on quitting for any improvement in the condition of the hedges and fences which shall be effected by him during the tenancy". The Agricultural Holdings Act, 1948, s. 6 (1), empowered the Minister to make regulations prescribing terms as to the maintenance, repair and insurance of fixed equipment "which shall be deemed to be incorporated in every contract of tenancy of an agricultural holding". The Minister made regulations, the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations, 1948, by which there was deemed to be incorporated into the tenancy agreement a clause whereby the tenant was made liable "To repair and to keep and leave clean and in good tenantable repair, order and condition . . . fences, live and dead hedges . . .".

Held: the conflict between the contractual clause and the clause introduced by s. 6 (1) and the Regulations of 1948 must be resolved by giving effect to the contractual clause and not (so far as it conflicted) to the statutory clause.

Appeal dismissed.

[As to the incorporation of the prescribed terms concerning fixed equipment in agricultural tenancies, see 1 HALSBURY'S LAWS (3rd Edn.) 261, para. 568.

For the Agricultural Holdings Act, 1948, s. 6, see 28 HALSBURY'S STATUTES (2nd Edn.) 32.

For the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations, 1948, schedule, para. 5, see 1 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-Issue) 86.]

Appeal.

Appeal by the landlord from an order of His Honour JUDGE PRATT, dated July 15, 1955, made at Totnes County Court. The county court judge decided that the contractual provision relating to the repair of hedges in an agreement for the tenancy of a farm (whereby the tenant was under no liability to repair) prevailed over a clause introduced into the tenancy by the Agricultural Holdings Act, 1948, s. 6 (1) and the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations, 1948, schedule, para. 5 (whereby liability to repair was imposed on the tenant).

G. R. F. Morris for the landlord.
D. M. Scott for the tenant.

DENNING, L.J.: This case concerns the dilapidations at the end of a tenancy of a farm known as East Bickleigh at Halwell in Devonshire. The short question is: what is to happen when the agreed contractual terms of the tenancy come into conflict with the model clauses which are incorporated by statute into the contract?

In 1935 the owner of a farm in Devon let it to a tenant on terms which imposed no liability to keep the hedges and fences in repair, but which included this special clause:

> "The tenant shall not be liable to the landlord for dilapidations on

> quitting for any of the hedges and fences on the farm and shall not be entitled to any compensation on quitting for any improvement in the condition of the hedges and fences which shall be effected by him during the tenancy."

That clause clearly meant that, if the tenant chose to repair the fences for his own convenience, he could do so, but he did not get any compensation for it; and on the other hand, if he failed to repair them, he was not under any liability to the landlord for dilapidations.

In 1940, in the exigencies of the war, the agricultural executive committee wanted the fences and hedges repaired. There were interviews between the landlord and the tenant, as a result of which a letter was written by the landlord on Feb. 26, 1941, to the tenant, saying:

> " Following our interview with you in respect of the hedges on the above, we confirm the arrangement between us that on your quitting the above farm we agree to pay you for any hedges repaired by you."

According to that document, there was no obligation on the tenant to do anything, but, if he did anything, the landlord promised that on quitting he would pay him. Thereafter the tenant did some repairs to hedges and fences, but not all that were necessary. In 1948 the Agricultural Holdings Act, 1948, came into operation. By s. 6 (1) of that Act the Minister was empowered to make regulations prescribing terms

> " as to the maintenance, repair and insurance of fixed equipment which shall be deemed to be incorporated in every contract of tenancy of an agricultural holding . . ."

The Minister made regulations, the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations, 1948 (S.I. 1948 No. 184), under which there was deemed to be incorporated into this contract of tenancy a statutory clause whereby the tenant was made liable

> " To repair and to keep and leave clean and in good tenantable repair, order and condition . . . fences, live and dead hedges . . ."

Section 6 (1) contained an exception that the statutory clauses were not to be incorporated

> ". . . in so far as they would impose on one of the parties to an agreement in writing a liability which under the agreement is imposed on the other."

That exception did not apply in this case because under the tenancy agreement no obligation was imposed on either party to repair the hedges and fences. So the statutory clauses (or model clauses as they are sometimes called) were incorporated into the contract.

Although the statutory clauses are incorporated, it appears that one of them cannot stand with the agreed contractual clause. The statutory clause says that the tenant is to leave the fences in good repair but the contractual clause says that the tenant is not liable for dilapidations to the fences. Which is to prevail ? In my opinion the contractual clause still binds the parties. Reading s. 6 as a whole, I think that, if any conflict appears between a statutory clause and a contractual clause, then it is the contractual clause which must be given effect. If modifications are necessary to make the two run together, then modifications must be made in the statutory clause not in the contractual clause, subject, however, to the power of either party to apply to an arbitrator to vary the contractual clause. Section 6 provides that either party may apply to an arbitrator to vary the contractual clause so as to bring it into conformity with the statutory clause. If the arbitrator thinks right, he can make such variations

A as he thinks are justifiable in the contract; but he may not think it justifiable to make them, and if so, he need not make them, and the contractual clause prevails. In this particular case, neither party applied to an arbitrator to vary the contractual clause. That being so, the contractual clause still remains good.

Later events show that the landlord acted on the view that the contractual clause still applied. On two occasions he applied for an increase of rent, and to B support his case he asserted that the tenant was under no obligation to repair the hedges and fences. He was given increases. The landlord later gave a notice to quit to the tenant, and he succeeded before the tribunal in getting the consent of the Minister to the eviction of the tenant. In those proceedings again he asserted that the agreement did not require the tenant to keep up the hedges and fences, and he made it a reason for getting possession. Now that the landlord C has got the tenant out he turns round and makes this claim for dilapidations on the basis that the tenant was liable under the statutory clause. He is met, however, by the contractual clause which says that the tenant shall not be liable to the landlord for dilapidations on quitting for any of the hedges and fences on the farm. I think that clause prevails so as to exempt the tenant.

In the result, I find myself in agreement with the learned county court judge, D and I would dismiss the appeal.

HODSON, L.J.: The first question is whether the landlord is entitled to be paid compensation by the tenant for the latter's failure to repair hedges. That question depends on the construction of the lease of Dec. 31, 1935, made between the tenant and the landlord's predecessors in title, and also on the Agricultural E Holdings Act, 1948, s. 6, and the regulations made thereunder. In my judgment, the learned county court judge was right on that question of construction, and I think that he rightly answered the question in the negative.

By the terms of the lease the tenant was plainly not liable to the landlord for dilapidations on quitting for any of the hedges and fences on the farm, and on the construction of the lease alone there would have been no question. But the F landlord has argued before the learned judge and in this court that the effect of the incorporation of para. 5 of the schedule to the Regulations of 1948 made under s. 6 (1) of the Act of 1948 is to produce the opposite result. There being no liability on the tenant to repair, it is agreed between the parties that s. 6 (1) operates so as to incorporate the regulations imposing an obligation on the tenant

> G "To repair and to keep and leave clean and in good tenantable repair, order and condition, the farmhouse, cottages and farm buildings, together with all fixtures and fittings, drains, sewers, water supplies, pumps, fences, live and dead hedges . . ."

The argument which has been put before the court for the landlord is that as H from the date of the Act of 1948 coming into operation, the regulations prevailed; that it would make nonsense of the Act and the policy of the Act if the tenant were entitled to rely on the special condition; and that once para. 5 of the schedule to the regulations was incorporated, the inevitable result followed that the tenant was liable.

I think the true position is that the clause incorporated by virtue of the I regulations and the special condition must be read together. There is no question of one prevailing over the other. It was argued on behalf of the landlord that there was here a gap which the regulations were designed to fill. The answer to that on behalf of the tenant was given, correctly as I think, by counsel when he said that it was not right to say that there was a gap when one party under the agreement was excused from liability. So that this is not a case where there is a void in the agreement which is being filled by the regulations. What has to be done is to read the two together; and when one finds, I agree, the remarkable result that the tenant is in fact exonerated from liability to pay by the special condition, that in my judgment is the necessary result of reading together the regulations and the special condition.

That result is reinforced by consideration of s. 6 (2) which provides:

> " Where an agreement in writing relating to a tenancy of an agricultural holding, whether created before or after the commencement of this Act, effects substantial modifications in the operation of regulations under the foregoing sub-section, the landlord or the tenant of the holding may, if he has requested his tenant or landlord to vary the agreement so as to bring it into conformity with the provisions of regulations under that sub-section but no agreement has been reached on the request, refer to arbitration under this Act the terms of the tenancy with respect to the maintenance, repair and insurance of fixed equipment."

The reference there to the agreement effecting " substantial modifications " in the operation of regulations appears to me quite inconsistent with the idea that regulations of themselves are to have the effect of obliterating the substance of an agreement. It is immaterial to that argument, in my view, to consider whether in this case there could be what may be regarded as a " substantial modification " in the operation of the regulation.

In other words, it is unnecessary to answer the question posed by counsel for the landlord: Could there be said to be a modification of the regulations when the regulations impose a liability to repair, and the agreement merely exonerates from payment? Whatever answer may be given to that question, it seems to me that the argument remains the same, that s. 6 (2) contemplates the agreement modifying the regulations. In other words, it contemplates both subject-matters being construed together. The effect of that construction to my mind is inevitable in leading to the conclusion that the tenant here is right, and that he is exonerated.

It is unnecessary to say anything about the other matters raised on this appeal by the tenant because that disposes of that point.

MORRIS, L.J.: I have reached the same conclusion. It is common ground that the special clause must be deemed to be incorporated in the contract. That is the effect of s. 6 (1). That sub-section ends with the words:

> " except in so far as they would impose on one of the parties to an agreement in writing a liability which under the agreement is imposed on the other."

It has been common ground that no liability was imposed under the agreement to repair the fences and hedges, and so the words of the exception do not apply.

In addition to the agreement there was a subsidiary agreement which came into effect as a result of a letter dated Feb. 26, 1941, which reads as follows:

> " Following our interview with you in respect of the hedges on the above, we confirm the arrangement between us that on your quitting the above farm we agree to pay you for any hedges repaired by you."

The position, therefore, under the agreement and under that letter, taken together, is that the landlord was really saying: " I will pay for any hedges repaired by you if you repair them, though you need not repair them ". If, therefore, there was any repair of hedges, the liability to pay was on the landlord. If the model clause applies and prevails, then the liability to pay for any repair of hedges is on the tenant. But nobody has suggested that the case need be approached in that way, so as to make it possible to argue that the words of exception at the end of s. 6 (1) apply. The case has been approached by all and has proceeded on the basis that the model clause is to be deemed to be incorporated.

A On that basis I have felt, as my Lords have felt, that great assistance is to be derived by looking at the wording of sub-s. (2) and sub-s. (3) of s. 6. I think it is fair to look at s. 6 as a whole. It is true that sub-s. (2) refers to cases where the agreement relating to a tenancy is in writing. The sub-section begins:

> B " Where an agreement in writing relating to a tenancy of an agricultural holding . . . effects substantial modifications in the operation of regulations under [sub-s. (1)]."

There is force in the submission of counsel for the tenant that the wording denotes that it is the agreement which effects "substantial modifications" in the operation of the regulations as opposed to the regulations modifying the agreement.

C There is also force in another point taken by counsel for the tenant in reference to the term " substantial modifications ". Supposing that there were trifling modifications, does not s. 6 (2) indicate that those trifling modifications would prevail ? In other words, the agreement would prevail if it effects trifling modifications in the operation of the regulations. If the agreement effects " substantial modifications ", then the sub-sections provide machinery as to D what may happen. There may be an arbitration, and the powers of the arbitrator include powers to vary the agreement so as to bring it into conformity with the provisions of the regulations. All this points to the view that the agreement prevails until any steps are taken to vary it. In this case nothing has happened to vary the agreement; and I think that the agreement prevails in so far as it conflicts with the model clause which was deemed to have been incorporated E in the contract.

I think, therefore, that the learned judge came to a correct conclusion.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Church, Rendell*, agents for *Kellock & Cornish-Bowden*, Totnes (for the landlord); *Collyer-Bristow & Co.*, agents for *Rossetti & Peppercorn*, Kingsbridge (for the tenant).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

HINCHLIFFE *v.* SHELDON.

[Queen's Bench Division (Lord Goddard, C.J., Cassels and Streatfeild, JJ.), January 20, 1955.]

Criminal Law—Obstructing constable when in the execution of his duty—Police about to enter licensed premises—Police delayed and licensee warned, by accused—Prevention of Crimes Amendment Act, 1885 (48 *&* 49 *Vict.* c. 75), *s.* 2—*Licensing Act*, 1953 (1 *&* 2 *Eliz.* 2 *c.* 46), *s.* 151 (1).

The appellant was the son of the licensee of an inn. On returning to the inn one night, at about 11.17 p.m., he found that police officers wished to enter the premises as they suspected that the licensee was committing an offence against s. 100 of the Licensing Act, 1953. The appellant thereupon shouted warnings to the licensee, who did not open the door to the police officers until 11.25 p.m. The licensee was not found to be committing any offence. Under s. 151 (1) of the Licensing Act, 1953*, the police had the right to enter licensed premises, whether an offence was being committed or not. The appellant was convicted under the Prevention of Crimes Amendment Act, 1885, s. 2†, of wilfully obstructing a constable when in the execution of his duty. On appeal, he submitted that he could not be convicted of obstructing a constable when in the execution of his duty unless it was shown that the licensee had committed an offence.

Held: " obstructing ", within the meaning of s. 2 of the Prevention of Crimes Amendment Act, 1885, meant making it more difficult for the police to carry out their duties; under s. 151 (1) of the Licensing Act, 1953, it was the duty of the police to enter licensed premises if they thought it likely that an offence might be committed, and, therefore, the appellant, in making it difficult for the police to enter the inn, was guilty of wilfully obstructing a constable when in the execution of his duty, and was rightly convicted under s. 2 of the Act of 1885.

Bastable v. *Little* ([1907] 1 K.B. 59) distinguished.

Appeal dismissed.

[**Editorial Note.** The judgment of Darling, J., in *Betts* v. *Stevens* ([1910] 1 K.B. at p. 8) may usefully be compared with the decision in the present case. After pointing out that the police in performance of their duty were endeavouring to collect evidence of the pace of cars driven at speeds exceeding the speed limit, Darling, J., emphasised that the giving of warning of this to motorists was obstructing the police in exercising that duty. The warning was not given with a view to procuring the observance of the law, but to frustrating the endeavours of the police. So in the present case the police wished to enter the inn in the performance of their duty and in lawful exercise of a statutory power of entry. The appellant's conduct was directed to frustrating their purpose.

As to obstructing a police officer, see 10 Halsbury's Laws (3rd Edn.) 634, para. 1207; and for cases on the subject, see 15 Digest 709, 710, *7675-7680*.

For the Prevention of Crimes Amendment Act, 1885, s. 2, see 5 Halsbury's Statutes (2nd Edn.) 915.

For the Licensing Act, 1953, s. 151 (1), see 33 Halsbury's Statutes (2nd Edn.) 279.]

Cases referred to:

(1) *Bastable* v. *Little*, [1907] 1 K.B. 59; 76 L.J.K.B. 77; 96 L.T. 115; 71 J.P. 52; 15 Digest 710, *7677*.

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* The terms of the sub-section are set out at pp. 407, 408, post.

† By s. 2 of the Prevention of Crimes Amendment Act, 1885, the provisions of the Prevention of Crimes Act, 1871, s. 12, which prescribes the punishment for an assault on a constable when in the execution of his duty, " shall apply to all cases of resisting or wilfully obstructing any constable or peace officer when in the execution of his duty." See 5 Halsbury's Statutes (2nd Edn.) 873, 915.

A (2) *Betts* v. *Stevens*, [1910] 1 K.B. 1; 79 L.J.K.B. 17; 101 L.T. 564; 73 J.P. 486; 15 Digest 710, *7678*.

Case Stated.

This was a Case Stated by the justices for the West Riding of the county of York in respect of their adjudication as a magistrates' court sitting at Uppermill, Saddleworth. On June 23, 1954, an information was preferred by the respondent, B David Leslie Sheldon, against the appellant, Roy Hinchliffe, that on May 27, 1954, he wilfully obstructed Charles William Jones, a constable of the West Riding Constabulary, then acting in the execution of his duty, contrary to s. 2 of the Prevention of Crimes Amendment Act, 1885. On July 21, 1954, the magistrates heard the information, found that the offence was proved, and convicted the appellant.

C The material facts found by the magistrates appear in the judgment of LORD GODDARD, C.J.

The appellant appeared in person.
F. P. Neill for the respondent.

LORD GODDARD, C.J.: This is a Case Stated by justices for the West D Riding before whom the appellant was summoned for obstructing a police constable in the execution of his duty. The appellant is the son of the licensee of an inn and of his wife. Coming back to the inn one night at about 11.17 p.m. he found some police about the inn. There was a light in the bar; the time was 11.17 p.m. and there were two cars outside. That is not conclusive that an offence was being committed*; it may have been that two private friends of the E licensee were visiting him, or that the cars belonged to the people who were staying in the house. It was, however, obviously a matter which the police were entitled to inquire into, and a matter which might cause suspicion.

The case made against the appellant was that he first knocked at one of the doors and said: " It's me, mum, it's all right ". By itself there would be nothing in this; it was only indicating that it was the son of the house who was at the F door. He then called out to the licensee and his wife and said: " The police are outside ", and then went round to the back of the premises. Immediately afterwards one of the police constables knocked at the door and got no reply. When the appellant arrived at the rear of the premises, he saw another policeman and said: " You'll not catch them because I've told them you are here ", and some conversation passed between the appellant and one of the constables G about getting in through a window. The appellant returned to the front of the premises and shouted: " Make sure you are clear before you open the door ", and, a few seconds later, " The place is surrounded by police ". Ultimately the door was opened at 11.25 p.m. by the licensee. The licensee, his wife and a hotel resident were found in the bar. There were no glasses or intoxicating liquor in sight. The bar counter was wet, which rather looks as though there H may have been some reason for suspicion, but it is not said that an offence was thereby proved. The police constables then went to another place in the hotel, a room with " No. 6 " on the door, where there were six persons, one of whom was the licensee's daughter, but they were not consuming intoxicating liquor. The justices found that the appellant, by giving the alarm in this way when he knew that the police were there and intended coming into the inn to look round, gave I the licensee the opportunity of delaying the police so that the traces of any offence, if an offence was being committed, could be removed.

The first thing to understand in this case, and the reason why this case is not governed by *Bastable* v. *Little* (1) ([1907] 1 K.B. 59) is this. One has to see what was the right of the police, and s. 151 (1) of the Licensing Act, 1953, provides:

" A constable may at any time enter licensed premises . . . for the

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* See s. 100, s. 101 of the Licensing Act, 1953; 33 HALSBURY'S STATUTES (2nd Edn.) 231, 233.

> purpose of preventing or detecting the commission of any offence against this Act.”

Therefore, the police have a right to go in to see whether or not there is any likelihood of an offence being committed. That is their right, and, therefore, it is their duty if they consider that circumstances call for investigation. The appellant relies principally on *Bastable* v. *Little* (1), a case in the early days of motoring, where it was held that it was not an offence for a person to say to motorists: “ Look out, you are just entering a police trap ”, or words to that effect, because there was no evidence in that case that the motorists were committing an offence, and there was no reason to say, as a matter of definite conclusion, that by the time they got to the police trap they would be committing an offence. That case, however, was followed three years later by *Betts* v. *Stevens* (2) ([1910] 1 K.B. 1), in which it was decided that directly it was shown that an offence was being committed by a motorist in that he was travelling more than twenty miles an hour when an Automobile Association scout gave him warning, then the scout was interfering with the police. The appellant, accordingly, submitted that he could not be convicted unless it was shown that an offence was being committed, but that is to overlook s. 151 (1) of the Licensing Act, 1953. There is no such provision as that in the Road Traffic Acts. Section 151 (1) gives the police the right to enter licensed premises, whether an offence has been committed or not. They can go in to see whether it is likely that an offence will be committed. If they are detained from going in, that does obstruct them in the execution of their duty, because it gives the licensee, if he is committing an offence, the opportunity to get everything out of the way. In fact, in these police raids, it is essential that the thing should be done as quickly as possible without previous warning being given, otherwise there might as well not be a raid.

I think that the police, in the execution of their duty, intended to get into the inn. They wanted to get in before anybody in the inn had an opportunity of putting things away, and if they had knocked at the door and the licensee had not opened the door for several minutes, the justices could have found that the licensee was obstructing the police. “ Obstructing ” means, for this purpose, making it more difficult for the police to carry out their duties. It is quite obvious that the appellant was detaining the police while giving a warning; he was making it more difficult for the police to get certain entry into the premises, and the justices were entitled to find as they did, and, therefore, the appeal is dismissed.

CASSELS, J.: I agree.

STREATFEILD, J.: I also agree.

Appeal dismissed.

Solicitors: *Cummings, Marchant & Ashton*, agents for *R. C. Linney*, Wakefield (for the respondent).

[*Reported by* A. P. PRINGLE, ESQ., *Barrister-at-Law.*]

POOLE CORPORATION *v.* BLAKE AND OTHERS.

[Queen's Bench Division (Lord Goddard, C.J., Ormerod and Barry, JJ.), October 26, 1955.]

Highway—Street—Surface water drainage vested in local authority—Cost of alteration and repair—Whether chargeable to frontagers—Private Street Works Act, 1892 (55 *&* 56 *Vict. c.* 57), *s.* 6 (1), *s.* 9 (1).

In the course of developing a private estate for building purposes a private street was constructed in 1923, including a system of surface water drainage, to which additions were made in 1932. At the time of construction, the surface water drainage system, with which the local authority were or must be deemed to have been satisfied, vested in them under the Public Health Act, 1875, s. 13, and under s. 15 they became responsible for its repair. The local authority did no work of maintenance or repair on the surface water drainage system, which fell into disrepair. In 1953 the local authority resolved with respect to the street to do private street works pursuant to the Private Street Works Act, 1892, s. 6 (1), s. 9 (1)*, and approved a provisional apportionment of the expenses on the frontagers. The private street works included works to the existing system of surface water drainage, such works being within s. 9 (1) of the Act of 1892. On objection being made by the frontagers, the provisional apportionment was amended by the court of summary jurisdiction by excluding therefrom the cost of the work on the surface water drainage system. On appeal by the local authority,

Held: the Private Street Works Act, 1892, s. 6 (1), did not enable the local authority to put on the frontagers the liability for maintenance and repair of the surface water drainage system, which liability had long been vested in the local authority; moreover, s. 9 (1) of the Act of 1892 was ancillary to s. 6 (1) and, therefore, since s. 6 (1) did not enable the local authority, by resolving that work be done to the surface water drainage system, to apportion and impose expenses of the work between and on the premises fronting the street, neither did s. 9 (1); accordingly, the appeal must be dismissed.

Bonella v. *Twickenham Local Board of Health* (1887) (20 Q.B.D. 63) followed.

Appeal dismissed.

[**Editorial Note.** Sections 13 and 15 of the Public Health Act, 1875, were repealed by the Public Health Act, 1936, s. 346 and Sch. 3. Power to adopt sewers is now conferred by s. 17 of that Act and under this section sewers do not vest in the local authority without their declaration; sewers previously vested in a local authority remain vested by virtue of s. 20.

As to expenses which may be charged to frontagers, see 16 Halsbury's Laws (2nd Edn.) 442, 443, para. 642; and for cases on the subject, see 26 Digest 523-529, *2241-2269*.

For the Private Street Works Act, 1892, s. 6 and s. 9, see 11 Halsbury's Statutes (2nd Edn.) 184, 189.]

Cases referred to:

(1) *Bonella* v. *Twickenham Local Board of Health*, (1887), 20 Q.B.D. 63; 57 L.J.M.C. 1; 58 L.T. 299; 52 J.P. 356; 26 Digest 527, *2263*.

(2) *Caley* v. *Local Board for Kingston-upon-Hull*, (1864), 5 B. & S. 815; 11 L.T. 339; 29 J.P. 116; 122 E.R. 1033.

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* The terms of the relevant provisions of s. 6 (1) and s. 9 (1) of the Private Street Works Act, 1892, are printed at p. 413, letter C, and p. 412, letter G, post.

(3) *Rishton* v. *Haslingden Corpn.*, [1898] 1 Q.B. 294; 67 L.J.Q.B. 387; 77 L.T. 620; 62 J.P. 85; 26 Digest 543, *2416*.

(4) *East Barnet Urban District Council* v. *Stacey*, [1939] 2 All E.R. 621; [1939] 2 K.B. 861; 160 L.T. 561; 103 J.P. 237; Digest Supp.

(5) *Re Jesty's Avenue, Broadway, Weymouth*, [1940] 2 All E.R. 632; [1940] 2 K.B. 65; 109 L.J.K.B. 689; 162 L.T. 360; 104 J.P. 279; 2nd Digest Supp.

Case Stated.

On Apr. 8, 1954, at a court of summary jurisdiction sitting at Poole, certain objections by the respondents, sixteen frontagers in Orchard Avenue, Poole, against proposals of the appellants, the Corporation of Poole, for making up, lighting, and surface water drainage of Orchard Avenue were heard and determined by amending the provisional apportionment of the estimated expense of executing street works in Orchard Avenue pursuant to the Private Street Works Act, 1892, so as to exclude therefrom the cost of surface water drainage, namely, £4,116, and to direct that the cost should not fall on the frontagers.

On appeal by the appellants to Poole Quarter Sessions, heard by the recorder of Poole on June 30, July 1, Oct. 4 and 5, and Nov. 6, 1954, the following facts were admitted or found. In 1923, Park Estates, Ltd., commenced to develop the area of land in the neighbourhood of Poole Park. On June 20, 1923, the appellants received from Park Estates, Ltd., plans, sections and descriptions of work proposed to be done by them and these were submitted for the purpose of obtaining bye-law approval. The documents submitted showed the proposed road lay-out and construction and the foul sewerage system, and referred to the proposed disposal of road surface water by means of gullies and pipes. On June 21, 1923, approval for bye-law purposes was granted, extending only to the road proposals. Thereafter, Park Estates, Ltd., proceeded to construct roads and sewers in accordance with the proposals submitted and, in particular, laid out Orchard Avenue. At intervals, a total of nine gullies were set to carry off surface water from the road, and these were connected by pipes to existing surface water sewers, or otherwise provided with a suitable outfall and were properly constructed. The gullies and pipes were " sewers " within the meaning of the Public Health Act, 1875, and, accordingly, by s. 13 of that Act, they vested in, and came under the control of, the appellants, and the appellants were, by s. 15, required to keep them in repair. In or about 1931 the frontagers of Orchard Avenue at their own expense laid a light tar-macadam dressing on the carriageway of Orchard Avenue, and in 1932 the appellants constructed a cul-de-sac which became part of Orchard Avenue, the surface water drainage of which was constructed in accordance with proposals approved by the appellants and to the satisfaction of the appellants' borough engineer. The appellants were satisfied with the surface water drainage system of Orchard Avenue when it was constructed in 1923-24, and with the addition made to it in 1932, but performed no works of maintenance or repair on the pipes and gullies thereafter. In the late 1930's several gullies became choked, and, more recently, the system of surface water drainage, in common with the road and footpath surfaces, had fallen generally into disrepair. The appellants had a reasonable time after the construction of the system in which to make up their minds whether or not they were satisfied and had it not been found that they were satisfied, they must be deemed to have been satisfied by reason of the fact that they had not expressed dissatisfaction nor taken any step to improve or alter the system during such reasonable time. Between 1923 and 1953 substantially all the eighty-five plots in Orchard Avenue were sold and built on. The respondents, of whom there were sixteen, were frontagers to Orchard Avenue and were liable in various amounts for charges leviable under the Private

A Street Works Act, 1892. On Dec. 1, 1953, the appellants passed a resolution resolving to do private street works in, inter alia, Orchard Avenue, pursuant to the Private Street Works Act, 1892, comprising levelling, metalling, kerbing and making good the street, providing proper means for lighting and providing surface water drainage. The surface water drainage arrangements were necessary to drain the road effectively after making up in accordance with modern B standards.

It was contended on behalf of the appellants that the doctrine of *Bonella* v. *Twickenham Local Board of Health* (1) (1887) (20 Q.B.D. 63), had no application to the works undertaken under the Private Street Works Act, 1892, and that the appellants' satisfaction, or implied satisfaction, with the surface water drainage arrangements in an unmade-up street did not preclude them from providing C at the frontagers' expense surface water drainage of a character appropriate to a fully levelled, metalled, channelled, kerbed and lit street, and that s. 9 (1) of the Private Street Works Act, 1892, was intended to confer express powers to this end. It was contended on behalf of the respondents that, by reason of s. 6 of the Private Street Works Act, 1892, no sewerage or drainage works could be provided under that Act unless the street was not drained to the satis- D faction of the appellants, and that, on its true construction, s. 9 (1) did not alter that position. Once the appellants were satisfied, or deemed to be satisfied, with a surface water system vested in them, they could not be heard to say that they were not so satisfied. Having regard to the appellants' satisfaction with the system, it was unreasonable to require it to be improved at the frontagers' expense.

E The recorder was of the opinion that, once the appellants were satisfied, or (following the doctrine of *Bonella* v. *Twickenham Local Board of Health* (1), 20 Q.B.D. 63) ought to be taken to be satisfied, with the existing surface water drainage, they could not thereafter improve or enlarge it at the frontagers' expense, and that s. 9 (1) of the Private Street Works Act, 1892, did not permit F the appellants to do additional work, and, therefore, dismissed the appeal. The appellants now appealed.

J. T. Molony, Q.C., and *R. Hughes* for the appellants.
E. S. Fay for the respondents.

LORD GODDARD, C.J., stated the facts and continued: When *Bonella* G v. *Twickenham Local Board of Health* (1) (1887) (20 Q.B.D. 63) was decided, the law which governed this matter was entirely contained in s. 150 of the Public Health Act, 1875, which was in precisely the same terms as s. 6 of the Private Street Works Act, 1892, which says what the local authority are entitled to do. The Private Street Works Act, 1892, goes on to provide a good deal more machinery than the Public Health Act, 1875, but, except for s. 9, to which I H shall refer in a moment, I do not think the other provisions of the Act are, for the purposes of this case, in any way material.

In *Bonella's* case (1) there was an old system of drainage and, exactly as here, requirements were made by the local authority to do work on the street, and the Court of Appeal held that that did not come within the work for which, I under s. 150 of the Public Health Act, 1875, the local authority could require the frontagers to pay. It was a new sewer and the reasoning of the case is shown by a passage from the judgment of LORD ESHER, M.R., where, having pointed out that the existing sewer was vested in the local authority, he said (20 Q.B.D. at p. 66):

> "The moment it so vested it was, as it appears to me, [the local authority's] duty to see whether that sewer was sufficient for the drainage of the street for the purposes for which it was then used. If they were not satisfied

> with it, they would, I think, at that time have had power to deal with it A
> under the provisions of the Public Health Act, 1848, now re-enacted
> by s. 150 of the Public Health Act, 1875. It being their duty then to
> consider whether it was sufficient or not, they would be entitled I think
> to a reasonable time within which to make up their minds whether it was so,
> and whether they should act under those provisions. But, if after the lapse
> of a reasonable time they have done nothing and expressed no view on the B
> subject, I think that must be taken, for the purpose of the application of
> these sections, to be conclusive as a matter of fact that at that time they
> were satisfied with the sewer for the purposes for which it was then used.
> When once they are so satisfied, I think they can no longer bring into play
> the provisions of s. 150. In my opinion the provisions of the section with
> regard to the sewerage of the street by the frontagers can only be brought C
> into play within the reasonable time during which the board are entitled to
> say that they are dissatisfied with the existing sewer. If they were no longer
> able to have recourse to the provisions of that section, what would be their
> duty with regard to the sewer ? The sewer being vested in them, they
> would be bound to keep it in repair under s. 15 of the Public Health Act,
> 1875, for the purposes for which it existed, and, if at any time they came D
> to the conclusion that it was not sufficient, they would be entitled under
> s. 18 to enlarge it, or alter the course of it, or close it."

I have only one comment to make on that judgment which, of course, is
binding on this court. It is true that there is a reference made to the Public
Health Act, 1848, but I think the Master of the Rolls was meaning that, as soon E
as the local authority found that the sewer was vested in them, if they were not
satisfied with it, they could use their powers under s. 150 and say: " Put in a
sewer which would be sufficient ". They could not be heard to say that, however,
after some years had elapsed, after they had had far more than a reasonable
time to make up their minds and after they had stood by and done nothing
until the sewer became irrevocably vested in them, because they must in fact F
have been satisfied that enough had been done. Once they were satisfied that
it was enough, and the sewer was vested in them, then, so the court held, from
that time onwards the sewer was their affair. The law with regard to sewers
was altered by the Public Health Act, 1936*, which by reason of its date does not
affect this case. So we have here exactly the same situation as existed in
Bonella's case (1), but for one thing. In the Private Street Works Act, 1892, G
there is s. 9, which counsel for the appellants has argued alters the whole position.
Section 9 (1) which clearly, I think, although marginal notes† are no part of a
statute, is an ancillary section, is in these terms:

> " The urban authority may include in any works to be done under this
> Act with respect to any street or part of a street any works which they H
> think necessary for bringing the street or part of a street, as regards sewerage,
> drainage, level, or other matters, into conformity with any other streets
> (whether repairable or not by the inhabitants at large), including the
> provision of separate sewers for the reception of sewage and of surface
> water respectively."

I

Counsel has submitted to us in the course of a careful argument that that section
was intended to overrule *Bonella's* case (1). With all respect, I do not think
that it was. It was intended to overrule another class of case, of which a very
good example, perhaps the best, is *Caley* v. *Local Board for Kingston-upon-Hull* (2) (1864) (5 B. & S. 815), which showed that, under the law as it then

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* See the note p. 409, letter G, ante.

† The marginal note to s. 9 is " Incidental works."

existed and which, for this purpose, was not changed by the Act of 1875, the local authority were only entitled to do works which were necessary to the road in question. They could not say, for example: "We are going to make up the road and alter its level because the road running in the next street is at a different level". Nor could they say, if there were no sewer in the road that they were going to order a sewer to be put down, although all the other roads in the neighbourhood might have had sewers. They had simply to consider the condition of the particular road, and this section, in my opinion, was meant to deal with that state of affairs. When the section is read carefully it is apparent that it is merely supplementary to s. 6. Section 6 (1) of the Private Street Works Act, 1892, says what may be done. It begins:

> "Where any street or part of a street is not sewered, levelled, paved, metalled, flagged, channelled, made good, and lighted to the satisfaction of the urban authority, the urban authority may from time to time resolve with respect to such street or part of a street to do any one or more of the following works . . ."

They can require private street works to be done on it, that is to say:

> "to sewer, level, pave, metal, flag, channel, or make good, or to provide proper means for lighting such street . . ."

Then, under s. 9 (1), the urban authority

> "may include in any works to be done under this Act with respect to any street or part of a street any works which they think necessary for bringing the street or part of a street, as regards sewerage, drainage, level, or other matters, into conformity with any other streets (whether repairable or not by the inhabitants at large), including the provision of separate sewers for the reception of sewage and of surface water respectively."

If there had been no surface water sewer in this road at all, it would be quite clear, I think, and thus far I agree with the argument of counsel for the appellants, that the local authority could have ordered one; but that is not what they have ordered in this case. The work which they have ordered is work on the existing sewer, because, I suppose, they were advised that the existing sewer was capable of dealing with the surface water but that more gullies or tracks leading to gratings and into the sewer were wanted. The ratio decidendi of *Bonella's* case (1) seems to show that the local authority cannot order, in these circumstances, work to be done at the expense of the frontagers, because the old sewer vested in the local authority, and the Private Street Works Act, 1892, does not enable the local authority to throw on the frontagers a liability which has been vested in them since 1923.

That is really enough to dispose of this case, but I ought to mention three other cases which have been cited. First, *Rishton* v. *Haslingden Corpn.* (3) ([1898] 1 Q.B. 294), to which I only refer because the leading judgment was delivered by CHANNELL, J., who was a great authority on these matters of local government. He refers to *Bonella* v. *Twickenham Local Board of Health* (1), and the cases following that case. I do not propose to state the facts in the *Rishton* case (3), which are not identical, but the court did say ([1898] 1 Q.B. at p. 303) that if the view expressed in *Bonella's* case (1) and other cases is correct

> ". . . the appeal should be allowed on this ground also, but we have not very fully considered it, and base our judgment . . ."

on another ground. Therefore, it is fair to say that the faintly expressed approval of *Bonella's* case (1) must be regarded as a dictum, and not as a considered opinion, of the court; but it is quite clear to me from reading the case that the opinion of Channell, J., at that time, without giving the matter full consideration, was that *Bonella's* case (1) was rightly decided.

The next two cases which have been brought to our attention are *East Barnet Urban District Council* v. *Stacey* (4) ([1939] 2 All E.R. 621), and *Re Jesty's Avenue, Broadway, Weymouth* (5) ([1940] 2 All E.R. 632). I can only say with regard to those cases that they are both decisions of this court, and I do not think we could allow this appeal without overruling them. Counsel for the appellants has sought to distinguish these cases from the present case by saying that s. 9 of the Act was never mentioned, but I think it was never mentioned for a very good reason. If s. 9 bore the construction which counsel has sought to put on it, I cannot believe that the counsel who argued those cases, and who were counsel very well versed in this particular law, and all the members of the court, would have ignored s. 9. The fact is that s. 9 had nothing to do with those cases, and could not have anything to do with them, any more than I think, with all respect to counsel's argument, it has anything to do with this case. If main work cannot be ordered to be done under s. 6, ancillary work cannot be ordered to be done. On its true construction s. 9 of the Private Street Works Act, 1892, relates to work that is ancillary, for the reasons which I have given. That is a very good reason for s. 9 not having been cited in the cases which I have mentioned, and, therefore, no question of s. 9 arises in this case.

For these reasons, I think the justices and the learned recorder came to a correct decision in point of law and this appeal fails and must be dismissed.

ORMEROD, J.: I agree entirely with the reasons given by the Lord Chief Justice.

BARRY, J.: I agree and have nothing to add to the reasons given.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Town clerk*, Poole (for the appellants); *Church, Adams, Tatham & Co.*, agents for *Dickinson, Manser & Co.*, Poole (for the respondents).

[*Reported by* G. A. Kidner, Esq., *Barrister-at-Law.*]

CENTRAL LAND BOARD *v.* SAXONE SHOE CO., LTD.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett and Romer, L.JJ.), October 19, 1955.]

Town and Country Planning—Development value—Site of former public house—Public house selling alcoholic and non-alcoholic drinks and light refreshments—Right to use as shop—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6 *c.* 51), *s.* 61 (2)—*Town and Country Planning* (*Use Classes for Third Schedule Purposes*) *Order,* 1948 (*S.I.* 1948 *No.* 955), *para.* 2 (2), *schedule—Town and Country Planning* (*Use Classes*) *Order,* 1948 (*S.I.* 1948 *No.* 954), *para.* 2 (2), *schedule.*

On July 1, 1948 (the "appointed day" for the purposes of Part 6 of the Town and Country Planning Act, 1947), the respondents owned a vacant corner site with an area of 315 square yards. The site was formerly occupied by a building on four floors with a basement cellar. The building was destroyed by enemy action during the war of 1939-45. At the time of the destruction of the building, the ground floor was used as a public house licensed for the sale of intoxicating liquors for consumption on the premises, and the upper part of the premises was used for the accommodation of the manager of the licensed premises. The premises had contained no accommodation for guests. Non-alcoholic drinks and other light refreshments had normally been sold on the premises as well as alcoholic drinks. On July 1, 1948, the licence was held in suspense. The question arose whether, for the purpose of ascertaining as at July 1, 1948, the restricted value of the land within s. 61 (2) of the Act of 1947, the existing use of the former licensed premises would or would not include the right, in the event of their becoming unlicensed, to use for any of certain shop purposes such part of the premises as was not formerly used for dwelling purposes. The shop purposes were those within class I of the schedule to the Town and Country Planning (Use Classes) Order, 1948, which prescribed use classes for the purposes of s. 12 of the Act of 1947, or class I of the schedule to the Town and Country Planning (Use Classes for Third Schedule Purposes) Order, 1948; the definitions of class I and also of "shop" in both orders being the same. On the basis that the existing use of the premises did not include the right to use any part of the premises as a shop, if the premises became unlicensed, the development value was £12,700 and on the other basis it was nil. On appeal from a determination of the Lands Tribunal that the development value was £12,700,

Held: the public house was not a "shop" within the Orders of 1948 and it should not, therefore, be assumed, in arriving at the restricted value, that planning permission would be granted for use of the premises as a shop within class I.

Appeal dismissed.

[**Editorial Note.** The Town and Country Planning (Use Classes) Order, 1948 (S.I. 1948 No. 954), which was made under and for the purposes of s. 12 of the Town and Country Planning Act, 1947, specified "use classes" identical with those specified for the purposes of being included in the "existing use" of land. These latter were prescribed under para. 6 of Sch. 3 to the Act of 1947 by the Town and Country Planning (Use Classes for Third Schedule Purposes) Order, 1948 (S.I. 1948 No. 955). The former order, S.I. 1948 No. 954, was revoked and replaced by the Town and Country Planning (Use Classes) Order, 1950 (S.I. 1950 No. 1131) (21 HALSBURY'S STATUTORY INSTRUMENTS 176). The definition of "shop" in S.I. 1950 No. 1131 differs materially from that in the Orders of 1948, but it seems that the decision in the present case that an on-licensed public house is not a shop applies a fortiori to S.I. 1950 No. 1131, although a restaurant may be a shop within that order.

For the Town and Country Planning Act, 1947, s. 61 (2), see 25 HALSBURY'S STATUTES (2nd Edn.) 565.

For the Town and Country Planning (Use Classes for Third Schedule Purposes) Order, 1948, see 21 HALSBURY'S STATUTORY INSTRUMENTS 34.]

Case Stated.

This was an appeal of the Central Land Board by way of Case Stated from the decision of the Lands Tribunal (C. H. BAILEY, Esq.) dated June 6, 1955, holding that a determination of development value made by the board on Dec. 18, 1953, was wrong. The tribunal found the following facts proved or admitted.

(1) (a) The land, the subject of the appeal, was on July 1, 1948, a vacant site situated at the corner of Waterloo Street and Oxford Street, Swansea, with an area of 315 square yards. (b) It was formerly occupied by a building on four floors with a basement cellar, which building was destroyed during the war of 1939-45. (c) The ground floor was at the time of its destruction used as a public house licensed for the sale of intoxicating liquors for consumption on the premises. There was a lock-up shop on the corner with an area of thirty square yards. The upper part of the premises was used for the accommodation of the manager of the licensed premises. There was no accommodation for guests. Not only alcoholic drinks but also non-alcoholic drinks and other light refreshments were normally sold on the licensed premises. (d) The licence was on July 1, 1948, held in suspense under the provisions of the Finance Act, 1942, s. 10 and Sch. 6. (e) On the appointed day (July 1, 1948) for the purpose of Part 6 of the Town and Country Planning Act, 1947, the land was, therefore, vacant and in calculating the restricted value thereof by virtue of s. 61 (2) of the Act of 1947 it was to be assumed that planning permission would be granted for the erection of a building within the conditions of para. 1 and, so far as material, para. 3 of Sch. 3 to the Act with the provisions as to use set out in para. 6 of that schedule. (f) In the course of carrying out their duty under the Act of 1947 and for the purpose of those duties the Central Land Board made the following ruling:

> "Existing Use Value—De-licensed premises. The Central Land Board have made the following ruling: When licensed premises become de-licensed either voluntarily or as a result of redundancy or removal the board will regard the existing use of the premises as falling within class XIV of the Use Classes Order (i.e., hotel or boarding house etc.) if sleeping accommodation was provided. If, however, sleeping accommodation was not provided, and the premises were primarily used only for the sale of light refreshments—which includes the sale of intoxicating liquors—the board would regard the existing use as including any of the shop purposes within class I of the Use Classes Order. If the premises fall within the latter category, no development charge will be payable for the use of the premises as a shop. If the existing use on the relinquishment of a licence is any use falling within class XIV of the Use Classes Order, however, the question of whether any development charge is payable for conversion into a shop will depend on the facts of the particular case, i.e., whether use as a shop in the particular situation is more valuable than any use for any purpose falling within class XIV."

(2) The determination made by the Central Land Board was that there was no development value in the freehold interest in the above described land.

(3) The tribunal was asked in this appeal to decide between the following agreed alternative valuations: (a) on the basis that, for the purpose of arriving at the restricted value, the existing use of the former licensed premises on part of this land would include the right, in the event of their becoming unlicensed, to use, as dwelling accommodation, the part formerly used for dwelling purposes and to use the remainder thereof for any of the shop purposes within class I of the Town and

A Country Planning (Use Classes) Order, 1948 (S.I. 1948 No. 954) or class I of the Town and Country Planning (Use Classes for Third Schedule Purposes) Order, 1948 (S.I. 1948 No. 955):

Unrestricted value	£19,000
Restricted value	£19,000
Development value	Nil.

B

(b) On the basis that, for the purpose of arriving at the restricted value, the existing use of the former licensed premises on part of this land would include the right, in the event of their becoming unlicensed, to use as dwelling accommodation the part formerly so used but would not include the right to use the remainder thereof for any of the shop purposes within class I of the said two orders: C

Unrestricted value	£19,000
Restricted value	£ 6,300
Development value	£12,700

D

(4) The value of the licence in suspense was excluded from the valuations on both bases above, and in arriving at the restricted values the existing use of that part of the former property which was used as a lock-up shop, was taken to be that of a shop within class I of the Order No. 955 of 1948.

E The tribunal found that the determination of the board was wrong, and directed the board to alter its determination to the figure alternatively agreed, viz., unrestricted value £19,000, restricted value £6,300, giving a development value of £12,700.

J. R. Willis for the appellant, the Central Land Board.
G. D. Squibb for the respondents.

F

SIR RAYMOND EVERSHED, M.R.: The question posed for our determination in this appeal is a short one. For myself, however, being relatively unaccustomed to dealing with cases falling under the Town and Country Planning Act, 1947, I confess that I have not found it entirely easy. The question itself is stated clearly enough in para. 3 of the Case Stated. As BIRKETT, L.J., pointed G out in the course of the argument, there were there presented two alternative views of arriving at a valuation for the purposes in hand. In para. 3 (a) there is stated one alternative view in this form:

> "that, for the purpose of arriving at the restricted value, the existing use of the former licensed premises on part of this land would include the right, H in the event of their becoming unlicensed, to use, as dwelling accommodation, the part formerly used for dwelling purposes and to use the remainder thereof for any of the shop purposes within class I of the Town and Country Planning (Use Classes) Order, 1948 (S.I. 1948 No. 954) or class I of the Town and Country Planning (Use Classes for Third Schedule Purposes) Order, 1948 (S.I. 1948 No. 955)."

I On that basis the development value is nil, for the restricted value is equivalent to the unrestricted value. The second alternative is thus stated in para. 3 (b):

> "that, for the purpose of arriving at the restricted value, the existing use of the former licensed premises on part of this land would include the right, in the event of their becoming unlicensed, to use as dwelling accommodation the part formerly so used but would not include the right to use the remainder thereof for any of the shop purposes within class I of the two respective orders already mentioned."

On that alternative the restricted value is reduced to £6,300, so as to leave a balance figure for the development value of £12,700. From my reading of that paragraph, it is apparent that the only question is whether the premises here in question other than the dwelling accommodation may or may not be used, for the purposes of making the valuation, for shop purposes within the classes stated.

The premises in question were originally used as a public house. They are described as having been situated at the corner of Waterloo Street and Oxford Street, Swansea. They were destroyed by enemy action during the late war, and have been at all material times, and still are, a vacant site. I think that is a sufficient statement of the facts for present purposes, save only that, as stated in the Case, and, as I think, will be the common experience for public houses, there were normally sold on the licensed premises not only alcoholic drinks but also non-alcoholic drinks and other light refreshments.

I will dispose at once of one small point. I am satisfied that the phrase " light refreshments " was used in this connection as a term of art, and means eatables not cooked on the premises but including beverages of all kinds. I take my definition of this from the two Town and Country Planning Orders to which I have already referred*. I assume (and I express my opinion in this case on the assumption) that we are here dealing with the demolished site of what was an ordinary public house as that term is commonly understood: a place, resort to which would primarily be had for obtaining alcoholic refreshment but in which there would also be sold as ancillary to the main business and in the same part of the premises, non-alcoholic drinks and also some light refreshments, that is, perhaps bread and cheese or biscuits.

The problem being one of ascertaining the development value of the land, the court is directed primarily and essentially, as counsel for the respondents contended, to the Town and Country Planning Act, 1947, s. 61. That section is directed to this very purpose of ascertaining that value. So far as relevant, it reads as follows:

> " (1) For the purposes of this Part of this Act [Part 6] and of any scheme made thereunder an interest in land shall be deemed to be depreciated in value by virtue of the provisions of this Act if the restricted value of that interest on the appointed day [July 1, 1948], calculated in accordance with the provisions of this and the next following section, is less than the unrestricted value of that interest on that day as so calculated; and references in this Part of this Act to the development value of an interest in land shall be construed as references to the difference between those values."

Let me pause for a moment to repeat by way of reminder that the question raised here is, exclusively, what is in this case the restricted value? I pass, therefore, to sub-s. (2):

> " Subject to the following provisions of this section—(a) the restricted value of an interest in land on the appointed day shall be taken to be the value of that interest as it subsists on that day, calculated on the assumption that planning permission would be granted under Part 3 of this Act for development of any class specified in Sch. 3 to this Act, but would not be so granted for any other development."

The sub-section then states how the unrestricted value, which is the other integer in the calculation, is to be arrived at. Sub-section (5) of the same section reads:

> " For the purposes of this section, the restricted and the unrestricted values of interests in land shall be calculated by reference to prices current

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* S.I. 1948 No. 955, art. 2 (2); S.I. 1948 No. 954, art. 2 (2). The definition of " light refreshments " does not appear in S.I. 1950 No. 1131 art. 2 (2) which has subsequently replaced S.I. 1948 No. 954.

> A immediately before Jan. 7, 1947, and for that purpose any such interest shall be treated as if it had been subsisting immediately before that date with all incidents to which it is subject on the appointed day . . . and the land shall be treated as having been immediately before that date in the same state as it is on the appointed day."

B Again let me repeat by way of reminder that on the appointed day this site was vacant, in consequence of enemy action. In order, then, to discover what planning permission it must be assumed will be granted for the purpose of arriving at the figure for restricted value in accordance with the directions I have read in sub-s. (2), it becomes necessary to turn to Sch. 3. That consists of a number of paragraphs consecutively numbered. Though the paragraphs are C in fact divided into two parts, the latter division is not material for my present purpose. The first paragraph includes the rebuilding of any building which was in existence on the appointed day. There was no building here in existence on the appointed day. The paragraph also includes the rebuilding " of any building which was in existence before that day but has been destroyed " since a date in 1937. So that by virtue of that paragraph, development which consists in D rebuilding is included in development under Sch. 3. Paragraph 3 includes the enlargement or improvement of such buildings, and I can, I think, pass that over. Paragraph 6 provides:

> " In the case of a building or other land which, on the appointed day, was used for a purpose falling within any general class specified in an order made by the Minister for the purposes of this paragraph, or which [this is E particularly applicable here] being unoccupied on the appointed day, was last used (otherwise than before Jan. 7, 1937) for any such purpose, the use of that building or land for any other purpose falling within the same general class."

Pursuant to s. 111 of the Act, the Minister made an order* which specified the F classes indicated in para. 6 of Sch. 3. It is a point to be noted that by s. 111 (4), an order made by the Minister for the purpose of para. 6 of Sch. 3 shall not be amended or revoked at any time after the appointed day. In that respect such an order differs from an order made under another provision of the Act, e.g., s. 12 —a point to which I shall come back hereafter. The Minister made under those powers an order which is conveniently or most briefly described by its number, 955, the second of the two orders referred to in para. 3 of the Case Stated.

G By art. 2 (2) of that order the word " shop " is defined:

> " ' shop ' means a building used for the carrying on of any retail trade or retail business wherein the primary purpose is the selling of goods (excluding refreshments other than light refreshments) by retail, and without prejudice to the generality of the foregoing includes a building used for H the purposes of [a number of purposes are set out] but does not include a building used as . . . premises licensed for the sale of intoxicating liquors for consumption on the premises."

With that definition in mind, I turn to what were proleptically called " general classes " in para. 6 of Sch. 3. The first general class is thus stated: " Use as a I shop for any purpose except as . . . " and then there are four exceptions which have no application to the present case. If, therefore, for the purposes in hand, s. 61 forms the code to which exclusively the court is directed to turn, then it would appear that the answer to the problem may be thus briefly stated: having regard to the use to which this public house was put at the time of its destruction, can it fairly be said that it was being used as a shop? If so, then by virtue of s. 61 (2) (a) the restricted value must be arrived at on the assumption that it could be used and the planning permission would be granted for its use as a shop of any other kind, with the sole exception, of course, of the four excluded items.

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* I.e., the Town and Country Planning (Use Classes for Third Schedule Purposes) Order, 1948 (S.I. 1948 No. 955); 21 HALSBURY'S STATUTORY INSTRUMENTS 34.

At first blush I must confess that to describe a public house as premises used as a shop would not appear to be sensible, and to that view further emphasis is given by the express exclusion, in the definition of a shop, of premises licensed for the sale of intoxicating liquors for consumption on the premises. This was such a place, and, as I have said—and I am conscious of this assumption—the sale of the other beverages and eatables would be on the premises licensed, strictly so called. But counsel for the board contended that although these premises were a public house, and, therefore, can be described as premises licensed for the sale of intoxicating liquors for consumption on the premises, that is not an exhaustive statement of the uses to which the place as a whole was put at the relevant date; and the burden of his argument has been to this effect: that since light refreshments other than intoxicating liquors were sold on the premises, and since the sale of light refreshments by retail is in terms within the definition of " shop ", therefore these premises were being used as a shop at the relevant date, albeit they were also being used for purposes not appropriate, according to the definition, to use as a shop. Counsel for the board, if he will allow me to say so, put perhaps most forcibly his point by this test: let it be supposed, he says, that the owners or lessees, the brewers, determined that they would not continue the licence, or let it be supposed that the licence was lost or abandoned; could the brewers then, within the sense and meaning of this Act, without obtaining planning permission, persist in the use of the premises for the sale of light refreshments by converting it into (to take counsel's example) a milk bar? Having regard to the former use, there is obvious force and common sense in the view that the change from the one to the other is not of so great or significant a character as to make one suppose that planning permission would be required. If, however, counsel for the board's test is to be affirmatively answered in the case he put, then it must also follow, as was conceded, that these brewers could equally, without asking for planning permission, arrange, by a sub-tenancy or otherwise, to change the character of the premises far more fundamentally, viz., by converting them in effect from a public house into a shop for the sale, for example, of boots and shoes. Again as a matter of common sense, if it be permissible to appeal to such a standard in this kind of context, that would appear to be a somewhat substantial and significant change in the character of the use; and for my part, I think, the answer is really to be supplied in the way which counsel for the board was at first disposed to concede, viz., that one must look at the substance of the matter. Now, looking at the substance of the matter, it seems to me that this public house was not, at the relevant date, a shop within the definition of the order which I have read; and if that is right, then no assistance can be got by counsel for the board from his appeal to s. 61 (2), for it would follow from what I have said, that it can no longer be assumed that planning permission would be granted for use as a shop of any kind within the class.

Counsel for the board contended further that that, after all, was not the end of the matter. He said that for the purposes of arriving at the restricted value it was true that an assumption is made that planning permission will be granted where planning permission would otherwise be required; but counsel contended that there still remains a field of use for which in no circumstances would planning permission be required, and that if regard is had to that scope of use, then the restricted value will be found to be equivalent to the unrestricted value. In order to make good that part of the argument, counsel for the board falls back on s. 12. He is, I think, met at first with the difficulty that s. 12 is directed, not to ascertaining restricted value, but to the formulation of the circumstances in which planning permission is required; and it is not directed to the case of rebuilding. The answer to that difficulty counsel for the board finds in s. 12 (5) (c), to which I will come later. But the two sections, s. 61 and s. 12, seem to pose a certain contradiction to which counsel for the respondents drew our attention. I have already read s. 61 (2), and if that sub-section is read together with the order which was made under it*, it seems clearly to proceed on the hypothesis that to convert these premises—assuming for the moment they had not been destroyed—to some use different from their actual use, would involve what is called " development ".

I will read again the essential words of s. 61 (2) (a): ". . . calculated on the assumption that planning permission would be granted . . . for development of any class specified in Sch. 3 ". Section 12, however, seems to exclude from the scope of the word " development " the very uses which s. 61 (2) (a) implicitly regards as " development ". The answer to that somewhat strange antinomy may lie in this—that the order which was made under s. 12, unlike the order which was made under s. 61, is alterable. It happened that at the relevant time the relevant terms of the order under s. 12† were identical with those of the order made under para. 6 of Sch. 3* to the Act of 1947.

Let me, however, turn to s. 12 (2). So far as relevant, it provides as follows:

> " In this Act . . . the expression ' development ' means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land: Provided that the following operations or uses of land shall not be deemed for the purposes of this Act to involve development of the land, that is to say . . ."

I note, though I do not desire merely to make criticisms of the drafting, that, whereas the main body of sub-s. (2) speaks of " buildings or other land ", the proviso is on the face of it at first limited to land. That limitation obviously is insignificant having regard to para. (f) of the proviso, which is the relevant one and which reads:

> " in the case of buildings or other land which are used for a purpose of any class specified in an order made by the Minister under this section, the use thereof for any other purpose of the same class."

What I have read seems to involve the conclusion that what would otherwise be the making of any material change in the use of the building is not " development " for the purposes of the Act if that material change is merely a transfer, so to speak, from one type of use to another in the same class, as stated in the order indicated.

The order indicated, the Town and Country Planning (Use Classes) Order, 1948 (S.I. 1948 No. 954), as I have stated, contained precisely the same definition of " shop " and precisely the same language for class I, " use as a shop for any purpose ", as we find in S.I. 1948 No. 955. If, therefore, the original use of the public house was use as a shop, then use as another kind of shop would not be a material change, viz., a development under s. 12 (2). But in my judgment the conclusion I have reached under s. 61, which I think strictly to be the material section, is equally and necessarily available to counsel for the respondents under s. 12 (2); in other words, as I construe the class, with the definition of " shop " written in instead of the word " shop ", these premises were not being used as a shop at the date when they were last used.

I have earlier said that if counsel for the board sought to rely exclusively on s. 12 (2), he might be in the added difficulty that here there are no buildings and we are not, therefore, in terms within the proviso which relates only to buildings in fact being used for some purposes. But counsel falls back for this purpose on s. 12 (5), which is, so far as relevant, as follows:

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* S.I. 1948 No. 955.

† S.I. 1948 No. 954, made under s. 12 was substantially identical with the Town and Country Planning (Use Classes for Third Schedule Purposes) Order, 1948 (S.I. 1948 No. 955) but the former order was revoked and replaced by the Town and Country Planning (Use Classes) Order, 1950 (S.I. 1950 No. 1131), which is not in all respects similar.

> "Notwithstanding anything in this section, permission shall not be required under this Part of this Act . . . (c) in the case of land which on the appointed day is unoccupied, in respect of the use of the land for the purpose for which it was last used."

It was last used as a public house, and counsel for the board, therefore, says that re-application to that use is not by the terms of sub-s. (5) development. That, however, is, I think, insufficient for him, because what is here in question does not depend on these premises being used as a public house. In order to succeed, the landlords must say that they are entitled, without involving themselves in any development, to use the reconstructed premises as a shop.

I find some difficulty in expanding the paragraph which I last read, para. (c) of sub-s. (5), to so generous a scope as has been given to para. (f) of sub-s. (2) by virtue of the Town and Country Planning (Use Classes) Order, 1948 (S.I. 1948 No. 954); but, so far as I can see, even if I were so to expand the words for the purpose, still I find the same answer to the case put on that paragraph as I have found to the case put on the other paragraphs already dealt with.

The conclusion then on the whole matter is that here for the purposes of finding the restricted value it cannot be said that the uses which would be permitted or which would not constitute development would include the use as any type of shop within the categories set out in either of the orders; in other words, I concur, for my part, with the conclusion which the tribunal reached. I confess to some regret in so doing. As counsel for the board observed, as I understood him, the conclusion goes counter to the view on which the Central Land Board appear to have acted. That view is contained in a ruling which is to be found in para. 1 (f) of the Case Stated. I am bound to say that I do not think the paragraph, applied to this particular case, is very clear; but that may be my fault. I am confining my judgment in this case to the facts as I have understood or assumed them, viz., that we are here dealing with the ordinary well-known case of a public house. It may well be that there are other establishments where the sale of intoxicating liquors does not so predominate over all other activities that it could be said, as I think it cannot on the facts which I have treated as being the facts in this case, that the premises were being used, though not exclusively used, as a shop. For the reasons I have tried to state, I have felt constrained to the view which commended itself to the tribunal, and I, therefore, think that the appeal should be dismissed.

BIRKETT, L.J.: I am entirely of the same opinion. By para. 1 (c) of the Case it is stated that

> "the ground floor of this building was at the time of its destruction used as a public house licensed for the sale of intoxicating liquors for consumption on the premises. There was a lock-up shop on the corner with an area of thirty square yards. The upper part of the premises was used for the accommodation of the manager of the licensed premises. There was no accommodation for guests. There was normally sold upon the licensed premises not only alcoholic drinks but also non-alcoholic drinks and other light refreshments."

That paragraph is descriptive of an ordinary public house. In almost every public house it is a part of the business of the licensee to sell on the premises, not merely alcoholic drinks, but non-alcoholic drinks and light refreshments. In para. 3 of the Case two alternative agreed views are stated; and, as I put to counsel for the respondents in the course of the argument, they are identical save in this all-important matter, that in para. 3 (a) it is said—" to use the remainder thereof for any of the shop purposes within class I "—which is the contention of the Central Land Board, and in para. 3 (b) " would not include the right to use the remainder thereof for any of the shop purposes within class I "—which is the contention of the respondents. That is the only point in the case.

The question has been a little complicated by para. 1 (f)* which contains the quotation from the ruling of the Central Land Board. But we are not told with any detail how that ruling was given, or in what circumstances, or to what it applied. It seemed to me that the board were not dealing with a case like the one we are dealing with. The Central Land Board under Part 6 of the Act of 1947 had to deal with the question of payments for the depreciation of land values, and the £300 million fund was set up for that purpose. Section 61 comes within that Part; but in Part 7 of the Act of 1947 the Central Land Board had to deal with development charges—not depreciation of land values as to which they were going to pay out, but development charges, as to which they were going to levy sums of money. This ruling which is headed " Existing Use Value—De-licensed premises ", seems to me plainly to be a ruling under Part 7, because it begins:

> " The Central Land Board have made the following ruling: When licensed premises become de-licensed either voluntarily or as a result of redundancy or removal the board will regard the existing use of the premises as falling within class XIV of the Use Classes Order . . . "

Class XIV is:

> " Use as a boarding or guest house, a residential club, a hostel or a hotel providing sleeping accommodation."

The ruling went on:

> " If, however, sleeping accommodation was not provided, and the premises were primarily used only for the sale of light refreshments—which includes the sale of intoxicating liquors—the board would regard the existing use as including any of the shop purposes within class I of the Use Classes Order. If the premises fall within the latter category, no development charge will be payable for the use of the premises as a shop. If the existing use on the relinquishment of a licence is any use falling within class XIV of the Use Classes Order, however, the question of whether any development charge is payable for conversion into a shop will depend on the facts of the particular case . . . "

The words " no development charge will be payable " are clearly dealing with Part 7.

It seems to me, therefore, that this ruling which is cited in para. 1 (f) was dealing solely as a matter of business utility and practice with development charges and was not intended to govern the decision of questions with which we are concerned today.

So far as the point with which we are concerned here today, viz., the contention of the Central Land Board that this site may be used for any of the shop purposes, as against the contention of the respondents that it cannot, I have nothing to add to what my Lord has said, and I think that the tribunal reached a proper and just determination and I agree with it.

ROMER, L.J.: I quite agree. Counsel for the board put his case in the first place on s. 61 of the Act of 1947, coupled with Sch. 3 and the order (S.I. 1948 No. 955) which the Minister made thereunder; and alternatively he relied on s. 12 and the order (S.I. 1948 No. 954) which the Minister made under that section. It may be, and I think it is the fact, that one arrives at the same conclusion adverse to the board whichever section and order one applies. But for myself I think that counsel for the respondents was quite right when he said that s. 12 does not really enter into the picture at all so far as the present problem is concerned, and that s. 61 and Sch. 3 and the Town and Country Planning (Use Classes for Third Schedule Purposes) Order, 1948 (S.I. 1948 No. 955) constitute a comprehensive code for the purposes of the ascertainment of development values of land. Section 12, which, it is to be observed, comes in Part 3, a different part of the Act altogether, which deals with control of development, is directed to providing what the public can do, and what they cannot do without permission in relation to the development of their land. Even if one did resort to s. 12, I think that one arrives at the same result, but I think it right to say that, in my opinion, s. 61 for the present purposes is the only section that one need bear in mind. I agree with the order proposed.

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* Paragraph 1 (f) of the Case Stated is printed at p. 416, letter E, ante.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Treasury Solicitor* (for the Central Land Board); *Rowe & Maw* (for the respondents).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

PETERBOROUGH CORPORATION *v.* HOLDICH AND ANOTHER.

[QUEEN'S BENCH DIVISION (Pearce, Barry and Glyn-Jones, JJ.), October 21, 1955.]

Public Health—Dustbin—Provision—Owner of building required by local authority to provide—House subject to Rent Restrictions Acts—Appeal by owner to justices—Copy of notice of appeal given to occupier—Court " may " make such order as it thinks fit—Duty of court—Public Health Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8 *c.* 49), *s.* 75 (1), (3)—*Local Government* (*Miscellaneous Provisions*) *Act,* 1953 (1 *&* 2 *Eliz.* 2 *c.* 26), *s.* 8 (4) (*b*).

A local authority which had undertaken the removal of house refuse required, under s. 75 (1)* of the Public Health Act, 1936, the owner of a dwelling-house to provide a dustbin. The owner appealed to the justices on the ground that it was not equitable that the notice should have been served on him, and in accordance with s. 8 (4) (a) of the Local Government (Miscellaneous Provisions) Act, 1953, the owner served a copy of his notice of appeal on the occupier of the dwelling-house, who was a statutory tenant at a weekly rent of 5s. 10½d., the tenant paying the rates. Section 8 (4) (b)† of the Act of 1953 provides " on the hearing of the appeal the court may make such order as it thinks fit with respect to compliance " with the notice either by the owner or by the occupier. The justices found that it was not equitable to make an order requiring the owner to provide a dustbin, that the wording of s. 8 (4) (b) was permissive and did not require them to make an order on the occupier if they did not make an order on the owner, and they declined to make an order on either. On appeal by the local authority it was contended, in support of the decision of the justices, that s. 75 (3) of the Public Health Act, 1936, enabled a local authority to provide and maintain dustbins in respect of the dwelling-house, and that therefore the justices were not obliged to make an order on either the owner or the occupier.

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* The terms of the sub-section are printed at p. 426, letter C, post.

† The terms of the paragraph are printed at p. 426, letter G, post.

Held: section 75 (3) of the Act of 1936 enabled the local authority to undertake the provision of dustbins for a district or part of a district, but not for particular houses; and, when once it was established that a dustbin should be provided, the justices were required, notwithstanding the use of the word "may" in s. 8 (4) (b) of the Act of 1953, to make an order on either the owner or the occupier to provide the dustbin.

Dictum of PARKER, J., in *R.* v. *Nottingham Quarter Sessions, Ex p. Harlow* ([1952] 2 All E.R. at p. 80) distinguished.

Appeal allowed.

[Editorial Note. In *Croydon Corpn.* v. *Thomas* ([1947] 1 All E.R. 239) the Divisional Court decided that an appeal lay against a notice to provide a dustbin under s. 75 (1) of the Public Health Act, 1936, and that the discretion of the justices as between the owner and the occupier was unfettered. LORD GODDARD, C.J. (at p. 241, letter B) intimated that one would have expected to find in s. 75 an express provision as to an appeal, similar to that in s. 45 of the Act. Section 8 (4) of the Local Government (Miscellaneous Provisions) Act, 1953, has now made further provision as to appeal, but it does not enable the owner or occupier to raise the question whether, assuming that it is established that dustbins are required, the local authority should provide them at the expense of the rates.

For the Public Health Act, 1936, s. 75, see 19 HALSBURY'S STATUTES (2nd Edn.) 368; and for cases on the section, see 2nd DIGEST SUPP. to 38 DIGEST 234, *652*.

For the Local Government (Miscellaneous Provisions) Act, 1953, s. 8 (4), see 33 HALSBURY'S STATUTES (2nd Edn.) 554.]

Case referred to:

(1) *R.* v. *Nottingham Quarter Sessions, Ex p. Harlow*, [1952] 2 All E.R. 78; [1952] 2 Q.B. 601; 116 J.P. 397; 3rd Digest Supp.

Case Stated.

This was a Case Stated by justices for the Soke of Peterborough in respect of their adjudication as a magistrates' court sitting at Peterborough on Apr. 15, 1955. On Mar. 17, 1955, Frederick White Holdich, the owner of a dwelling-house known as 151, Aldermans Drive, Peterborough, appealed by way of complaint to the justices against a notice served pursuant to s. 75 (1) of the Public Health Act, 1936, by the local authority, viz., the mayor, aldermen and citizens of the city of Peterborough, requiring him as the owner of the dwelling-house to provide a dustbin complying with the requirements therein specified. The owner gave as the ground of appeal that it was not equitable that the notice should have been served on him, and duly served a copy of his notice of appeal on the occupier of the dwelling-house pursuant to s. 8 (4) (a) of the Local Government (Miscellaneous Provisions) Act, 1953. At the hearing on Apr. 15, 1955, the following facts were found. The local authority had undertaken the removal of house refuse within the district in which the dwelling-house was situate. On Feb. 28, 1955, the local authority caused to be served on the owner the notice pursuant to the Public Health Act, 1936, s. 75. The owner of the dwelling-house was the landlord and the occupier was the tenant under the terms of a weekly statutory tenancy at a weekly rent of 5s. 10½d., the tenant paying rates. The terms and conditions of the tenancy required neither the landlord nor the tenant to provide a dustbin. Prior to and on the date of the service of the notice dustbins had been supplied on occasions by the landlord or his predecessors in title, and on occasion by the tenant, and the dustbin actually in use was defective in that the bottom of it had rusted away. It was contended for the local authority that in view of the evidence adduced the court was required to make an order in respect of the compliance with the statutory notice either by the owner or by the occupier and that, if the court were of opinion that it was not equitable that the notice should have been served on the owner, it was the duty of the court to make an order requiring the occupier to comply with the notice. It was contended for the owner that it was not equitable that the notice should have been served on him, and by the occupier that it would be inequitable for him to be required to provide a dustbin. The justices were of opinion (i) that it was not equitable that the notice should have been served on the owner, and (ii) that s. 8 (4) of the Act of 1953 was permissive, and that having refused to make an order in respect of the owner the court was not bound in the particular circumstances to make an order in respect of the occupier, and accordingly allowed the appeal of the owner and also declined to make an order in respect of the occupier. The local authority now appealed.

E. D. Smith for the local authority.
P. J. Fitzgerald for the justices.
The owner and the occupier did not appear.

PEARCE, J.: By s. 75 (1) of the Public Health Act, 1936, it is provided:

> " A local authority who, as respects their district or any part thereof, have undertaken the removal of house refuse may by notice require the owner or occupier of any building within the district, or, as the case may be, within that part of the district, to provide such number of covered dustbins for the reception of house refuse of such material, size and construction as the authority may approve."

There is a proviso that the authority shall not require the replacement of a dustbin so long as it is of proper construction and in a proper condition. Then sub-s. (1) continues:

> " Any person aggrieved by a requirement of the local authority under this sub-section may appeal to a court of summary jurisdiction."

Sub-section (3) provides:

> " A local authority may, as respects their district or any part thereof, in lieu of requiring the owners or occupiers of buildings to provide and maintain dustbins for the reception of house refuse, undertake themselves to provide and maintain such dustbins as may be necessary and, so long as such an undertaking is in force, the authority may make in respect of each dustbin provided by them such annual charge not exceeding 2s. 6d. as they think proper.
>
> " Any such charge shall become due on Apr. 1 in each year and may be recovered as part of the general rate in respect of the premises for which the dustbin has been provided, but without prejudice to the rights of any person under any tenancy agreement."

The Local Government (Miscellaneous Provisions) Act, 1953, s. 8 (4), provides:

> " Where an appeal is brought under the said s. 75 (1) [of the Public Health Act, 1936] in respect of a notice requiring one of two persons who are respectively the owner and the occupier of a building to provide a dustbin, and the grounds upon which the appeal is brought include the ground that it was not equitable that the notice should have been served on the appellant —(a) the appellant shall serve a copy of his notice of appeal on the other of the two said persons; and (b) on the hearing of the appeal the court may make such order as it thinks fit with respect to compliance with the first-mentioned notice either by the appellant or by the said other person; and in exercising its powers under this sub-section the court shall have regard, as between an owner and an occupier, to the terms and conditions, whether contractual or statutory, of the tenancy of the premises concerned."

In the present case a notice under s. 75 (1) of the Public Health Act, 1936, was served on the owner of a house requiring him to provide a proper dustbin. He appealed to the justices and served a notice of appeal on the occupier in accordance with the provisions of s. 8 (4) (a) of the Local Government (Miscellaneous Provisions) Act, 1953. It was held by the justices that it was not equitable that the notice should have been served on the owner and as s. 8 (4) of the Act of 1953 was permissive they were not bound, having refused to make an order in respect of the owner, in the particular circumstances to make an order in respect of the occupier. Accordingly they allowed the appeal of the owner and made no order on the occupier. The question for the opinion of this court is whether the justices having come to the conclusion that no sufficient dustbin was provided at the dwelling-house at the time of the service of the notice and that it was inequitable in all the circumstances that the notice should have been served on the owner, it was then their duty to make an order against the occupier with respect to the compliance with the notice. It was argued on behalf of the local authority that though s. 8 (4) (b) of the Act of 1953 in terms said that the justices might make an order, it was necessary in the particular circumstances of the present case for the justices in a proper use of their judicial discretion to make an order on either the owner or the occupier. At first it seemed to me that as by virtue of s. 75 (3) of the Act of 1936 the local authority could themselves provide dustbins, it did not necessarily follow that, when the justices were considering as between the owner and the occupier whether they should make an order on one or the other, in the exercise of their judicial discretion they had to make an order on either of them because there was always the possibility envisaged by the sub-section that the local authority would provide the dustbin themselves and charge for it in the rate. But a further consideration of sub-s. (3) seems to show that it was not intended to give local authorities a right or duty to supply dustbins for particular houses. The words are " the local authority may, as respects their district or any part thereof ", and it seems that the sub-section was intended to give them a right to deal with the whole or a particular part of their district and not to supply dustbins to individual houses.

Counsel for the justices pointed out that in *R.* v. *Nottingham Quarter Sessions, Ex p. Harlow* (1), where this court was considering a slightly different application of s. 75 (1), Parker, J., used these words ([1952] 2 All E.R. at p. 80):

> " Accordingly, once the court of summary jurisdiction in the present case had declared null and void the notice and requirement to the applicant, as agent for the owners, to provide a dustbin, the respondent council would have to fulfil its duties in some other way. It would either have to provide a dustbin itself, or serve a notice on the occupier requiring him to do so with the risk of being taken by the occupier to the court, and having to incur, and, possibly, to pay costs."

It is apparent that Parker, J., was not considering the wording of s. 75 (3) or whether that sub-section did in fact give the local authority power or a duty to provide dustbins for individual houses, rather than dustbins for a district or some part thereof, and I do not think that the learned judge intended that sentence to be taken as a pronouncement on the effect of sub-s. (3).

It was also argued by counsel for the justices that in the Act of 1953 there were various places where the word " shall " was used as opposed to the word " may ". In s. 8 (4) (b), however, as it is at present drafted, it would be impossible for the word " shall " to be used, since there might be cases in which the court found there was nothing wrong with the dustbin; and, though in fact it would have been possible to draft the sub-section in such manner that the word " shall " could be appropriately inserted, I do not think that it is fair to infer from the use of the word " may ", as opposed to the word " shall ", that the object was that a burden might not be placed, once it was established that a dustbin must be provided, on either the occupier or the owner. In my view, the justices are deciding as between the occupier and the owner who is the person who shall more equitably bear the burden of providing a dustbin. In the present case they have found that it was inequitable that the owner should provide it. They have not in terms found that it was inequitable that the occupier should provide it. It is, however, a fair implication that considerations of equity made them reluctant to make an order at all. I have come to the conclusion that once it has been proved that there is no adequate dustbin, and if the owner and the occupier are before the court, the court has a duty to make an order against one or the other, and, therefore, the case must go back to the justices with that direction.

BARRY, J.: I agree. In my judgment the fundamental consideration is that under s. 75 (1) of the Public Health Act, 1936, Parliament has seen fit to provide that local authorities who have undertaken the removal of house refuse within their district, may require the owners or occupiers of premises within that district to provide dustbins for the reception of house refuse. I respectfully agree with PEARCE, J., as to the true construction of s. 75 (3). If, contrary to my view, it were possible for a local authority to deal with an individual house under the provisions of that sub-section, that would not entitle the justices to refuse to make any order under sub-s. (1) in cases where the local authority have decided to proceed under that sub-section. In my judgment, they are to exercise their discretion judicially when parties are before them under the provisions of s. 8 (4) of the Local Government (Miscellaneous Provisions) Act, 1953, and the only question before the court is whether it is equitable to serve the notice requiring the provision of a dustbin on the owner or the occupier. The justices must, under that sub-section, reach a decision on that point and, having done so, they must require either the owner or the occupier to provide the dustbin. In appeals to them under s. 75 (1) they have also other matters to consider. Questions may arise as to the suitability of existing dustbins, and as to the propriety of requiring either the owner or the occupier to provide an alternative receptacle. If, however, the only issue is whether the notice should be served on the owner or occupier, I am satisfied that in the judicial exercise of their discretion the justices must reach a decision on that point, and make an order that one or other of those two parties shall comply with the requirements of the local authority. As PEARCE, J., has said, no real significance can be attached to the use of the word " may " in s. 8 (4) (b) of the Act of 1953. Indeed, it is to be observed that a similar use of the word is made in s. 290 (5) of the Public Health Act, 1936*, which deals with the apportionment of the expense of complying with various orders made by the local authority between owners and occupiers.

GLYN-JONES, J.: I agree. Counsel for the justices sought to persuade us that s. 8 (4) (b) of the Act of 1953 should be given the meaning which it would have had if it had read as follows: " The court may make such order as it thinks fit with respect to compliance with the . . . notice by the [owner] or by the [occupier] *or at all* ". At first, I was inclined to think that the sub-section might have been intended to confer a complete discretion on the justices, but I am bound to say that that is the wrong view, and the proper view is as stated in the judgments which have been delivered.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Town clerk*, Peterborough (for the local authority); *Bridges, Sawtell & Co.*, agents for *Percival & Son*, Peterborough (for the justices).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law*.]

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* See 19 HALSBURY'S STATUTES (2nd. Edn.) 469.

GALLOWAY *v.* GALLOWAY (*Ex parte*).

[HOUSE OF LORDS (Viscount Simonds, Lord Oaksey, Lord Radcliffe, Lord Tucker and Lord Cohen), July 11, 12, November 2, 1955.]

Divorce—Custody—Child born before marriage—Not legitimated per subsequens matrimonium—Matrimonial Causes Act, 1950 (14 *Geo*. 6 *c*. 25), *s*. 26 (1).

Infant—Maintenance—Infant born before marriage—Not legitimated per subsequens matrimonium—Matrimonial Causes Act, 1950 (14 *Geo*. 6 *c*. 25), *s*. 26 (1).

On Aug. 17, 1950, the appellant, being then a widow, gave birth to an illegitimate child of whom the respondent, then the husband of another woman, was the father. His marriage was dissolved and in May, 1952, he married the appellant. In November, 1953, a decree of dissolution of the marriage was granted to the appellant on the ground of the respondent's adultery, but her prayer for an order under s. 26 (1) of the Matrimonial Causes Act, 1950*, for custody of the illegitimate child was refused on the ground that the sub-section did not extend to illegitimate children. On appeal,

Held (VISCOUNT SIMONDS and LORD COHEN dissenting): the term "children" in s. 26 (1) of the Matrimonial Causes Act, 1950, included illegitimate children the marriage of whose parents was the subject of the proceedings, since, although the word "children" in a statute prima facie meant legitimate children, that meaning was displaced if the context in which the word "children" appeared required it, as here, to embrace a wider category than that of legitimate children; accordingly, the appeal must be allowed.

Decision of DENNING, L.J., in *Packer* v. *Packer* ([1953] 2 All E.R. 127) approved.

Harrison v. *Harrison* ([1951] 2 All E.R. 346) disapproved.

Decision of the COURT OF APPEAL ([1954] 2 All E.R. 143) reversed.

[**Editorial Note.** The principle established by this decision is that epitomised by DENNING, J., in *Millard* v. *Millard & Addis* ([1945] 2 All E.R. at p. 527, letter D) in the saying that "the test is parenthood, not legitimacy" (cf. per LORD RADCLIFFE at p. 438, letter B, post; per LORD TUCKER at p. 440, letter F, post). Section 26 (1) of the Matrimonial Causes Act, 1950, reproduces provisions which were originally enacted in s. 35 of the Matrimonial Causes Act, 1857, subsequently replaced by s. 193 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925. Thus nearly a century has elapsed before the construction now placed on the enactment has been established, and of this over ninety years had passed before the first decision directly on the point was made in *Harrison* v. *Harrison* ([1951] 2 All E.R. 346). This decision is now overruled. In the circumstances, a question distinct from that of the true construction of the words of the enactment arose, viz., whether there had been a long course of accepted interpretation of the enactment which should not now be displaced. On this question the majority opinion was that there was not any such long course of judicial interpretation of this enactment as required the meaning of "children" in s. 26 (1) to be confined to legitimate children.

As to contemporanea expositio and the construction of statutes in accordance with previously accepted interpretation, see 31 HALSBURY'S LAWS (2nd Edn.) 493, para. 627; and for cases on the subject, see 42 DIGEST 667-670, *774-805*.

As to the power of the court to make orders for the custody of children on dissolution of marriage, see 12 HALSBURY'S LAWS (3rd Edn.) 354, para. 755; and for cases on the subject, see 27 DIGEST (Repl.) 663-668, *6282-6333*.

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* The terms of the sub-section are printed at p. 431, letter D, post.

For the Matrimonial Causes Act, 1950, s. 26 (1), see 29 HALSBURY'S STATUTES (2nd Edn.) 413.]

Cases referred to:

(1) *Harrison* v. *Harrison*, [1951] 2 All E.R. 346; [1951] P. 476; 115 J.P. 428; 27 Digest (Repl.) 664, *6289*.

(2) *Woolwich Union* v. *Fulham Union*, [1906] 2 K.B. 240; 75 L.J.K.B. 675; 95 L.T. 337; *affd.* H.L. sub nom. *Fulham Parish* v. *Woolwich Union*, [1907] A.C. 255; 76 L.J.K.B. 739; 97 L.T. 117; 71 J.P. 361; 37 Digest 255, *503*.

(3) *Dorin* v. *Dorin*, (1875), L.R. 7 H.L. 568; 45 L.J.Ch. 652; 33 L.T. 281; 39 J.P. 790; 44 Digest 809, *6616*.

(4) *Re Taylor*, [1925] Ch. 739; 95 L.J.Ch. 43; 133 L.T. 602; 44 Digest 811, *6629*.

(5) *Re Makein* (*decd.*), [1955] 1 All E.R. 57; [1955] Ch. 194.

(6) *Langworthy* v. *Langworthy*, (1886), 11 P.D. 85; 55 L.J.P. 33; 54 L.T. 776; 27 Digest (Repl.) 689, *6597*.

(7) *Green* v. *Green*, [1929] P. 101; 98 L.J.P. 58; 140 L.T. 93; 27 Digest (Repl.) 664, *6286*.

(8) *Millard* v. *Millard & Addis*, [1945] 2 All E.R. 525; sub nom. *M.* v. *M.* [1946] P. 31; 115 L.J.P. 29; 173 L.T. 305; 27 Digest (Repl.) 555, *5053*.

(9) *C.* v. *C.*, [1947] 2 All E.R. 50; 177 L.T. 399; 111 J.P. 442; sub nom. *Colquitt* v. *Colquitt*, [1948] P. 19; [1948] L.J.R. 897; 27 Digest (Repl.) 709, *6765*.

(10) *Wilkinson* v. *Adam*, (1813), 1 Ves. & B. 422; 35 E.R. 163; *affd.* (1823), 12 Price 470; 147 E.R. 780; 44 Digest 807, *6607*.

(11) *Barras* v. *Aberdeen Steam Trawling & Fishing Co., Ltd.*, [1933] A.C. 402; 102 L.J.P.C. 33; 149 L.T. 169; Digest Supp.

(12) *Packer* v. *Packer*, [1953] 2 All E.R. 127; [1954] P. 15; 3rd Digest Supp.

(13) *Webb* v. *Webb*, [1952] 1 All E.R. 527; 116 J.P. 146; 3rd Digest Supp.

(14) *Bednall* v. *Bednall & Shivussawa*, [1927] P. 225; 96 L.J.P. 150; 137 L.T. 632; 27 Digest (Repl.) 664, *6285*.

(15) *Jones* v. *Jones*, (1929), 98 L.J.P. 74; 140 L.T. 647; 27 Digest (Repl.) 664, *6287*.

(16) *Jackson* (*otherwise Macfarlane*) v. *Jackson*, [1909] P. 308; 77 L.J.P. 147; 27 Digest (Repl.) 577, *5352*.

(17) *Bryant* v. *Bryant*, [1955] 2 All E.R. 116; [1955] P. 164.

Appeal.

Appeal by the wife from an order of the Court of Appeal, dated Apr. 13, 1954, and reported [1954] 2 All E.R. 143, affirming an order of His Honour JUDGE LAWSON CAMPBELL, sitting as special commissioner in divorce at Cambridge, dated Nov. 26, 1953, whereby he granted the wife a decree nisi for the dissolution of her marriage but refused her application for the custody of her illegitimate child. The facts appear in the headnote.

J. E. S. Simon, Q.C., and *R. E. M. Elborne* for the appellant.
Gilbert Beyfus, Q.C., and *J. P. Comyn* for the Queen's Proctor.

The House took time for consideration.

Nov. 2. The following opinions were read.

VISCOUNT SIMONDS: My Lords, this appeal raises the question what is the true construction of certain words in s. 26 (1) of the Matrimonial Causes Act, 1950, on which judicial opinion has differed in the Court of Appeal and will, I believe, differ in this House. The section to which I have referred reproduces, A so far as its relevant words are concerned, s. 35 of the Matrimonial Causes Act, 1857, and I think that it is important at the outset to emphasise this fact as there has been some disposition to ignore it. Counsel who argued this case for the appellant in a manner which left the House in his debt, conceded that these relevant words must be construed in the same sense today as in 1857.

B This, then, briefly is the problem. The appellant, being then a widow, on Aug. 17, 1950, gave birth to an illegitimate child of whom the respondent, then the husband of another woman, was the father. His marriage was dissolved and, in May, 1952, he married the appellant. On Nov. 26, 1953, a decree of dissolution of marriage was granted to her on the ground of his adultery, but the learned commissioner refused her prayer for an order for custody of the illegitimate C child holding that he was bound by the decision of BARNARD, J., in *Harrison* v. *Harrison* (1) ([1951] 2 All E.R. 346). From this refusal she appealed to the Court of Appeal which, by a majority (JENKINS and HODSON, L.JJ., dissentiente SINGLETON, L.J.), dismissed her appeal. Hence her appeal to this House.

My Lords, the jurisdiction of the Divorce Court to make an order for the custody of a child is now founded on s. 26 (1) of the Matrimonial Causes Act, D 1950, which is in these terms:

> "In any proceedings for divorce or nullity of marriage or judicial separation, the court may from time to time, either before or by or after the final decree, make such provision as appears just with respect to the custody, maintenance and education of the children the marriage of whose parents E is the subject of the proceedings, or, if it thinks fit, direct proper proceedings to be taken for placing the children under the protection of the court."

The vital words

> "the children the marriage of whose parents is the subject of the proceedings"

F are derived by way of s. 193 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, from s. 35 of the Matrimonial Causes Act, 1857, and the question which might have been asked at any time during the last ninety-eight years is whether, in the phrase that I have cited, the word "children" includes illegitimate children. Today it must be answered, and the answer cannot be G different from that which would have been given in 1857. That does not mean that, in regard to particular individuals, the result may not be different, for a child who would have been illegitimate in 1857 may today, as the result of the Legitimacy Act, 1926, be a legitimate child. But that only means that, as the law does not stand still, the word "children", meaning thereby "legitimate H children", will have a wider content. For this reason, though the House has been referred to a large number of statutes dealing with matrimonial causes from 1857 to the present day, I do not, myself, get any help from them, except in one aspect to which I will presently refer. The question is, in my opinion, to be decided by an examination of the relevant words in the context of the statute in which they are found, and the then prevailing general law.

I First, as to the prevailing law. It was in 1857 (as it is today) a cardinal rule applicable to all written instruments, wills, deeds or Acts of Parliament, that "child" prima facie means lawful child, and "parent" lawful parent. The common law of England did not contemplate illegitimacy and, shutting its eyes to the facts of life, described an illegitimate child as "filius nullius". This prima facie meaning may, in certain circumstances, be displaced and a wider meaning given to the words, and it is said that those circumstances are present if the wider meaning is more consonant with the policy of the statute in which the words are found; see per Vaughan Williams, L.J., in *Woolwich Union* v. *Fulham Union* (2) ([1906] 2 K.B. at p. 246). This is not, I think, an entirely happy phrase, for it appears to suggest that the court begins its consideration of the statute with an impartial mind towards either meaning. It is, moreover, capable of leading and, I think, has led the court to find the policy of the Act in its own predilections of a later age rather than in the provisions of the Act itself.

A safer approach to the question of construction, and one that has the authority of this House, is to say that "children" means "legitimate children" unless some repugnancy or inconsistency and not merely some violation of a moral obligation or of a probable intention would result from so interpreting the word: see, e.g., per Lord Selborne in *Dorin* v. *Dorin* (3) (1875) (L.R. 7 H.L. at p. 577). Lord Selborne was there dealing with the use of the word "children" in a will, but the principle is the same. Examples of it could be multiplied. I will only refer to what Eve, J., said in *Re Taylor* (4) ([1925] Ch. at p. 743), viz., that no other meaning than lawful child can be given to the word unless there is clear evidence in the will itself of an intention to establish another application of the word, and finally express my entire concurrence in the judgment of Harman, J., in *Re Makein* (*decd.*) (5) ([1955] 1 All E.R. 57). I do not think that his examination of this branch of the law can be improved on.

I turn now to the context of the Act, and I do not find one word in it which suggests that illegitimate children were the concern of the legislature unless it is to be found in the words under discussion; on the contrary, if they were, it would be remarkable that, being provided for by s. 35, they have not been provided for by other sections of the Act, as admittedly they have not. In effect, it appears to me that the argument, which found favour with Singleton, L.J., that it is more consonant with the object of the statute to include illegitimate children in s. 35 than to exclude them from it, is based, not on any policy which is to be found in the statute as a whole, but on a conviction that the legislature ought to have provided for illegitimate children and the consequent attribution of the wider but unnatural meaning to that word.

It is, I think, permissible to question this attitude, and to ask whether the argument that illegitimate children are as much in need of custody, education and maintenance as legitimate children ought to be assumed to have had, or to have, any weight with the legislature in this connection. I can see no ground whatever for saying that it ought. It is important not to confuse the issue by the fact that the category of legitimate children has been enlarged by the Act of 1926: for that means only that legitimated children become children within the meaning of the Act of 1857 and its successors, as well as of many other Acts. It does not mean that there was, or is, any disposition for the legislature, when dealing with matrimonial causes, to treat legitimate and illegitimate children alike. When, indeed, it is remembered how different, even today, is the measure meted out to them it is, in my opinion, extravagant to suppose that they would be subject without distinction to a single provision. Let me remind your Lordships that the putative father of an illegitimate child had no rights whatever in regard to it: nor—and this is of great importance—had he, as between himself and the mother, any obligations or liabilities in respect of it, unless she, within a short period of time and by evidence that required corroboration, established that he was the father and obtained an order against him. Is all this to be changed ? Is the mother to have less than her former rights to the custody of her natural child ? Is the man whom she has married and alleges to be its father to be subject to new liabilities ? Is he, when the years have passed and he has by his generous treatment of the mother's illegitimate child as his own lent colour to the allegation of his paternity, to be the victim of claims which he cannot then disprove ? For my part, my Lords, as I reflect on this matter, I am ever more strongly persuaded that it can only be by the most imperative demand of the language used that illegitimate children can be brought within the section. I hope I am not wanting in respect to the contrary argument if I say that it appears to amount to the bare assertion that the word " children ", in s. 35, includes illegitimate children, therefore it is the policy of the Act to provide for illegitimate children.

I have, perhaps, dealt at too great length with the context in which the words that we have to construe are found. I recognise that the force of the appellant's argument lies in the words themselves, but I am anxious that the question that is asked should be properly framed. In my opinion, the question is whether the use of the word " children ", in the phrase " the children the marriage of whose parents ", can be satisfactorily explained otherwise than by giving it the meaning " legitimate or illegitimate ". The strength of the argument in favour of this meaning is that, since the jurisdiction covers cases of nullity as well as of divorce, the children in respect of whom an order for custody may be made must include children of a marriage which has been annulled and must, therefore, include some children who are illegitimate. If then, so runs the argument, some children who are illegitimate are included, by what method can any illegitimate children be excluded ? My Lords, I find this an unsatisfactory and unconvincing argument. Section 35 of the Act of 1857 dealt with three different kinds of proceeding, for divorce, for nullity and for restitution of conjugal rights. In any of the three cases there might be children of the union for whose custody, maintenance and education it would be proper to provide, and it appears to me that, in this fact, ample justification is to be found for the use of a phrase which is not found elsewhere in the statute. I might test it in this way. Suppose that the draftsman wishes to provide for the children of a marriage which it is sought to annul. If, following the language commonly used in the Act, he speaks of children of the marriage, the doubt will at once arise whether these can be children of a marriage, which, being annulled, is no marriage. He, therefore, uses words, which, I think, cannot be bettered, to cover the children of an annulled marriage. Even so, it was urged in *Langworthy* v. *Langworthy* (6) (1886) (11 P.D. 85) that the child of an invalid marriage which was annulled was not a child of the marriage of its parents, but the significant reply was made by COTTON, L.J. (ibid., at p. 89), that s. 35 includes sentences of nullity of marriage and must, therefore, be considered as enacting that, in cases where there is no valid marriage, the children of the union may be provided for. The learned lord justice did not say, as was said seventy years later, that the legislature had now made parenthood, not legitimacy, the test of jurisdiction, but was careful to explain and, as I think, at the same time to limit, the meaning of the phrase. In the same way FRY, L.J., said (ibid.) that it had been suggested that the child, being the offspring of a void marriage, was not within the section, but for the reason given by COTTON, L.J., he was of opinion that he was. It has been urged that to enlarge the meaning of child so far and no further is not justifiable, and that to do so involves a rewriting of the section. I do not think so. The section is dealing with a marriage of which children have been born; it does not look behind it. It is a natural and proper use of language to speak of the children of that union as children "the marriage of whose parents is the subject of such suit ", even though the result of the suit is to annul the marriage. They are the children who are affected by the result of the suit, as other illegitimate children are not, and it is proper that the court, having by its decree affected their status, should be empowered to provide for them. Children born before the marriage which is the subject of the suit, whose paternity may well be in dispute, are in a different category from those whose parentage is notorious until the marriage is annulled, and who, but for the suit, would forever remain "children the marriage of whose parents is the subject of the suit". It appears to me that, without repugnancy or inconsistency, the meaning of the relevant phrase can be confined to these children and, if it can be so confined, according to the proper canon of construction it should be.

My Lords, I have tried to interpret this section without reference to authority, and I concede that your Lordships are at liberty to give to these words a meaning which in their hundred years of life they have not yet borne. Yet it may be right to pause before you do so. It is no doubt true that, during the first fifty years of its existence, the cases in which s. 35 might have been invoked were but a trickle compared with the flood that followed after. But, whether there was a trickle or a flood, there is no record of this contention being raised except in an argument of the Attorney-General in 1929 (see *Green* v. *Green* (7), [1929] P. 101), which was not even noticed in the reserved judgment of Lord Merrivale, P., until in *Millard* v. *Millard & Addis* (8) ([1945] 2 All E.R. at p. 527), it was decided by Denning, J., that, under s. 193 of the Act of 1925 (the successor of s. 35), the test of jurisdiction was "parenthood, not legitimacy". The reported cases in which the contention might have been raised are numerous; most of them are referred to in the judgment of Jenkins, L.J. ([1954] 2 All E.R. at p. 148). I cannot even conjecture the number of unreported cases. Yet to generations of lawyers on the Bench and at the Bar, learned in this branch of the law, it did not occur that the words had the meaning now attributed to them, a fact the more strange if, indeed, it is a meaning more consonant with the policy of an Act with which nobody could be more familiar than they.

In this connection, I do not think that your Lordships can disregard the course of legislation. The relevant words of s. 35 of the Act of 1857 have been repeated once and again, and are now found in the Act of 1950. At that later date, the accepted view of the scope of the jurisdiction of the Divorce Court was as I have described. It is true that *Millard* v. *Millard & Addis* (8) had been decided in 1945, but in *C.* v. *C.* (9) ([1947] 2 All E.R. 50), a Divisional Court consisting of Lord Merriman, P., and Jones, J., had said (ibid., at p. 53):

> ". . . but in relation to proceedings for divorce, at any rate, we think that to say that parenthood, not legitimacy, is the test, goes too far. It cannot, in our opinion, be suggested that, although the parenthood is undisputed, an illegitimate child who cannot be legitimated is the subject of custody proceedings under s. 193, on the divorce of the spouses who are, in fact, his parents . . ."

No doubt the court went too far, for the suggestion had been made in 1946 and it has been made since. Yet the view of the court clearly represented the climate of opinion, and it might fairly be attributed to the legislature in 1950 that it did not intend, by a repetition of the same words, to give them a different meaning. This view is clearly expressed in *Harrison* v. *Harrison* (1) ([1951] 2 All E.R. 346) by Barnard, J., himself a very experienced judge in this jurisdiction, and is reinforced by his reference to the numerous statutes in modern times in which the legislature has specifically defined child to include illegitimate child where that has been its intention.

For these reasons, my Lords, this appeal should be dismissed, and if what I think was justly called by counsel for the Queen's Proctor a revolutionary change is to be made in the law, it should be made by the legislature by such plain words as in modern times it has been accustomed to use when it has intended to confer advantages or impose obligations in respect of children whether legitimate or illegitimate.

LORD OAKSEY: My Lords, the question in this case is whether, on its true construction, s. 26 (1) of the Matrimonial Causes Act, 1950, confers on the

A court jurisdiction to make provision with respect to the custody, maintenance and education of illegitimate children of parents whose marriage is the subject of proceedings for divorce, or nullity of marriage or judicial separation. That section re-enacts the words of s. 35 of the Matrimonial Causes Act, 1857, but it is said that, even if s. 35 of the Act of 1857 did, on its true construction, confer such jurisdiction, that construction cannot be put on s. 26 (1) of the Act of 1950 B owing to the cases which had been decided between 1857 and 1950.

It is convenient, I think, to consider first what is the true construction of the original section, s. 35 of the Act of 1857. It is important, in my opinion, to observe that the section had nothing to do with legitimation or status, but provided only for custody, maintenance and education. It is true that the word "children" has acquired the prima facie meaning of legitimate children in C statutes, wills and deeds, because it has been considered that the legislature, testators and settlors usually intend, in using the simple word "children", to refer to legitimate children. But circumstances can displace this rule (cf. *Wilkinson* v. *Adam* (10) (1813), 1 Ves. & B. 422). As VAUGHAN WILLIAMS, L.J., said in *Woolwich Union* v. *Fulham Union* (2) ([1906] 2 K.B. at p. 246):

D
> "It is of course true that that is only prima facie the meaning to be given to the word [children], and that a wider meaning may, in the case of some statutes, be given to it, so as to include an illegitimate child or illegitimate children, where that meaning is more consonant with the object of the statute."

E In my opinion, it is more consonant with the object of the Act of 1857 that jurisdiction over the custody and maintenance of illegitimate children as well as legitimate children should be conferred on the Divorce Court in all the proceedings referred to in the section. I can conceive of no reason why, when the marriage of their parents is being dissolved or annulled or their parents are being judicially separated, the custody of illegitimate children should not be dealt with F in the same proceedings, or why the cost of their maintenance should not be laid on the spouse who is to blame. That there is an obligation on the Crown as parens patriae to deal with their custody is not in question.

Apart, however, from these considerations, it is admitted that illegitimate children are included in the word "children" used in s. 35, but it is said that the word refers only to that class of illegitimate children whose illegitimacy is G declared in the suit or proceedings. In my opinion, this is not the meaning of the words used. The child in question in the present case is the child of the parents whose marriage was the subject of the proceedings. He is not the child of the marriage, but he is the child of the parents whose marriage is the subject of the proceedings. Not only do the words used accurately describe him, but they are used in contradistinction to the words "children of the marriage" which occur H elsewhere in the Act.

Turning to the construction of s. 26 (1) of the Act of 1950, it is not, I think, necessary for me to review all the cases which have been so carefully reviewed by JENKINS, L.J., in the Court of Appeal ([1954] 2 All E.R. at p. 148). It does not appear to me that the construction of the word "children", adopted by the Court of Appeal, had been put on the words of the section so clearly that the I section, when re-enacted as s. 26 in the Act of 1950, must be given that interpretation in accordance with the principle stated in *Barras* v. *Aberdeen Steam Trawling & Fishing Co., Ltd.* (11) ([1933] A.C. 402).

For these reasons, I agree with the judgment of DENNING, L.J., in *Millard* v. *Millard & Addis* (8) ([1945] 2 All E.R. at p. 526) and *Packer* v. *Packer* (12) ([1953] 2 All E.R. at p. 128), and the judgment of SINGLETON, L.J., in the present case ([1954] 2 All E.R. at p. 144), and I, therefore, move your Lordships that this appeal should be allowed.

LORD RADCLIFFE: My Lords, I think that this appeal ought to succeed. It turns on a short point. If a man and a woman have a child before they are married, and in circumstances which preclude its legitimation under the Legitimacy Act, 1926, can the court which dissolves their marriage make

> " such provision as appears just with respect to the custody, maintenance and education "

of the child under s. 26 (1) of the Matrimonial Causes Act, 1950 ? The power to make such an order under the section covers

> " children the marriage of whose parents is the subject of the proceedings ":

and the view which has hitherto prevailed in this case is that this power does not extend to an illegitimate child, except a child whose illegitimacy arises from the nullity of a marriage which is the current subject of court proceedings. The reason for the admission of this " class " of illegitimate children to the benefit of the section is that the section includes proceedings for nullity of marriage among the occasions on which an order in respect of children can be made, and it was realised as long ago as 1886, in *Langworthy* v. *Langworthy* (6) (11 P.D. 85), that s. 35 of the Matrimonial Causes Act, 1857, the predecessor of our present sub-section, must, of necessity, extend to the children of parents whose marriage was subjected to a decree of nullity, even though, in those circumstances, such children could not be described as anything but illegitimate.

The foundation of the case for the respondent rests in the principle that, in the construction of an Act of Parliament, words such as " child " or " children " are to be understood, prima facie, as referring to a legitimate child or legitimate children only. The rule is a rule of construction, and no one suggests, of course, that it is absolute in its requirements. Various phrases have been used to define the conditions under which this prima facie meaning is displaced. For instance, in *Woolwich Union* v. *Fulham Union* (2) ([1906] 2 K.B. at p. 246), VAUGHAN WILLIAMS, L.J., said:

> " It is of course true that that is only prima facie the meaning to be given to the word, and that a wider meaning may, in the case of some statutes, be given to it, so as to include an illegitimate child or illegitimate children, where that meaning is more consonant with the object of the statute."

I take leave to doubt whether the test which meaning is " more consonant " with the object of the statute is in all respects a satisfactory guide to decision, for I think it a very vague one; but, on the other hand, it seems to me uncontroversial to say that the prima facie meaning will be displaced if the context in which the word " child " appears evidently requires it to embrace a wider category than that of legitimate children. And that is the case here.

The sub-section in question confers a power on the court, the exercise of which is regarded indifferently as likely to be called for in proceedings for divorce, nullity or judicial separation. The power is to make orders regulating the care of children, the marriage of whose parents is the subject of any such proceedings. There is only the one word " children " in the sub-section. Either its meaning is confined to legitimate children or it is not. It cannot be said that it is so confined, since the *Langworthy* decision (6) showed long ago that it must include illegitimate children the marriage of whose parents is not in law a marriage for any of the various causes which make void an ostensible marriage. Where I differ from the Court of Appeal and from some of your Lordships is in thinking that, if the rule as to the prima facie meaning of " children " is displaced in this sub-section, it is displaced for good and that it cannot be allowed to come back, as it were, for a second bite by confining the illegitimate children contemplated to those born after an ostensible, but void, ceremony of marriage. Such a method of construction appears to me to be equivalent to rewriting the sub-section rather than to construing it. Indeed, it seems to me to treat what is, after all, only a rule of construction as if it were more truly a rule of policy. In other words, I do not think that it is a right application of the rule of construction to read the word as extending to illegitimate children, but only to as few of them as possible.

For my part, I do not feel disposed to make such a restriction in this case. Once it is granted that, in s. 35 of the Act of 1857, the legislature was plainly contemplating that illegitimacy was not to exclude at any rate some such children from the court's protection, I cannot see any distinction of policy which would separate the children born of a void marriage, a nullity which may be due to formal invalidity, insanity, bigamy, consanguinity and other causes, from the children born without pretence of marriage. In all these cases in which it can be affirmed of a child that he is the child of two identified persons, though not born in wedlock, it seems to me that the court's order which dissolves, cancels or separates their union—and that is the situation envisaged—raises the same problem with regard to the child and recognises in him the same need. In whatever circumstances it came to be formed in the first place, the union of the only two persons to whom he has a right to look for care and upbringing is to be broken; and the court which has charged itself with the duty of decreeing the break is required to allocate, as between the two parties, future responsibility for the custody, maintenance and education of the child. It seems to me by no means desirable to distinguish between the different causes of illegitimacy, when a power of this kind is in question, unless the statute granting the power clearly requires that we should do so; and, for the reasons which I have given, I do not think that the statute does make any such demand.

We were pressed, very naturally, with the argument that a decision in favour of the appeal would involve a departure from what was described by JENKINS, L.J., in the Court of Appeal ([1954] 2 All E.R. at p. 155) as the

> " . . . received interpretation of s. 26 (1) and its predecessors over so long a period."

The argument on these lines takes a variety of forms. In one form it stresses what has actually been said by eminent judges of the past in the course of decisions which relate to the point, in another it relies on the fact that, in all the period since 1857, no decision in favour of the appellant's claim has ever been recorded, while on only a few occasions does it appear to have been presented to the court. Finally, it is said that the judicial interpretation of the relevant words of the sub-section was so clearly established by 1950 that the enactment of s. 26 (1) in the same form must be treated as, in effect, a statutory declaration that the established interpretation was the correct one. I must confess that I do not lend a sympathetic ear to this last, and almost mystical, method of discovering the law, least of all when it depends on a consolidating Act, the function of which is to repeat, but not to amend, existing statute law. But, however that may be, the argument, whatever form it takes, depends for its force on the demonstration that there has been an authoritative judicial interpretation over a period from which your Lordships ought not now to depart. This is a large claim to make in a case where it is not suggested that there has been any previous decision of this House on the matter, and in a case when it is sought, not to deny a jurisdiction hitherto asserted, but to assert a jurisdiction not hitherto exercised. In my opinion, the demonstration fails.

I think that the analysis of existing authority stands this way. The actual question before us was never decided until 1951, when, in *Harrison* v. *Harrison* (1) ([1951] 2 All E.R. 346), BARNARD, J., held that an illegitimate (but not legitimated) child of persons who married after its birth was not within s. 26 (1) of the Act of 1950. *Webb* v. *Webb* (13) ([1952] 1 All E.R. 527) followed this judgment. The decision of the Court of Appeal in *Packer* v. *Packer* (12) ([1953] 2 All E.R. 127) is to the same effect, but only because the two lords justices who heard the appeal differed in their views and, therefore, the decision of the special commissioner, who had followed *Harrison* v. *Harrison* (1), remained in force. If this were all, it is obvious that there could not be said to be any current of authority which would impede your Lordships' free consideration of the matter; all the less so because, in *Millard* v. *Millard & Addis* (8) ([1945] 2 All E.R. at p. 527), DENNING, J., had already expressed the contrary view of the range of the sub-section (then s. 193 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925) which view is expressed by the phrase " the test is parenthood, not legitimacy."

What further judicial observations there are on the point have come by a side-wind, either by inference from what was not decided but might have been decided, or by expressions of opinion not essential to what was actually being decided. Nevertheless, their existence constitutes a formidable criticism of the validity of the appellant's argument. In effect, four cases are concerned—*Bednall* v. *Bednall & Shivussawa* (14) ([1927] P. 225), *Green* v. *Green* (7) ([1929] P. 101), *Jones* v. *Jones* (15) (1929) (98 L.J.P. 74) and *C.* v. *C.* (9) ([1947] 2 All E.R. 50). In all these cases, the point presented for the court's decision was whether a child, for whom it was claimed that he had been legitimated by his parents' subsequent marriage, could be made the subject of a custody order under the Supreme Court of Judicature (Consolidation) Act, 1925, in divorce proceedings to which the child was not a party and without a formal declaration of legitimacy. The first three of these cases decided that, in such circumstances, no order could be made; the fourth overruled them and decided that it could. It is one of the complications of this part of the case that the first three authorities are no longer good law on the point which they actually decided. But this much, at any rate, is clear, that the point itself need never have been debated at all if the power in question extends to cover illegitimate children as well as legitimated and legitimate children of divorced parents. How much weight, then, ought we to give to this set of cases ?

I do not think that *Bednall* v. *Bednall & Shivussawa* (14) is of any weight. The petitioner's application for custody was rested entirely on the child's legitimation, and the judge considered nothing except the procedural point how legitimation was to be recognised judicially. Indeed, it does not appear that the actual wording of the custody section was ever brought to his attention. *Green* v. *Green* (7) is a different matter. The King's Proctor was brought in to argue the case for the custody order, he did refer to the words of the section, and he pointed out that the power was not on the face of it ([1929] P. at p. 102) " confined to the case of children that are legitimate ". LORD MERRIVALE, P., in giving his decision, adopted the reasoning of *Bednall* v. *Bednall & Shivussawa* (14), though he found another way of giving directions for the custody of the child; but he also said, with reference to the custody power in s. 193 of the Act of 1925:

> " ' Children ' in these enactments means legitimate children in the sense that at the time of the suit they are legitimate."

This is a clear expression of opinion, but, unfortunately, it is not a reasoned one; and, if it is intended to take account of the decision in *Langworthy* v. *Langworthy* (6), as I think that it is, I do not quite see how the children of a void marriage are anything but illegitimate, although recent legislation has enabled the children of voidable marriages to be treated otherwise. I pass over *Jones* v. *Jones* (15), which merely followed the two earlier cases.

C. v. *C.* (9) was decided by a Divisional Court (LORD MERRIMAN, P., and JONES, J.) in 1947. Its effect was to disapprove of *Bednall* v. *Bednall & Shivussawa* (14), *Green* v. *Green* (7), and *Jones* v. *Jones* (15) as decisions and, A consequently, to uphold the contrary decision of DENNING, J., in *Millard* v. *Millard & Addis* (8), which had been given in 1945. But, in upholding the decision of DENNING, J., the Divisional Court did not agree with what may fairly be said to have been the whole basis of his reasoning. After referring to *Langworthy* v. *Langworthy* (6), they say ([1947] 2 All E.R. at p. 53):

> B "... but in relation to proceedings for divorce, at any rate, we think that to say that parenthood, not legitimacy, is the test, goes too far. It cannot, in our opinion, be suggested that, although the parenthood is undisputed, an illegitimate child who cannot be legitimated is the subject of custody proceedings under s. 193, on the divorce of the spouses who are, in fact, his parents, but we agree with DENNING, J., that the fact that the wording of C s. 193 is wide enough to cover the case of a child of the union rendered illegitimate by the annulment of the marriage of his parents, tends to support the view that in divorce proceedings it is also wide enough to include a child who has been rendered legitimate."

My Lords, this is the other expression of opinion that must be taken account of. Again, no reasons are given for it, and I am left at large to speculate why the D Divisional Court thought that something could not be suggested which had quite explicitly been not only suggested but avowed in the very judgment of the Probate Division, *Millard* v. *Millard & Addis* (8), which they were upholding as against the other decisions. The words " parenthood, not legitimacy, is the test " are intended to convey just that suggestion. When one has said, with all sincerity, that one should pause long before adopting a construction of the Act E which clearly did not commend itself to such authorities as LORD MERRIVALE and LORD MERRIMAN and which, it may be supposed, has not presented itself as plausible to several experienced divorce court practitioners, the question still remains whether, now that it is for the first time before your Lordships' House, an opinion which you might otherwise have favoured should be put aside in deference to the fact that the law has already been clearly and firmly established in the F cases to which I have referred. I can only say that, in my view, the law is very far from having settled into anything that can be called a clear course of decision. I agree that the appeal should be allowed.

LORD TUCKER: My Lords, the decision of this appeal turns on the proper construction of s. 26 (1) of the Matrimonial Causes Act, 1950, which is as follows:

> G " In any proceedings for divorce or nullity of marriage or judicial separation, the court may from time to time, either before or by or after the final decree, make such provision as appears just with respect to the custody, maintenance and education of the children the marriage of whose parents is the subject of the proceedings, or, if it thinks fit, direct proper proceedings to be taken for placing the children under the protection of H the court."

This sub-section reproduced, without any material alteration, s. 35 of the Matrimonial Causes Act, 1857, which, for the first time, entrusted to the court questions of custody in divorce proceedings.

The question is whether the jurisdiction of the court over the children of I the parties to proceedings relating to divorce, nullity and judicial separation extends to a child born to those parties before the marriage which is the subject of the proceedings and not subsequently legitimised. My Lords, I do not think it necessary to refer to the authorities which established beyond question that, prima facie, the words " child " or " children " in an Act of Parliament mean a legitimate child or legitimate children, and that illegitimate children can only be included by express words or necessary implication from the context.

Section 26 does not use the words " children of the marriage " which appear in other sections of the Act, so that it is, at any rate, plain that they have been used for the purpose of including some children who could not be described as children of the marriage, and *Langworthy* v. *Langworthy* (6) (11 P.D. 85) is an instance of a case where the latter phrase would have been inappropriate, and the section was, accordingly, construed as giving the court power over the custody of a child that was illegitimate by reason of the invalidity of the marriage of its parents. But the wider words

> "children the marriage of whose parents is the subject of the proceedings"

are not used exclusively with reference to nullity proceedings, they refer also to proceedings for divorce and judicial separation, and I find difficulty in understanding by what principle of construction they can be given a more restricted meaning in the latter context, with the result that, in one case, the legislature is including in the word "children" illegitimate children, and, in the other two cases, the same word is to be construed as excluding children who come strictly within the language used solely because any other construction would result in the inclusion of illegitimate children in cases 2 and 3 as well as in case 1.

It is said that this section must be looked at "through 1857 spectacles", and that, at that date, Parliament was not disposed to concern itself over much with the interests or welfare of illegitimate children, so that they cannot have been intended to be included as fit subjects for custody orders. I agree that 1857 is the crucial date, but by 1887 it had become manifest from *Langworthy's* case (6) that, notwithstanding its presumed attitude towards illegitimacy, the legislature in 1857 had, in fact, by this section made provision for illegitimate children. Moreover, I am not persuaded that the view with regard to illegitimacy attributed to Parliament in 1857 is a sufficient ground for not construing the section strictly in accordance with its language. Purely as a matter of construction, it would seem to me that Parliament, having deliberately chosen a form of words which can only have one meaning with reference to one class of proceeding, and having used the same words with reference to two other classes in a section which is prefaced with the words "in any proceedings", these words must necessarily bear the same meaning throughout. I agree with the view expressed by DENNING, L.J., in *Packer* v. *Packer* (12) ([1953] 2 All E.R. 127), that any other construction requires the section to be rewritten, and that, by the language adopted, the test of parenthood has been substituted for legitimacy. I find difficulty in accepting the view which is, I think, implicit in the judgment of MORRIS, L.J., in that case (ibid., at p. 130), that, in the case of void marriages, the power to award custody is limited to children born as a result of the void "marriage" (using the word in inverted commas). I can see no reason why it should not, in the case of bigamy for instance, include children born before the bigamous marriage. This necessarily follows if the test in that case is, as I think it must be, parenthood rather than legitimacy. There does not seem to me to be room for any test other than parenthood or legitimacy. The same test must, I feel, be applied in each case, and the inclusion of nullity in the proceedings referred to is decisive in favour of parenthood.

My Lords, I have endeavoured to express my views on the construction of the section, but I would be disposed to accept a different construction if there existed a considerable body of authority—although not binding on this House—which had been acted on for many years and which must be assumed to have been in the mind of Parliament on the occasions when s. 35 of the Act of 1857 has been amended or re-enacted. I do not, however, find that the precise point has ever been the subject of express decision until *Harrison* v. *Harrison* (1) ([1951] 2 All E.R. 346), although I agree that the reasoning of many of the cases cited points to the construction which has been accepted by the majority of the Court of Appeal in the present case. In *Green* v. *Green* (7) ([1929] P. 101), the Attorney-General, appearing on behalf of the King's Proctor, advanced the argument now relied on by the appellant, and the judgment in that case, which proceeded on a different ground and was subsequently overruled, necessarily involved its rejection, though it was not in terms mentioned. It was also referred to with disfavour in *C.* v. *C.* (9) ([1947] 2 All E.R. 50), which overruled *Green* v. *Green* (7). It is, I think, worthy of notice that, over a long period of years, the effect of the decision in *Langworthy* v. *Langworthy* (6) does not appear to have been fully appreciated. For example, r. 54 (1) of the Matrimonial Causes Rules, 1950, which dates from r. 104 of the Rules of 1865, has never been altered so as to take cognisance of that decision. The existence of this rule unaltered for so long may well have, consciously or unconsciously, influenced the views of practitioners and others with regard to the scope of s. 35 of the Act of 1857.

My Lords, I cannot find in the history of this matter sufficient grounds for inferring that, in 1950, Parliament placed the seal of its approval on a previously accepted construction of this section. The arguments on each side have been already fully canvassed in the judgments of the Court of Appeal in the present case, and in *Packer* v. *Packer* (12), and I am conscious that I have added little, if anything, to what has already been said, but, as this question has given rise to difference of judicial opinion in the Court of Appeal on each occasion and again in your Lordships' House, I have felt bound to express my opinion in my own words rather than to content myself with saying that I prefer the construction accepted by SINGLETON, L.J., in the present case ([1954] 2 All E.R. at p. 144) and DENNING, L.J., in *Packer* v. *Packer* (12) ([1953] 2 All E.R. at p. 128) to that which has found favour with JENKINS, HODSON and MORRIS, L.JJ. I have not referred to the question of convenience, because, in my view, this has little, if any, bearing on questions of construction, but, where I find a strict construction which results in enabling the court to do that which justice clearly requires in the interest of an infant child, I am the less inclined to reject a literal interpretation by attributing a lack of enlightenment to Parliament in 1857.

I would allow the appeal.

LORD COHEN: My Lords, it is not contended that the expression

> " the children the marriage of whose parents is the subject of the proceedings "

in s. 26 (1) of the Matrimonial Causes Act, 1950, is synonymous with the expression " children of the marriage " and is, therefore, confined to legitimate children. The dispute is whether the illegitimate children who fall within the ambit of the expression include all the fruit of the intercourse between the petitioner and the respondent, or are confined to those born between the date of the ceremony of marriage which gave rise to the proceedings and the date of the decree. The arguments in support of the rival contentions have been summarised by JENKINS, L.J., in his judgment in the Court of Appeal ([1954] 2 All E.R. at p. 153), and I agree with him in finding the arguments against the appeal more cogent than those adduced in support of it. Had it not been that the majority of your Lordships have reached a different conclusion, I should have been content to say no more, but, in the circumstances, I must state as shortly as I can my reasons for my opinion.

Section 26 (1) of the Matrimonial Causes Act, 1950, reproduces, without material alteration, s. 193 of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by s. 10 (4) of the Matrimonial Causes Act, 1937, and s. 193 re-enacted, without material alteration, the combined provisions of s. 35 of the Matrimonial Causes Act, 1857, and s. 4 of the Matrimonial Causes Act, 1859. I think, therefore, the proper approach to the question is to seek the meaning of s. 35 of the Act of 1857. The preamble to that Act states its purpose; to constitute a court with exclusive jurisdiction in matters matrimonial and with authority in certain cases to decree the dissolution of a marriage. The operative provisions of the Act make it clear that the court is to have jurisdiction to declare a marriage null as well as to dissolve it. The Act contains no reference to children until s. 33, which, inter alia, empowers the court to direct that the whole or any part of the damages recovered from an adulterer shall be settled for the benefit of the children (if any) of the marriage. This section only applies to suits for dissolution of marriage or for judicial separation, and it is admitted that the expression " children of the marriage " comprises only legitimate children. I need not set out s. 35 in full, as its effect has already been stated by your Lordships, but I would observe in passing that it applies not only in suits for judicial separation or dissolution of the marriage but also to suits for a decree of nullity of the marriage.

The only other reference to children is in s. 45, which empowers the court, if it pronounces a sentence of divorce or judicial separation because of the adultery of a wife, to order such settlement as it thinks reasonable to be made of the wife's property or any part thereof for the benefit, inter alia, of the children of the marriage. Here, again, it is admitted that the expression " children of the marriage " comprises only legitimate children. It follows that, prior to the passing of the Legitimacy Act, 1926, the expression " children of the marriage " in this section, as in s. 33 or in the corresponding sections of the Supreme Court of Judicature (Consolidation) Act, 1925, would not include illegitimate children born to the parties to the proceedings before the celebration of the marriage the subject of the proceedings.

Returning to s. 35, the substitution of the phrase

> " children the marriage of whose parents is the subject of such suit or other proceeding "

for the phrase " the children of the marriage " is, as appears from the judgments of COTTON, L.J., and FRY, L.J., in *Langworthy* v. *Langworthy* (6) (11 P.D. at pp. 88, 89), explained by the fact that the section includes sentences of nullity of marriage. It must, therefore, as COTTON, L.J., said,

> " be considered as enacting that in cases where there is no valid marriage the children of the union may be provided for."

It was argued before us that this ratio decidendi was expressed in terms wide enough to include children born to the parties before the date of the ceremony of marriage which gave rise to the suit, but there is nothing in the report of the arguments or the judgments which suggests that the mind of the court was directed to any such wider topic. Bearing in mind the purpose of the Act as expressed in the preamble, the fact that, except where references to decrees of nullity make it necessary to depart from the phrase " children of the marriage ", that expression is used and the powers of the court in respect of children are thus limited to legitimate children, I find it impossible to hold that, by the change of expression in s. 35, the legislature did more than enable the court, in the case of suits for nullity, to make similar provision for children born between the date of the ceremony of the marriage which was the subject-matter of the suit and the date of the decree to that which the court could make for legitimate children in suits for dissolution of marriage or judicial separation. I see nothing in the subsequent legislation to lead me to think that a different construction should be placed on s. 26 (1) of the Matrimonial Causes Act, 1950, and the preponderance of judicial decision supports the conclusion I have reached.

Dealing first with subsequent legislation, I need only refer to the following sections on which some reliance was placed by counsel for the appellant. Section 5 of the Matrimonial Causes Act, 1859, gave power to the court, after a final decree of nullity of marriage or dissolution of marriage, to make such orders with reference to the application of the whole, or a portion, of the property settled by ante-nuptial or post-nuptial settlements either for the benefit of

> " the children of the marriage or of their respective parents as to the court shall seem fit."

The substance of this section, as amended in an immaterial particular, is reproduced in s. 25 of the Matrimonial Causes Act, 1950. It may well be, though

A it is not necessary in this appeal to decide the point, that the reference to " decree of nullity " in the section makes it necessary to enlarge the meaning to be given to the expression " children of the marriage " so as to include illegitimate children born to the parties between the date of the marriage ceremony and the date of decree, but it does not make it necessary to include children born before the date of the marriage ceremony. Indeed, the use of the phrase " children of the B marriage " in relation both to divorce and to nullity seems to me inconsistent with the wide interpretation which the appellant seeks to place on the phrase.

Section 6 of the Matrimonial Causes Act, 1884, enabled the court

> " at any time before final decree on any application for restitution of conjugal rights, or after final decree if the respondent shall fail to comply C therewith, upon application for that purpose [to] make . . . such orders . . . with respect to the custody, maintenance, and education of the children of the petitioner and respondent as might have been made by interim order during the pendency of a trial for judicial separation between the same parties."

D This section is reproduced in s. 26 (2) of the Act of 1950. It was argued that the change of phrase from " children of the marriage " was made with the deliberate intention of bringing in illegitimate children. I am unable to accept this argument. I agree with the respondent's counsel that the provisions of this sub-section are at least equally consistent with the view that the expression " the children of the petitioner and respondent " means in its context legitimate children and none other.

E I turn now to judicial authority. I have already dealt with *Langworthy* v. *Langworthy* (6). The only other decision prior to the passing of the Legitimacy Act, 1926, to which your Lordships' decision was directed was *Jackson* (*otherwise Macfarlane*) v. *Jackson* (16) ([1909] P. 308). That decision was consistent with *Langworthy* v. *Langworthy* (6), but throws no further light on the matter. After F the passing of the Legitimacy Act, 1926, a series of cases came before the courts in which the question was whether the court, exercising its divorce jurisdiction, could make an order for custody of a child legitimated per subsequens matrimonium before a declaration of legitimacy had been made under that Act. In *Bednall* v. *Bednall & Shivussawa* (14) ([1927] P. 225), *Green* v. *Green* (7) ([1929] P. 101), and *Jones* v. *Jones* (15) (1929) (98 L.J.P. 74), it was held that G the court could not do so. These decisions have since been disapproved, but *Green* v. *Green* (7) is instructive for present purposes because in that case the Attorney-General, appearing for the King's Proctor, argued that the power conferred by s. 35 of the Act of 1857 was not confined to the case of children who are legitimate. No express reference was made to this argument in the judgment of LORD MERRIVALE, P., but it must, I think, be taken to have been H rejected by him.

In *Millard* v. *Millard & Addis* (8) ([1945] 2 All E.R. 525) DENNING, J., refused to follow *Bednall* v. *Bednall & Shivussawa* (14), *Green* v. *Green* (7) and *Jones* v. *Jones* (15). He based his decision on two grounds—(a) that under s. 193 jurisdiction rests on parenthood, not legitimacy; and (b) (ibid., at p. 528):

> " . . . the established principle that a child can be found to be legitimate I without the necessity of a decree of legitimacy."

I have already given my reasons for not accepting the first ground. The second ground was approved by a Divisional Court in *C.* v. *C.* (9) ([1947] 2 All E.R. 50). As to the first ground, LORD MERRIMAN, P., said (ibid., at p. 53):

> " . . . but in relation to proceedings for divorce, at any rate, we think that to say that parenthood, not legitimacy, is the test, goes too far. It cannot, in our opinion, be suggested that, although the parenthood is

> undisputed, an illegitimate child who cannot be legitimated is the subject A of custody proceedings under s. 193, on the divorce of the spouses who are, in fact, his parents . . ."

In *Harrison* v. *Harrison* (1) ([1951] 2 All E.R. 346), BARNARD, J., acted on these observations of LORD MERRIMAN, P. This decision was followed in *Packer* v. *Packer* (12) ([1953] 2 All E.R. 127), a decision of the Court of Appeal. It is, B however, to be noted that DENNING, L.J., dissented, adhering to the principle he had expressed in *Millard* v. *Millard & Addis* (8). The last case to which I need refer is *Bryant* v. *Bryant* (17) ([1955] 2 All E.R. 116). The circumstances of the case were peculiar. The petitioner sought (a) a decree of nullity of a bigamous marriage with the respondent, and (b) a dissolution of a subsequent valid marriage with the respondent. Relief was granted accordingly. The issue C before the Court of Appeal was whether the court had jurisdiction to make an order for custody of children born after the bigamous ceremony of marriage and before the decree. The court, applying *Langworthy* v. *Langworthy* (6), held that it had the necessary power. It does not, however, follow that the decision would have been the same if the children in question had been born before the date of the bigamous ceremony. Indeed, since MORRIS, L.J., who was a member D of the court, had delivered the decisive judgment in *Packer* v. *Packer* (12) ([1953] 2 All E.R. at p. 130), it may be assumed the decision would have been different.

Summarising the effect of the decisions, it seems to me that, with the single exception of some observations of DENNING, L.J., in *Millard* v. *Millard & Addis* (8), and his dissenting judgment in *Packer* v. *Packer* (12), the decisions give consistent support to the view that the jurisdiction conferred by s. 26 (1) is E confined to children born between the date of the ceremony of marriage which gave rise to the suit and the date of the decree and, like JENKINS, L.J., I see no reason for departing from what may fairly be described as having been the received interpretation of s. 26 (1) and its predecessors over a long period.

I would dismiss the appeal.

Appeal allowed. F

Solicitors: *Kingsford, Dorman & Co.*, agents for *Buckle & Co.*, Peterborough (for the appellant); *Treasury Solicitor.*

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

SUMNER *v.* ROBERT L. PRIESTLY, LTD.

[COURT OF APPEAL (Singleton, Jenkins and Parker, L.JJ.), October 20, 21, 1955.]

Building—Building regulations—Application to certain operations—Workman making profile of a roof gutter—Whether work of repair or maintenance—Building (Safety, Health and Welfare) Regulations, 1948 (*S.I.* 1948 *No.* 1145), *reg.* 2, *reg.* 31 (3).

In August, 1953, the deceased, who was employed by the defendants as a handyman, went in the course of his employment on to the roof of their factory to make a profile of a gutter. This involved making a pattern of the length and shape of the gutter with a piece of wire, so that a new gutter could be made to that pattern. The work was thus that of gaining information and making preparation for making or obtaining a new gutter for the building. At the spot where the deceased would stand to do this work the roof of the factory was made of asbestos. While on the roof in the course of his work he fell through the asbestos and suffered injuries from which he died. His widow brought an action against the defendants under the Fatal Accidents Acts, 1846 to 1908, for damages for breach of statutory duty under the Building (Safety, Health and Welfare) Regulations, 1948, reg. 31 (3). On the question whether the work on which the deceased was engaged was an operation within reg. 2* which provides that the regulations apply to operations of " . . . repair or maintenance of a building . . . and the preparation for, and laying the foundation of, an intended building ",

Held: the Building (Safety, Health and Welfare) Regulations, 1948, did not apply because at the time of the accident the deceased was not engaged on an operation of repair or maintenance within reg. 2, work of preparation for an operation of repair or maintenance not being within the regulation.

Appeal dismissed.

[For the Building (Safety, Health and Welfare) Regulations, 1948, reg. 2, reg. 31 (3), see 8 HALSBURY'S STATUTORY INSTRUMENTS 210, 225.]

Case referred to:

(1) *A.-G.* v. *Lockwood*, (1842), 9 M. & W. 378; 152 E.R. 160; *affd. on other grounds* sub nom. *Lockwood* v. *A.-G.*, 10 M. & W. 464; 152 E.R. 552; 42 Digest 767, *1934*.

Appeal.

The plaintiff appealed from an order of OLIVER, J., at Maidstone Assizes, dated Mar. 17, 1955, whereby he dismissed the plaintiff's claim under the Fatal Accidents Acts, 1846 to 1908, for damages against the defendants on the ground of their breach of statutory duty.

The deceased, William Harry Sumner, was employed by the defendants at their factory at Gravesend as a handyman. He had been employed by the defendants for some fifteen years and during that period he was frequently called on to go on to the factory roof in the course of his duties. On Aug. 11, 1953, he was instructed by the foreman to go on to the roof and make a profile of a gutter which ran between two gables. He was reminded to take the usual precautions by the foreman who said " you know where the boards are ". This process involved making a pattern the length and shape of the gutter with a piece of wire, so that a new gutter of the correct dimensions could be made to order. One part of the roof below the level of the gutter and the spot where the deceased was required to work was made of asbestos. There was no notice nearby stating that the roof was made of fragile material, nor were there any ladders, duck ladders or crawling boards on the asbestos roof, although there were some available in another part of the premises. Whilst engaged in his work on the gutter the deceased fell on to the lower roof through the asbestos covering and received injuries from which he died. In an action for damages under the Fatal Accidents Acts, 1846 to 1908, his widow, the plaintiff, alleged that the defendants were in breach of their duty under the Building (Safety, Health and Welfare) Regulations, 1948, reg. 31 (3) (a) (b). OLIVER, J., dismissed the claim, holding that the regulations were inapplicable to the facts of the case.

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* The relevant terms of reg. 2 (1) are printed at p. 446, letter E, post.

Leonard Caplan, Q.C., and *F. E. C. Grundy* for the plaintiff.
E. M. Jukes, Q.C., and *P. H. Ripman* for the defendants.

SINGLETON, L.J., stated the facts and, having read reg. 31 (3) of the Building (Safety, Health and Welfare) Regulations, 1948, and having said that the submissions of breaches of paras. (a) and (b) of that regulation need not be considered further in view of a submission that the regulations did not apply, continued: The point is raised by the defendants that these regulations do not apply to the facts of this case. In my opinion, the submission of the defendants is right, or perhaps I should say that I am not satisfied, on the argument of counsel for the plaintiff, that the Building (Safety, Health and Welfare) Regulations, 1948, apply. That question depends on a view of reg. 2 as applied to the facts of this case. I wish to make it clear that I am dealing with the facts of this case and with nothing else. Instances have been put as to what the position would be if certain facts were proved. Some might be on one side of the line, some on the other; and it is not easy to set a line which would be a guide for all purposes. Each case must depend on its particular facts. Regulation 2 is headed " Application of Regulations " and it reads:

> " (1) These regulations shall apply to the following operations where undertaken by way of trade or business or for the purpose of any industrial or commercial undertaking, or by or on behalf of the Crown or any municipal or other public authority, namely, the construction, structural alteration, repair or maintenance of a building (including re-pointing, re-decoration and external cleaning of the structure), the demolition of a building, and the preparation for, and laying the foundation of, an intended building . . . "

The first point to which I draw attention is that there is a provision that the regulations shall apply to the preparation for, and laying the foundation of, an intended building. There is no provision that the regulations shall apply to the preparation for the following operations: the construction, structural alteration, repair or maintenance of a building. OLIVER, J., described the activities of Mr. Sumner at the time of his accident as

> " gaining information, making preparation for the purpose of being able to order an item belonging to the building."

He was of opinion that the regulations did not apply to the facts of this case.

It seems to me that the case falls to be determined very largely on a question of fact. Mr. Sumner, at the time of his accident, had gone up to the roof to make a profile of the gutter. He was not told to do any repair, nor did he start to do anything by way of repair. He was, on the instructions of the foreman, to obtain something which would have enabled a gutter to be made and which would have enabled a repair to be done. If he had been asked, when he went up the ladder, whether he was going to repair the gutter, I should imagine that his answer would have been that he was not, but that he was going to take a profile so that a new gutter could be made. If anyone was asked whether Mr. Sumner, when on the roof, was engaged on an operation of repair, I think that the answer would have been that he was not. If that were followed by the question whether he was engaged on an operation of maintenance, I am inclined to think that the answer of the ordinary person would again have been that he was not so engaged, although that is not quite so clear.

I think that this is really a question of fact, although I recognise that in many instances where the facts have been found, the question of construction of

A these regulations has arisen. If one considers the question of construction alone, it is necessary to remember that this is a penal regulation. If there had been an inspector present when Mr. Sumner went up the ladder on to the roof, and if the inspector had laid an information alleging an offence against reg. 31 (3), and if the information had come before justices to determine the question, what the justices would have had to ask themselves is the plain question: "Was the B employee at that time engaged on an operation of repair or maintenance ?" Looked at in that way, it is a question of fact. Counsel for the plaintiff asked us to bear in mind the words of ALDERSON, B., in *A.-G.* v. *Lockwood* (1) (1842) (9 M. & W. at p. 398):

> "The rule of law, I take it, upon the construction of all statutes, and C therefore applicable to the construction of this, is, whether they be penal or remedial, to construe them according to the plain, literal, and grammatical meaning of the words in which they are expressed, unless that construction leads to a plain and clear contradiction of the apparent purpose of the Act, or to some palpable and evident absurdity."

I have sought to construe the words in their plain, literal and grammatical D meaning. I do not think that it is shown that Mr. Sumner was, at the time he met with his accident, engaged on an operation of repair or maintenance for the purpose of this regulation. That is sufficient for the determination of this question, but I prefer to look on the matter rather as a question of fact which was decided by the learned judge against the plaintiff. In spite of counsel's argument, I am of the opinion that the judgment of OLIVER, J., was right and E that this appeal should be dismissed.

JENKINS, L.J.: I agree. In my opinion, the task on which the deceased was engaged at the time when he met with his accident, consisting (as it did) simply and solely of the making of a profile of the gutter, was not an "operation" of "repair" according to the ordinary and natural meaning of those words; and, inasmuch as I see no ground for construing the language of reg. 2 of the F Building (Safety, Health and Welfare) Regulations, 1948, otherwise than according to its natural and ordinary meaning, it follows that, in my judgment, this appeal fails and should be dismissed.

I entirely agree with my Lord that every case of this kind must depend on its own particular facts, and that it is neither necessary nor desirable to attempt to lay down an exhaustive definition of what is or is not "repair" or an G "operation" of "repair" or "maintenance", within the meaning of the regulation. I agree that the appeal fails.

PARKER, L.J.: I also agree and there is nothing that I can usefully add.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Rowley Ashworth & Co.* (for the plaintiff); *Clifford-Turner & Co.* (for the defendants).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

Re POWE (*deceased*). POWE *v.* BARCLAYS BANK, LTD. (POWE AND OTHERS cited).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sachs, J.), October 17, 18, 19, 20, 21, 24, 25, 1955.]

Document — Admissibility in evidence — Statement in document — " Person interested "—Note by solicitor of events and interviews leading up to signing of will—Statement dictated to typist and transcribed—Document checked and amended by witness—Whether made with his own hand—Evidence Act, 1938 (1 *&* 2 *Geo.* 6 *c.* 28), *s.* 1 (3), (4).

On June 18, 1952, the testator made his third will in which he revoked his second will and revived with modifications his first will. The third will was signed by the testator in a nursing home, where he was due to undergo a serious operation the following day. On June 19, 1952, the solicitor who had prepared the will dated June 18, and had attested the testator's signature thereto, dictated a note to his typist in which he set out the circumstances surrounding the preparation and signing of that will. This statement, when typewritten, was checked and amended by the solicitor but the amendments were not initialled by him. The testator died on June 27, 1952. On Sept. 24, 1952, probate of the first and third wills was granted to the bank, the defendants in the present action. The plaintiff, as residuary legatee under the second will, now claimed that the court should revoke the probate and pronounce for the second will on the grounds that the testator did not give any instructions for the preparation of the third will and that at the time of signing he did not know, understand or approve of the contents and that his signature was obtained in circumstances which constituted duress. At the trial, the solicitor was called as a witness and the bank sought to adduce the solicitor's note in evidence under the Evidence Act, 1938, s. 1. On objection by the plaintiff that it was inadmissible, since (i) it was not a document written, made or produced by him with his own hand, as required by s. 1 (4) and (ii) it was made by a " person interested at a time when proceedings were pending or anticipated " within the meaning of s. 1 (3),

Held: (i) a document which is dictated, checked and then amended in writing by a witness is made or produced by him with his own hand for the purposes of s. 1 (4) of the Act of 1938.

(ii) no proceedings were anticipated on June 18, and, since neither the possibility that he might act for the bank nor the risk that his conduct might later be questioned made the solicitor at that date a " person interested " within the meaning of s. 1 (3) of the Act of 1938, the document was admissible.

[For the Evidence Act, 1938, s. 1 (3), (4), see 9 HALSBURY'S STATUTES (2nd Edn.) 627; and for cases on who is a person interested, see 22 DIGEST (Repl.) 245, *2419-2425*.]

Cases referred to:

(1) *In the estate of Hill, Braham* v. *Haslewood*, [1948] 2 All E.R. 489; [1948] P. 341; [1948] L.J.R. 1634; 22 Digest (Repl.) 245, *2423*.

(2) *Barkway* v. *South Wales Transport Co., Ltd.*, [1948] 2 All E.R. 460; [1949] 1 K.B. 54; [1948] L.J.R. 1921; *revsd. on other grounds*, H.L., [1950] 1 All E.R. 392; [1950] A.C. 185; 22 Digest (Repl.) 245, *2418*.

(3) *Esch* v. *Nelson*, (1885), 1 T.L.R. 610; 22 Digest (Repl.) 107, *884*.

Action.

In this action before a judge and jury the plaintiff, the widow of the testator and his residuary legatee under a will dated June 9, 1952, instituted proceedings against the defendants, Barclays Bank, Ltd., as executors, claiming (i) revocation of probate of the testator's wills dated Mar. 6, 1952, and June 18, 1952, (ii) that the court should pronounce against the will dated June 18, 1952, and (iii) that the court should pronounce for the will dated June 9, 1952. The bank was named as executor in all three wills. At the time when the testator signed the third will he was eighty-eight years of age, was in a nursing home and was due to undergo a serious operation on the following day. He died on June 27, 1952. Probate of the wills dated Mar. 6, 1952, and June 18, 1952, was granted to the bank on Sept. 24, 1952. During the hearing of the action the defendants called as a witness the solicitor who had prepared, and attested the signature of the testator to, the will of June 18. This witness referred in examination-in-chief to a note which he had made on June 19, 1952, setting out the events and interviews leading up to the making of the will dated June 18. The question of the admissibility of this document was mooted but the document was not tendered as evidence at that stage. In re-examination, counsel for the defendants submitted that the document was admissible, (i) as a result of the cross-examination of the witness by counsel for the plaintiff, (ii) as part of the res gestae, and (iii) under the Evidence Act, 1938, s. 1. SACHS, J., then ruled on the point, and this report deals with that ruling. At the conclusion of all the evidence, SACHS, J., gave judgment for the defendants.

J. E. S. Simon, Q.C., and *Harold Lightman, Q.C.*, for the plaintiff.
C. R. Beddington for the defendants.
H. Heathcote-Williams, Q.C., and *D. Tolstoy* for the parties cited.

SACHS, J.: The present issue is whether or not there can be admitted into evidence a lengthy note made on June 19, 1952, by the witness, Mr. Port, the solicitor who prepared the will for the testator, immediately after the events and interviews which led to the will being signed on June 18, 1952. The document itself was brought into existence by dictation to a typist, followed by a checking of the transcript by the witness, followed by the writing of amendments by him on the face of the document. It was then sent to the defendant bank by the firm in which the witness is the "sole partner". The witness did all this, as he has put it, because he realised the occasions to which the notes referred were "very important business and, as a careful lawyer, I determined to make a record of what was done", and he added, as is quite obvious, that it was his duty to make such a record.

The grounds on which it is sought that the document be admitted are: first, that it became admissible by reason of counsel for the plaintiff's cross-examination; secondly, that it was part of the res gestae. On both points I was against counsel for the defendants.

There remains the ground of its admissibility under the Evidence Act, 1938. As regards that counsel for the plaintiff has taken three points. First, he says that under s. 1 (4) it cannot be said to be a

> ". . . document . . . written, made or produced by him [the witness] with his own hand . . . or otherwise recognised by him in writing as one for the accuracy of which he is responsible."

That point could not have arisen had the witness initialled the amendments after checking the note. My own view is that a document which is dictated, checked and then amended in writing by a witness, certainly comes within the ambit of s. 1 (4) of the Evidence Act, 1938, as being a document that was made or produced by that witness with his own hand. It does not matter if in fact he secured the intervention of someone else to do the actual typewriting provided that he himself sees it, checks it, and writes on it. It was then argued that the document fell to be excluded under s. 1 (3). One point which arose out of that sub-section was whether the document was made

> " . . . at a time when proceedings were . . . anticipated involving a dispute as to any fact which the statement might tend to establish."

I have not the slightest doubt in my mind that the witness was telling the truth when he said that because everyone seemed so happy he had no impression that the validity of the document would be challenged. It is axiomatic that in almost every case a solicitor keeps a record of an important conversation in case there is any dispute. I do not think, however, that in the present case at the time the document was made on June 18, 1952, there was anything which could be said to fall within sub-s. (3) so as to make it a time when " proceedings were . . . anticipated ".

The next point argued was whether the witness was a " person interested " within the meaning of sub-s. (3). Counsel for the plaintiff put forward the fact that the witness had at any rate a reasonable chance of acting for the bank as constituting an " interest ". I do not think that a contingent prospect of that sort can be an " interest " in the sense that this sub-section contemplates. I would add that otherwise every solicitor acting in any matter in which there could be any dispute, and in which accordingly there was at any rate a chance he might be employed, would never be able to make a record which could be evidence in a court of law. I would also add that I think counsel's submission on that point runs counter to the reasoning implicit in the decision of WALLINGTON, J., in *In the estate of Hill, Braham* v. *Haslewood* (1) ([1948] 2 All E.R. 489).

There remains a point which has not been really pursued by counsel for the plaintiff but with which I think I had better deal, namely, that it might be against a solicitor's reputation if a will which he is charged with preparing and seeing executed turns out not to be properly made. That is a point which is to some extent indicated in *In the estate of Hill* (1) and also in *Barkway* v. *South Wales Transport Co., Ltd.* (2) ([1948] 2 All E.R. 460). I think, however, that one has to look at the time when the document was made. Both *Hill's* case (1) and *Barkway's* case (2) refer to documents made at a time later than the actual happening of the facts to which the writings relate, and when litigation was already pending or anticipated. One notes that if the risk that a solicitor's conduct might later be called into question were an " interest " within the meaning of sub-s. (3), then all records of solicitors on such matters would tend to be excluded. That seems to me not only contrary to common sense and contrary to the practice of this Division but also contrary to the law implicit, I think, in the many decisions (such as *Esch* v. *Nelson* (3) (1885) (1 T.L.R. 610)) concerned with the records of deceased solicitors. These records have regularly been admitted, when the solicitor has died, under the rule that a statement made in the course of his duty by a deceased person is admissible providing he had, to use the words of PHIPSON ON EVIDENCE (9th Edn.), at p. 301, no " motive to misrepresent " the facts related in the document. Some of the old decisions as to what does and what does not constitute a motive to misrepresent facts seem to me to afford assistance on the meaning of the word " interested " in the Evidence Act, 1938, s. 1 (3).

I rule that the document is admissible. I have stated my reasons because of the importance of the particular point rather than the importance in the present case of the particular document. I will give guidance to the jury in due course as to the weight to be given to the document.

Rule accordingly.

Solicitors: *Oscar Mason & Co.* (for the plaintiff); *E. B. V. Christian & Co.*, agents for *Fillmer & Port*, Brighton (for the defendants); *George & George* (for the parties cited).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

BAGETTES, LTD. *v.* G. P. ESTATES CO., LTD.

[CHANCERY DIVISION (Wynn-Parry, J.), October 14, 26, 1955.]

Landlord and Tenant—New tenancy—Tenants' occupation for business purposes—Business of sub-letting part of premises as flats—Whether business within Landlord and Tenant Act, 1954 (2 & 3 *Eliz.* 2 *c.* 56), *Part* 2.

The defendants carried on the business of holding, managing and letting real property and for the purposes of their business they acquired a lease of premises owned by the plaintiffs. The premises comprised a number of flats which they sub-let and a basement containing accommodation for their caretaker, storerooms for cleaning materials and a boiler room. The defendants were not obliged to but did in fact provide hot water for their tenants and cleaned the common parts of the premises. On the expiry of their lease they applied under the Landlord and Tenant Act, 1954, s. 23, for the grant of a new tenancy. The plaintiffs now sought a declaration that the defendants' tenancy was not one to which Part 2 of the Act applied.

Held: the business of sub-letting parts of premises as flats with a view to making profits out of the rentals thereof was not a business in respect of which the person carrying it on was entitled to the security of tenure afforded by Part 2 of the Landlord and Tenant Act, 1954; therefore, the defendants' tenancy was not one to which Part 2 of the Act applied and the plaintiffs were entitled to the declaration which they sought.

[For the Landlord and Tenant Act, 1954, Part 2, s. 23, see 34 HALSBURY'S STATUTES (2nd Edn.) 408.]

Case referred to:

(1) *Trevillian* v. *Exeter Corpn.*, (1854), 5 De G.M. & G. 828; 24 L.J.Ch. 157; 24 L.T.O.S. 149; 18 J.P. 806; 43 E.R. 1091; 32 Digest 266, *482*.

Adjourned Summons.

The plaintiffs, the landlords, sought by originating summons a declaration that the defendants did not have a tenancy to which Part 2 of the Landlord and Tenant Act, 1954, applied, in premises known as 99, 101 and 103, Gloucester Place, London, W.1.

The facts appear in the judgment.

L. A. Blundell for the plaintiffs.

D. J. C. Ackner for the defendants.

Cur. adv. vult.

Oct. 26. **WYNN-PARRY, J.,** read the following judgment: This summons raises a short but interesting question of construction of the Landlord and Tenant

Act, 1954, s. 23. Section 23 is in Part 2 of that Act, which appears under the heading " Security of tenure for business, professional and other tenants ", and reads (so far as material) as follows:

> " (1) Subject to the provisions of this Act, this Part of this Act applies to any tenancy where the property comprised in the tenancy is or includes premises which are occupied by the tenant and are so occupied for the purposes of a business carried on by him or for those and other purposes. (2) In this Part of this Act the expression ' business ' includes a trade, profession or employment and includes any activity carried on by a body of persons, whether corporate or unincorporate. (3) In the following provisions of this Part of this Act the expression ' the holding ', in relation to a tenancy to which this Part of this Act applies, means the property comprised in the tenancy, there being excluded any part thereof which is occupied neither by the tenant nor by a person employed by the tenant and so employed for the purposes of a business by reason of which the tenancy is one to which this Part of this Act applies."

Machinery is provided whereby, in the absence of agreement between the landlord and tenant, the tenant can apply to the court for a new lease (s. 24), and on such an application where the tenancy is one to which Part 2 of the Act applies, it is provided that the court shall make an order for the grant of a new tenancy (s. 29 (1)). The property to be included in the grant is " the holding " as defined in s. 23 (3), (s. 32 (1)), but s. 32 (2) provides that s. 32 (1) is not to

> " . . . apply . . . where the property comprised in the current tenancy includes other property besides the holding and the landlord requires any new tenancy ordered to be granted under s. 29 . . . to be a tenancy of the whole of the property comprised in the current tenancy . . ."

in which case the landlord's wishes are to prevail.

The defendants carry on the business of holding, managing and letting real property, and in connection therewith they acquired and held the residue of a leasehold term, which expired on Mar. 25, 1955, of the premises in question, Nos. 99, 101 and 103, Gloucester Place, London, W.1. The premises are divided into thirteen flats, one of which is in the basement. Accommodation, the extent of which does not appear from the evidence, was also provided in the basement for a caretaker and a caretaker employed by the defendants was in occupation until Mar. 25, 1955. There are also in the basement storerooms used for the storage of cleaning materials, surplus articles of furniture, brushes, vacuum cleaners and other such articles. Fuel is also stored in the basement premises, and the boiler rooms are situate there. The defendants are not obliged to provide their tenants with hot water nor are they obliged to clean the common parts of the premises, namely, the hall, stairways, passages or landings in respect of which part of the premises the tenants under the terms of their lease only have the right to use the same in common with the defendants. The defendants, however, for the purpose of the better running of their business, provide hot water and clean the common parts of the premises so as to make the premises more attractive to their existing and prospective tenants. At all material times ten flats were occupied by tenants of the defendants, and, indeed, are still so occupied. The defendants had on Feb. 22, 1955, and still have, vacant possession of flat No. 3, and since Mar. 25, 1955, they have had vacant possession of flat No. 4. Possession of flat No. 18 was taken by the plaintiffs from the defendants' tenant on Mar. 25, 1955. The defendants have asked for a new tenancy of the whole of the premises. The plaintiffs have refused to accede to that request, and in consequence an application has been launched by the defendants under the Act asking for an order under s. 24. The plaintiffs have taken the point that on the facts set out above the defendants have not a

A tenancy to which Part 2 of the Act applies and the question, and the sole question, raised on the summons is whether they are right or wrong in that contention.

The argument put forward by counsel for the defendants is a short and perfectly clear argument. He contends that in order that Part 2 of the Act should apply in favour of the defendants, it is only necessary to find that some B part of the premises comprised in the lease is in the occupation of the tenants, however small that part may be; and that the question whether or not the tenant could carry on his business on that part is irrelevant. The part of the premises, however small, which is in the occupation of the tenant must constitute "the holding" (s. 23 (1)), and once it is shown that a holding exists, the tenant is entitled to have, and the court is bound to order, the grant of a new tenancy C of that holding. Applying that principle to the facts of this case, the holding in respect of which the defendants can ask for a grant would, it is argued, comprise at any rate the rooms in the basement, which are used for storage, and the stairs, landings and passage ways, which the defendants clean, light and heat. It might also include the flats and the rooms in the basement which are vacant, but it is conceded that it cannot on any view include the flats which D are occupied by tenants of the defendants. Now it is manifest that on such a holding, even including the flats and the rooms in the basement which are vacant, the defendants could not carry on the business, which up to the expiration of their contractual tenancy they were carrying on, namely, the business of letting off all the flats in the premises, and thereby making profit; nor, as a practical business proposition, could they carry on a business consisting of E letting off the flats now vacant with any hope of making a profit.

I cannot regard the language of s. 23 as being other than unfortunate. It would have been the simplest thing in the world to have introduced into Part 2 of the Act an express provision that it should not apply where the business consisted in sub-letting premises as flats, as was done in the Landlord and Tenant Act, 1927*. Nevertheless it is one of the basic canons of construction F that an Act of Parliament shall be construed so as, if possible, to produce a sensible result. In *Trevillian* v. *Exeter Corpn.* (1) (1854) (5 De G.M. & G. 828) KINDERSLEY, V.-C., said (at p. 831):

> "Now I have carefully gone through this Act of Parliament, and to say that it might have been made more clear and precise than it is, or even to G say that there is at least one passage in it which is absolute nonsense, is only to say of this Act what I am afraid may be predicted of perhaps nine out of ten Acts of Parliament which come before courts of justice for their consideration. Out of the terms of it, however, I have to collect, as well as I can, what the meaning of the legislature was."

H The construction which counsel for the defendants urged on me must produce an absurdity. The absurdity is even greater when one comes to consider the position of the flats now let. When the tenancies fall in, the plaintiffs will be entitled to possession of them. What are they to do with them? If they let them, what right to use the staircases, landings and passages will they be able to confer on their tenants, as ex hypothesi those parts of the premises form part of the defendants' holding and will be the subject of a grant to them under I the order, which, on counsel's argument, the court must make? I put to counsel during the argument that in truth all he could hope from success on this summons was to establish a nuisance value in subsequent negotiations with the landlord. With this suggestion he was constrained to agree. I recoil at making an order which must result in an absurdity, but I do not think I need make such an order.

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* See the Landlord and Tenant Act, 1927, s. 17 (3) (b); 13 HALSBURY'S STATUTES (2nd Edn.) 901.

The heading of Part 2 of the Act is " Security for business, professional and other tenants ", and the scheme of this Part of the Act, whatever the infirmity of its language, is that, where a man occupies as tenant premises for business or professional purposes, he will not necessarily have to leave against his will at the end of his tenancy, but that, subject to the terms and conditions contained in the Act, he will have the right to remain as tenant of those premises in order to enable him to occupy them for the purpose of continuing to carry on his business. It is no part of my intention to attempt any exhaustive statement of the businesses and professions which fall within or do not fall within Part 2 of the Act; it is enough for me to say that in my judgment on the view of the scheme of Part 2 of the Act which I have expressed, the business of sub-letting parts of premises as flats with a view to making a profit from the rentals is not a business in respect of which the person carrying it on is entitled to the form of protection, namely, security of tenure, which is the subject of Part 2 of the Act. Counsel urged on me that because the plaintiffs as landlords have the right under s. 32 to insist that the grant ordered to be made should comprise the whole of the premises, it did not lie in the mouth of the plaintiffs to advance the submission that the defendants' argument must lead to an absurdity. I cannot accept this reasoning. Section 32 gives the landlord a right, which he may or may not decide to exercise. He has a clear right to choose, and if he chooses not to exercise the right, he nevertheless must remain free to advance argument as to the consequences which necessarily follow as a result of that choice.

For these reasons I propose to declare that on the true construction of the Landlord and Tenant Act, 1954, the defendants have not got a tenancy of the premises 99, 101, and 103, Gloucester Place to which Part 2 of that Act applies.

Declaration accordingly.

Solicitors: *Harris, Chetham & Co.* (for the plaintiffs); *Clarke, Square & Co.* (for the defendants).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

WHEELER *v.* MERCER.

[COURT OF APPEAL (Denning, Hodson and Morris, L.JJ.), October 21, 24, 1955.]

Landlord and Tenant—New lease—Tenancy at will—Whether protected—Claim under Landlord and Tenant Act, 1927*—Statutory provisions replaced by Landlord and Tenant Act,* 1954*, during negotiations—"Tenancy"—Landlord and Tenant Act,* 1954 (2 *&* 3 *Eliz.* 2 *c.* 56), *s.* 25, *s.* 69 (1).

The tenant of business premises held under a quarterly tenancy which was determined by a notice to quit expiring on Sept. 29, 1953. On receipt of the notice to quit, the tenant gave notice under the Landlord and Tenant Act, 1927, s. 5 (1), claiming a new lease. In October, 1953, the hearing of her claim was adjourned to enable the parties to negotiate. The landlord did not take proceedings for possession and the tenant stayed on, but she did not obtain an order for security of tenure under s. 5 (13) of the Act of 1927. Negotiations continued until April, 1955, when the landlord by letter demanded possession and a week later instituted proceedings for possession. Section 5 of the Landlord and Tenant Act, 1927, had by then been repealed by the Landlord and Tenant Act, 1954, s. 45. The tenant, in the landlord's action for possession, claimed the protection of the latter Act.

Held: a tenancy at will is a tenancy within s. 69* of the Act of 1954; and, as the tenant was a tenant at will at the time when the landlord demanded possession in April, 1955, he was unable then to determine her tenancy except by six months' notice of termination in accordance with s. 25 of that Act.

Per DENNING, L.J.: where a purchaser goes into possession under a treaty for purchase and then the sale goes off, he is not entitled to the protection of Part 2 of the Landlord and Tenant Act, 1954, because he is not a tenant at will (see *Errington* v. *Errington & Woods*, [1952] 1 All E.R. 149); moreover, such a person does not hold under a "tenancy agreement" within the definition of "tenancy" in s. 69* of the Act of 1954. (See p. 457, letter C, post).

Appeal dismissed.

[For the Landlord and Tenant Act, 1954, s. 25 and s. 69, see 34 HALSBURY'S STATUTES (2nd Edn.) 410, 443.]

Cases referred to:

(1) *Errington* v. *Errington & Woods*, [1952] 1 All E.R. 149; [1952] 1 K.B. 290; 3rd Digest Supp.

(2) *Leigh* v. *Dickeson*, (1884), 15 Q.B.D. 60; 54 L.J.Q.B. 18; 52 L.T. 790; 31 Digest (Repl.) 306, *4434*.

Appeal.

This was an appeal by the landlord from an order of His Honour JUDGE GLAZEBROOK dated July 28, 1955, and made at Tunbridge Wells County Court, in an action in which the landlord claimed possession from the tenant of business premises. The county court judge held that the tenant was a tenant at will and as such was entitled to the protection of the Landlord and Tenant Act, 1954. It followed that the landlord was unable to recover possession except by following the procedure provided by s. 25 of that Act.

M. C. Parker for the landlord.

J. R. B. Fox-Andrews for the tenant.

DENNING, L.J.: Miss Mercer has been a tenant of business premises in Tunbridge Wells since 1936. For a time she held under a lease, but in the later stages there was a quarterly tenancy. That tenancy was determined by a notice to quit which expired at Michaelmas, Sept. 29, 1953. When she received the notice to quit she gave (as she was entitled to do at that time) a notice under the Landlord and Tenant Act, 1927, s. 5 (1), claiming a new lease on the ground that goodwill had become attached to the premises. There were proceedings in the county court on her claim for a new lease but the case never came to hearing because in October, 1953, it was adjourned so as to enable the parties to negotiate.

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* The relevant terms of s. 69 (1) are printed at p. 456, letter G, post.

The tenant never applied for an order for security of tenure under the Act of 1927. The reason was that for all practical purposes she had security by the fact of lodging her claim. The landlord did not take out a summons for possession against her because he knew it would be countered by an application for security. It is common knowledge that that was the usual course in such cases. So the tenant stayed on by mutual consent pending determination of her claim for a new lease.

Negotiations then took place for some eighteen months for a new lease. Just when it appeared that the parties might come to an agreement, the landlord changed his mind on the matter. By a letter of Apr. 6, 1955, he demanded possession of the premises, and on Apr. 13, 1955, he took out a summons for possession which came before the county court judge. By this time, however, the tenant had no protection under the Landlord and Tenant Act, 1927, because the relevant provision of that Act had been repealed by the Landlord and Tenant Act, 1954; but she claims that she is entitled to protection under the Act of 1954.

The Act of 1954 gives an automatic extension to tenancies of business premises. The question is whether the tenant can take advantage of it. This depends on whether in April, 1955, she was in occupation of the premises as a tenant under " a tenancy agreement " within the meaning of the Act of 1954. The landlord says that she was not. He says that after Sept. 29, 1953, when her quarterly tenancy expired, she held over only as a tenant at sufferance or a licensee, or at most he says a tenant at will; and as such he says that she is not within the protection conferred by the Act of 1954.

In my opinion the tenant was not a tenant at sufferance; she held over with the landlord's consent, not without it, and as such she was prima facie a tenant at will. True it is that under recent cases she might be held to be a licensee if all that she had was a mere personal privilege, such as happens when the landlord allows a person to stay on as an act of humanity; but the tenant had more than a personal privilege. She claimed to be entitled to a new lease and, if she made good her claim, she would be there by right. She asked no favours and received none. She was, I think, a tenant at will.

The question arises, therefore, whether a tenancy at will is within the Act of 1954. The definition section, s. 69, says:

> " ' tenancy ' means a tenancy created either immediately or derivatively out of the freehold, whether by a lease or underlease . . . or by a tenancy agreement . . ."

That definition is wide enough to include a tenancy at will, because every tenancy at will is created by agreement, express or implied. But counsel for the landlord says that there are other sections in the Act which show that a tenancy at will is not included. He points particularly to the provisions of s. 25 which show, he says, that the only tenancies in contemplation under Part 2 of the Act are tenancies which could be brought to an end by notice to quit, or tenancies which would come to an end by effluxion of time. He says that a tenancy at will is none of these things. It does not determine by notice to quit, certainly not by " notice to quit " such as is defined in s. 69, but determines by demand. It is not a tenancy which comes to an end by effluxion of time. It is, therefore, not in contemplation under this Part of the Act at all.

In considering this argument, it is necessary to remember the scheme of the Act. Tenancies of business premises are automatically extended beyond the common law time unless and until determined in the manner prescribed by the Act. They can be determined only by a notice of termination which is not less than six months' notice nor more than twelve months' notice (s. 25 (2)). Such a notice must not be given for a time earlier than could be given at common law.

or for a time earlier than that at which the common law lease would expire by effluxion of time; but it can be given to expire at any later time (s. 25 (3), (4)). The object of s. 25 (3) and (4) is to make it clear that the notice must not be given earlier than the common law time. That is all. There was no need to make any such provision about tenancies at will which could at common law be determined on demand at any time. The omission of them in that place is therefore explicable without taking them out of the Act altogether. I agree with counsel that the draftsman of the Act had not in mind tenancies at will when he was drafting sub-s. (3) and sub-s. (4) of that section of the Act, but nevertheless I cannot find in those sub-sections anything sufficient to take tenancies at will out of the Act. In my opinion, therefore, this tenancy at will comes within the Act, and the landlord could not determine it except by a six months' notice of termination in accordance with the provisions of s. 25 of the Act.

Counsel for the landlord then raised a point which he said would give rise to difficulty in the future. He took the case of a person who goes in under a treaty for purchase, and then the sale goes off. Such a person has been stated in the old books to be a tenant at will. Is he to be entitled to the benefit of the Act? I think not, for the simple reason that such a person is not a tenant at will at all; see *Errington* v. *Errington & Woods* (1) ([1952] 1 All E.R. 149). In any case such a person does not hold under a " tenancy agreement " as that term is used in the definition of " tenancy " contained in s. 69 of the Act of 1954.

My conclusion is that the tenant holds under a tenancy agreement within the meaning of the Act. I may say that any other view would, I think, be unfortunate. It is quite plain from the transitional provisions of para. 8 of Sch. 9 to the Act of 1954, that, if she had got an order for security of tenure under the Act of 1927, it would have been regarded as equal to a tenancy. The tenant did not get such an order for security of tenure, but she had by the mutual consent of the parties something which was just as good. I should regard it as unfortunate if the agreement by mutual consent did not give her the same protection as an order for security would have done. This result is achieved by holding her to have a tenancy agreement within the meaning of this Act, and she is protected accordingly.

I agree with the judgment of the county court judge, and I would dismiss this appeal.

HODSON, L.J.: I also agree with the learned county court judge on both points, and I would dismiss this appeal.

The first question discussed was whether or not the tenant was a tenant at will. I think that her position is one clearly covered by authority and is that of a tenant whose lease has expired, who has been permitted to continue in possession pending a treaty for a further lease, and that as such she is a tenant at will. It is to be noticed that negotiations for the new tenancy began before the expiration of the old lease. I mention that because the careful research of counsel for the landlord has brought to our notice *Leigh* v. *Dickeson* (2) (1884) (15 Q.B.D. 60), where, in a similar case, the tenant was held to be not a tenant at will but a tenant at sufferance. The only distinction which counsel for the tenant was able to find between that case and this was that in that case the defendant had continued in possession for some time after the lease had expired, and it was not until later that a correspondence began between the solicitors of the plaintiffs and the defendant with a view to the continuation of the tenancy. I agree with my Lord that the line of authority to the effect which I first stated seems to lead to the inevitable conclusion that the learned county court judge was right in saying that the tenant was a tenant at will and not a mere tenant at sufferance.

The second point is whether this tenancy at will is covered by the Landlord and Tenant Act, 1954. It is a troublesome question of construction. When one looks, however, at the interpretation section in that Act (s. 69) I think the learned judge was clearly right in taking the view that " tenancy " was apt to cover a tenancy at will, which is essentially a tenancy by agreement. The difficulty arises when one considers the earlier sections of the Act. It is to be observed that s. 43 does not exclude from Part 2 of this Act (the Part in question) here a tenancy at will; but an earlier section of the Act, s. 25, does present a difficulty which is strongly relied on by counsel for the landlord. Section 25 deals with termination of the tenancy by the landlord, and in sub-s. (2) provides:

> " Subject to the provisions of the next following sub-section, a notice under this section shall not have effect unless it is given not more than twelve nor less than six months before the date of termination specified therein."

Section 25 (3) to which s. 25 (2) is made subject, deals with tenancies which, apart from this Act, could have been brought to an end by notice to quit to be given by the landlord. Notice to quit is defined in s. 69 (1) to mean:

> " a notice to terminate a tenancy (whether a periodical tenancy or a tenancy for a term of years certain) given in accordance with the provisions (whether express or implied) of that tenancy."

So that s. 25 (3) does not apply to a tenancy at will which is brought to an end by demand. Section 25 (4) purports, I think, to provide a complete dichotomy and to deal with all other tenancies, i.e., other than those which could have been brought to an end by notice to quit, because it reads as follows:

> " In the case of any other tenancy, a notice under this section shall not specify a date of termination earlier than the date on which apart from this Part of this Act the tenancy would have come to an end by effluxion of time."

It appears, therefore, that the draftsman of the Act had not in mind any other tenancies than tenancies which could, apart from the Act, be brought to an end by notice to quit, and tenancies which come to an end by effluxion of time. If one reads s. 25 (4), as one possibly can, so as to include tenancies at will in the words " any other tenancy ", one finds that tenancies at will are left, so to speak, in the air. That seems to me to leave still open for operation sub-s. (2), which merely imposes a limit on notices to be given by landlords. The effect is that in such a case as this the notice will not have effect unless it is given not more than twelve months nor less than six months before the date of termination specified therein, and that means that in a case which is not covered specifically by the other sub-sections of s. 25 a six months' notice must be required.

I express no opinion on the question which my Lord has mentioned whether the purchaser of a house who was let into occupation pending completion can be regarded as a tenant at will. Counsel for the landlord relied on that matter because he said that shows how absurd it is to consider that tenants at will could be covered by this section. The cases which are collected together in WOODFALL ON LANDLORD AND TENANT (25th Edn.), at p. 305 are old cases which are cited in support of the proposition that a person who is admitted pending a treaty for purchase is a tenant at will; we have not considered those cases and it is not necessary to express any opinion whether that is the law at the present time. However that may be, and however wide may be the scope of the expression " tenant at will ", it appears to me that the learned county court judge was right in saying that a tenancy at will is covered by the Act of 1954.

I agree, therefore, that this appeal fails.

MORRIS, L.J.: I also agree. I have found myself in entire agreement with the conclusion of the learned county court judge that on the facts of this case the tenant's position could properly be described as that of a tenant at will: and further I think that her tenancy at will came within the definition of " tenancy " to be found in the Landlord and Tenant Act, 1954, s. 69. That definition includes the words " a tenancy agreement ". I think, therefore, that the tenant had a tenancy.

That being so, it becomes necessary to look at s. 23, s. 24 and s. 25 in order to see what follows. By s. 23 (1) it is provided:

> "Subject to the provisions of this Act, this Part of this Act applies to any tenancy where the property comprised in the tenancy is or includes premises which are occupied by the tenant and are so occupied for the purposes of a business carried on by him or for those and other purposes."

This tenancy was, therefore, a tenancy to which Part 2 of the Act applied.

Section 24 (1) provides:

> "A tenancy to which this Part of this Act applies shall not come to an end unless terminated in accordance with the provisions of this Part of this Act . . ."

There was here no such termination. It is said that s. 25 (and in particular sub-s. (3) and sub-s. (4)) introduces a limitation. Section 25 (1) is general and provides:

> "The landlord may terminate a tenancy to which this Part of this Act applies by a notice given to the tenant in the prescribed form."

The landlord did not give to the tenant notice in that form. The prescribed form, according to the sub-section, is a form "specifying the date at which the tenancy is to come to an end", and that under the scheme of the Act is called "the date of termination". Then s. 25 (2) provides specially that the notice is not to have effect "unless it is given not more than twelve months nor less than six months before the date of termination" specified in it.

It is necessary in considering sub-s. (3) and sub-s. (4) to read the definition of "notice to quit" in s. 69:

> "'notice to quit' means a notice to terminate a tenancy (whether a periodical tenancy or a tenancy for a term of years certain) given in accordance with the provisions (whether express or implied) of that tenancy."

There is great force in the submission of counsel for the landlord that sub-s. (3) and sub-s. (4) are dealing with periodical tenancies and tenancies for a term of years certain.

Counsel for the tenant submitted an argument to us under sub-s. (4) which was attractive. Conceding that sub-s. (3) does not avail him, he said that sub-s. (4) starts with the words "In the case of any other tenancy", and he says that a tenancy at will is within the words "any other tenancy". Then he says the provision is:

> ". . . a notice under this section shall not specify a date of termination earlier than the date on which apart from this Part of this Act the tenancy would have come to an end by effluxion of time."

Counsel argued that that is merely a limitation; that it is saying: "In the case of any other tenancy it must not specify a date of termination earlier than when a tenancy by effluxion of time would have come to an end". In reply to that submission counsel for the landlord pointed to the word "the". There is great force in the argument that sub-s. (3) and sub-s. (4) are referring to periodical tenancies and a tenancy for a term of years; but, even if that be the right view, it does not seem to me that these sub-sections cut down either the definition of "tenancy" or the provisions of sub-s. (1) and sub-s. (2) of s. 25. Sub-section (1) remains that the landlord "may terminate a tenancy in the prescribed form specifying the date of termination". That was not done in this case. I think that the learned county court judge came to a correct conclusion also on this part of the case.

I would dismiss the appeal.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Sole, Sawbridge & Co.*, agents for *Bailey & Cogger*, Tonbridge (for the landlord); *Waterhouse & Co.* (for the tenant).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

ROMFORD ICE & COLD STORAGE CO., LTD. *v.* LISTER.

[COURT OF APPEAL (Denning, Birkett and Romer, L.JJ.), May 18, 19, 20, 23, June 20, 27, July 4, October 26, 1955.]

Master and Servant—Liability of servant—Negligence—Whether liable in contract or tort—Joint tortfeasor's common law rights to contribution—Exemption—Implied terms of contract of service—Whether master required to insure servant against his own negligence—Duty to insure servants using vehicle on road—Injury to fellow workman—Law Reform (Married Women and Tortfeasors) Act, 1935 (25 *&* 26 *Geo.* 5 *c.* 30), *s.* 6 (2).

Damages—Remoteness—Servant's negligence—Master's liability to third party —Recovery from servant.

Insurance—Motor insurance—Insurance against third-party risks—Whether injury arose out of use of vehicle on road—Backing of lorry from road into yard—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5 *c.* 43), *s.* 35 (1), *s.* 36 (1), *s.* 121.

While backing his lorry in the yard of a slaughter-house to which he had been sent to collect waste, the defendant, a lorry driver employed by the plaintiffs, negligently ran into and injured his father, who was also employed by the plaintiffs on the same work. The father obtained judgment for damages for negligence against the plaintiffs. The plaintiffs' insurers, acting in the plaintiffs' name by virtue of a term (condition 2) in the contract of insurance but without consulting the plaintiffs, brought an action claiming damages for negligence or breach of contract against the defendant, the writ being issued a week before judgment was obtained by the father against the plaintiffs. Preliminary objection that the writ was premature having been taken by the defendant, a second action was allowed to be brought and consolidated with the first action.

Held (DENNING, L.J., dissenting): the plaintiffs were entitled to recover in damages from the defendant the amount for which they had been made liable to his father because—

(i) the defendant was in breach of an implied term in his contract of service with the plaintiffs that he would drive with reasonable care and skill (*Harmer* v. *Cornelius* (1858) (5 C.B.N.S. 236), dictum of WARRINGTON, L.J., in *Weld-Blundell* v. *Stephens* ([1919] 1 K.B. at p. 536) and *Jones* v. *Manchester Corpn.* ([1952] 2 All E.R. 125) applied); and the damages were not too remote (see p. 474, letter C, p. 476, letter G; p. 475, letter D, and p. 479, letter I, post).

(ii) although the plaintiffs and the defendant were joint tortfeasors as against the defendant's father (per SCRUTTON, L.J., in *The Koursk*, [1924] P. at p. 155), the plaintiffs' claims were not defeated by the principle of the common law that there was no contribution between joint tortfeasors, since the plaintiffs gave neither authority nor assent to the defendant's negligence and did not share in its commission (*Adamson* v. *Jarvis* (1827) (4 Bing. 66) applied); moreover, since the negligence was the defendant's own negligence, there was no ground for the court to grant (in the second action) the defendant immunity from liability to contribution under the Law Reform (Married Women and Tortfeasors) Act, 1935 (see p. 474, letter B, p. 478, letter G, p. 475, letter G, and p. 480, letter H, post).

(iii) although in so far as the first action was based on a claim for contribution under the Act of 1935 it was premature (*Littlewood* v. *George Wimpey & Co., Ltd.* ([1953] 2 All E.R. 915) followed), yet the first action was not premature in so far as it was founded on breach of contract, since the cause of action arose on the commission of the breach of contract and the fact that the writ was issued by the insurers before the liability of the plaintiffs to the defendant's father was established did not defeat the action as the insurers were entitled to issue the writ by virtue of condition 2 of the contract of insurance independently of the doctrine of subrogation (see p. 476, letters A to E, post).

A (iv) section 35 (1) of the Road Traffic Act, 1930, did not prevent the plaintiffs from maintaining their claims against the defendant because, on the footing that the yard in which the accident happened was not a road to which the public had access within s. 121 of that Act, the accident did not arise out of the use of the lorry on a road within s. 35 (1). See p. 475, letter B, p. 479, letter E, post.

B (v) there was no such implied term in the contract of service with the defendant as would place on the plaintiffs the duty of insuring the defendant against liability for injury such as had occurred to his father in this case (see p. 475, letter E, p. 479, letter G, post); nor was any term to be implied in that contract that that defendant should not be sued by the plaintiffs for damage arising from his negligence if they were insured in respect of such
C damage, for a servant was as much liable to his master for negligence as was anyone else (dictum of LORD WRIGHT in *Digby* v. *General Accident Fire & Life Assurance Corpn., Ltd.* ([1942] 2 All E.R. at p. 339) applied). See pp. 479, 480, post.

Per BIRKETT, L.J.: the submission that the slaughter-house yard where the accident took place was not a road [within the Road Traffic Act, 1930,
D s. 121] is well founded (see p. 475, letter C, post).

Appeals dismissed.

[As to liability of a servant to his master for negligence, see 22 HALSBURY'S LAWS (2nd Edn.) 184, para. 307; and for cases on the subject, see 34 DIGEST 117, *884-888*.

As to the implied obligation of a workman to exercise skill, see 2 HALSBURY'S
E LAWS (3rd Edn.) 131, para. 251.

As to contribution between joint tortfeasors, see 32 HALSBURY'S LAWS (2nd Edn.) 190, para. 284; and for cases on the subject, see 42 DIGEST 979, 980, *95-108* (contribution), ibid., 980-982, *109-127* (indemnity).

As to implied terms in contracts, see 8 HALSBURY'S LAWS (3rd Edn.) 123, para. 215; and for cases on the subject, see 12 DIGEST (Repl.) 685-688, *5269-5285*.

F For the Road Traffic Act, 1930, s. 35 (1), s. 36 (1), s. 121, see 24 HALSBURY'S STATUTES (2nd Edn.) 602, 605, 661.

For the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (2), see 25 HALSBURY'S STATUTES (2nd Edn.) 360.]

Cases referred to:

(1) *Jones* v. *Manchester Corpn.*, [1952] 2 All E.R. 125; [1952] 2 Q.B. 852;
G 116 J.P. 412; 3rd Digest Supp.

(2) *Harmer* v. *Cornelius*, (1858), 5 C.B.N.S. 236; 28 L.J.C.P. 85; 32 L.T.O.S. 62; 22 J.P. 724; 141 E.R. 94; 1 Digest 433, *1239*.

(3) *Wilsons & Clyde Coal Co., Ltd.* v. *English*, [1937] 3 All E.R. 628; [1938] A.C. 57; 106 L.J.P.C. 117; 157 L.T. 406; Digest Supp.

(4) *Digby* v. *General Accident Fire & Life Assurance Corpn., Ltd.*, [1942]
H 2 All E.R. 319; [1943] A.C. 121; 111 L.J.K.B. 628; 167 L.T. 222; 2nd Digest Supp.

(5) *Govett* v. *Radnidge, Pulman & Gimblett*, (1802), 3 East, 62; 102 E.R. 520; 1 Digest 19, *146*.

(6) *Taylor* v. *Manchester, Sheffield & Lincolnshire Ry. Co.*, [1895] 1 Q.B. 134; 64 L.J.Q.B. 6; 71 L.T. 596; 59 J.P. 100; 42 Digest 970, *21*.

I (7) *Jackson* v. *Mayfair Window Cleaning Co., Ltd.*, [1952] 1 All E.R. 215; 3rd Digest Supp.

(8) *Groom* v. *Crocker*, [1938] 2 All E.R. 394; [1939] 1 K.B. 194; 108 L.J.K.B. 296; 158 L.T. 477; Digest Supp.

(9) *Candler* v. *Crane, Christmas & Co.*, [1951] 1 All E.R. 426; [1951] 2 K.B. 164; 2nd Digest Supp.

(10) *Weld-Blundell* v. *Stephens*, [1919] 1 K.B. 520; 88 L.J.K.B. 689; 120 L.T. 494; *affd.* H.L., [1920] A.C. 956; 89 L.J.K.B. 705; 123 L.T. 593; Digest Supp.

(11) *The Koursk*, [1924] P. 140; 93 L.J.P. 72; 131 L.T. 700; 42 Digest 976, *72*.
(12) *Littlewood* v. *George Wimpey & Co., Ltd.*, [1953] 2 All E.R. 915; [1953] 2 Q.B. 501; *affd.* H.L. sub nom. *George Wimpey & Co., Ltd.* v. *British Overseas Airways Corpn.*, [1954] 3 All E.R. 661; [1955] A.C. 169; 3rd Digest Supp.
(13) *Simpson* v. *Thomson*, (1877), 3 App. Cas. 279; 58 L.T. 1; 1 Digest 43, *340*.
(14) *Semtex, Ltd.* v. *Gladstone*, [1954] 2 All E.R. 206; 3rd Digest Supp.
(15) *John T. Ellis, Ltd.* v. *Hinds*, [1947] 1 All E.R. 337; [1947] K.B. 475; [1947] L.J.R. 488; 176 L.T. 424; 2nd Digest Supp.
(16) *Sutch* v. *Burns*, [1943] 2 All E.R. 441; *revsd.* C.A., [1944] 1 All E.R. 520 n.; [1944] K.B. 406; 113 L.J.K.B. 407; 2nd Digest Supp.
(17) *Lees* v. *Motor Insurers Bureau*, [1952] 2 All E.R. 511; 3rd Digest Supp.
(18) *Richards* v. *Cox*, [1942] 2 All E.R. 624; [1943] K.B. 139; 112 L.J.K.B. 135; 168 L.T. 313; 2nd Digest Supp.
(19) *Merryweather* v. *Nixan*, (1799), 8 Term Rep. 186; 101 E.R. 1337; 1 Digest 683, *2926*.
(20) *Palmer* v. *Wick & Pulteneytown Steam Shipping Co.*, [1894] A.C. 318; 71 L.T. 163; 42 Digest 980, *105*.
(21) *Adamson* v. *Jarvis*, (1827), 4 Bing. 66; 5 L.J.O.S.C.P. 68; 130 E.R. 693; 1 Digest 534, *1908*.
(22) *Philips* v. *Biggs*, (1659), Hard. 164; 145 E.R. 433.
(23) *Jenkins* v. *Betham*, (1855), 15 C.B. 168; 24 L.J.C.P. 94; 24 L.T.O.S. 272; 139 E.R. 384; 2 Digest 429, *795*.
(24) *Cuckson* v. *Stones*, (1858), 1 E. & E. 248; 28 L.J.Q.B. 25; 32 L.T.O.S. 242; 120 E.R. 902; 34 Digest 71, *483*.
(25) *Green* v. *New River Co.*, (1792), 4 Term Rep. 589; 100 E.R. 1192; 34 Digest 123, *941 c*.

Appeal.

The defendant and his father were employed by the plaintiffs to collect waste and take it to the plaintiffs' factory. On Jan. 26, 1949, while backing his lorry in the yard of a slaughter-house to which he had been sent, the defendant ran into his father and injured him. The father brought an action for damages for negligence against the plaintiffs and on Jan. 29, 1953, obtained judgment; the court held that the father was one-third and the plaintiffs were two-thirds to blame, assessed the damages for injuries at £2,400 and gave judgment for the father for £1,600 and costs. On Jan. 23, 1953, the plaintiffs' insurance company had issued a writ in the plaintiffs' name against the defendant, claiming an indemnity or contribution from the defendant for any damages which the plaintiffs might have to pay because of the defendant's negligence. They pleaded that it was an implied term of his contract of employment that the defendant should carry out his duties with reasonable care and skill and that they had suffered damage by reason of his failure so to do and in the alternative they claimed damages for negligence or breach of contract. The defendant contended that the action was premature, in that it was commenced before any liability of the plaintiffs to the defendant's father had been established, that the plaintiffs were precluded from bringing the action by implied terms in the contract of service that they would insure the defendant against any liability arising out of his negligence and would not sue him in respect thereof if recovering from the insurers and that they would insure the defendant against the accident, which it was alleged arose out of the use of the lorry on a road, as required under the Road Traffic Act, 1930. They submitted further that the damages were too remote and that the defendant should be granted exemption from liability for contribution in the court's discretion under the Law Reform (Married Women and Tortfeasors) Act, 1935. On Feb. 18, 1955, Ormerod, J., gave judgment for the plaintiffs. The defendant appealed. To meet the preliminary objection the plaintiffs were permitted to bring a second action and consolidate it with the first.

C. N. Shawcross, Q.C., and *H. Lester* for the defendant.
P. M. O'Connor for the plaintiffs.

Cur. adv. vult.

Oct. 26. The following judgments were read.

DENNING, L.J.: Two men named Lister, father and son, were employed by the Romford Ice & Cold Storage Co., Ltd., the plaintiffs. Their task was to collect waste and take it to the factory. On Jan. 26, 1949, the son, the defendant, drove the lorry from the plaintiffs' premises to a slaughter-house in Oldchurch Road, Romford. The father went with him. The defendant drove the lorry through the main gates into the yard of the slaughter-house. His father got off to go to the office. The defendant backed the lorry to get it into position and unfortunately ran into his father and injured him. The reason was partly because the engine was defective, so that the defendant had to keep it going fast and, therefore, reversed more quickly than he need have done: partly because the son did not take sufficient steps to see that all was clear: partly because the father did not keep a proper look-out. The father sued the plaintiffs for damages for negligence. The case was tried by McNAIR, J., on Jan. 29, 1953. He found that the father was one-third to blame and the plaintiffs two-thirds. He assessed the total damages for the injuries at £2,400 and gave judgment for the father for £1,600 and costs.

The plaintiffs were insured against this liability and the insurers have paid the father the £1,600 and costs. Now the insurers seek to recover that sum from the son, the defendant. To do this, they have brought an action in the name of the plaintiffs against him. The Romford Ice & Cold Storage Co., Ltd. are only nominal plaintiffs. The managing director of the plaintiff company came to the court and gave evidence. He said that the plaintiffs were not consulted about this action. The insurers bring it under their right of subrogation or under the clause in the policy authorising them to use the name of the company.

There can be little doubt that this action was a surprise both to the plaintiffs and to the defendant. Mr. Lister junior, the defendant, is now thirty-three and he has been employed by the plaintiffs ever since he was sixteen. When he was seventeen the directors asked him to take a driving test, and, after he had passed it, they asked him to drive the company's lorries. He has driven for them ever since except when he was away on war service. The plaintiffs have never suggested to him that he ought to insure himself. He took it for granted that he was fully covered by his employers. The managing director evidently thought the same. He was subpoenaed to give evidence on the son's behalf. He said that it never occurred to him that the plaintiff company's motor drivers would be personally responsible: and he never suggested to them that they should cover themselves separately. The parties to this action are clearly of one mind about it, but the insurers think differently. They want the defendant to indemnify them out of his own pocket.

Let me put aside for the moment the question of insurance and treat the case as if the Romford Ice & Cold Storage Co., Ltd., were the real plaintiffs. Even so, there was until very recently never a case of this kind recorded in our books. Many a master has been made responsible for the mistakes of his servants, but never has he sought to get contribution or indemnity from his servants. One obvious reason is that it is not worth while. The master is not allowed to make any deduction from his servant's wages: and it would seem the extreme of harshness to seize his savings or to make him bankrupt. The other reason is no doubt the reluctance of a good master to visit the risk of accidents on to his servants. The risk should be borne by the undertaking as a whole rather than on the poor unfortunate servant who happens to make a mistake in a moment of temporary inadvertence. It seems that these reasons no longer commend themselves to the insurers of employers, and we have to consider whether the claim is good in law.

At the outset counsel for the defendant took a preliminary objection to the proceedings. He pointed out that, when the plaintiffs were sued by the father, if they wished to claim indemnity from the defendant, the appropriate way for them to do it would have been to issue a third-party notice against the defendant. The judge could then in the one action have assessed the share of responsibility which attached to the father, the defendant and the plaintiffs respectively. Instead of issuing a third-party notice, the plaintiffs proceeded by means of a separate writ against the defendant; and they issued this writ, it is said, a week too soon. They issued it before the action against them was tried and before they were found liable themselves. They issued their writ against the defendant on Jan. 23, 1953, but they were not found liable to the father until Jan. 29, 1953. Counsel argued that on this account the action was premature. The plaintiffs, he said, ought to have waited until they had actually been found liable to the father and then to have brought their action against the defendant.

At the hearing before this court, everyone agreed that it was undesirable that the substantive claim should go off on a technical point of this kind. We therefore gave leave for a second action to be brought and consolidated with the first action, the pleadings and evidence in the first action to stand as if they had taken place in the second action. This was done and we are able to deal with the merits of the case. Nevertheless, we still have to decide the preliminary point, because many costs depend on it.

In order to decide this point, and indeed the other points in the case, it is necessary to decide what is the true basis of an action like this by a master against his servant. Is it an action of contract, or of tort, or is it only given by statute?

So far as contract is concerned, it is not suggested that the servant ever agreed to indemnify his master, either expressly or impliedly, against this liability—he never agreed to any such thing—but it is suggested that the servant impliedly agreed to use reasonable care: and that an action lies by the master for breach of that contract. This is a possible way of formulating the claim. Indeed, I suggested it myself in *Jones* v. *Manchester Corpn.* (1) ([1952] 2 All E.R. 125) but, on reconsideration, I do not think it is the correct way, for the simple reason that it does not truly represent the facts. When a man holds himself out as a skilled man, he thereby impliedly warrants that he is competent at his work and will exercise his skill on his employer's behalf (see *Harmer* v. *Cornelius* (2) (1858), 5 C.B.N.S. 236) but he does not warrant that he will never make a mistake and I know of no case where it has been so held. If a lorry driver has an accident owing to a moment's inadvertence or a slight error of judgment, and a third person is injured, his employer must pay damages. The law imposes a very high standard of care in such cases. But it is going much too far to say that the driver is thereby in breach of a contract with his employer. No man, if asked, would give a warranty to his employer that he would at all times, without exception, come up to the standard of the reasonable man of the law who, so far as I know, never makes a slip or a mistake. The ordinary man would say "I will do my best; I cannot do more": and that could hardly be said to be a contract by him. It would not be intended to create legal relations.

Take the converse case, where a servant is injured by the negligence of his employer; e.g., the father's claim against the plaintiffs. The liability of the employer is in tort only, not in contract. If you read through the whole of *Wilsons & Clyde Coal Co., Ltd.* v. *English* (3) ([1937] 3 All E.R. 628) you will find not a word to suggest that the employer's liability rests on an implied term in the contract. The obligation of the employer is an obligation imposed by the law. It arises out of the relationship of master and servant, not out of any implied promise to use reasonable care. The employer was at one time given the defence of common employment on the supposition of a contract, but that fiction has now been abolished. It bedevilled the law long enough and should serve as a

A warning not to imply promises contrary to the fact. If there is no implied promise of care by master to servant, so also there is none by servant to master.

Another objection to the implied contract is that it would mean that the master could sue his servant for negligence although the master suffered no damage. That cannot be right. It is trite knowledge that an action for breach of contract lies without proof of damage, whereas in the tort of negligence damage B is essential. Test the position by taking the simple case where a servant negligently injures his master's person or property. Suppose, e.g., that a domestic servant carelessly breaks a plate whilst she is washing up the dinner things; or a chauffeur by his negligent driving injures his master who is riding in the car. The master in each case can claim damages for negligence (see *Digby* v. *General Accident Fire & Life Assurance Corpn., Ltd.* (4), [1942] 2 All E.R. 319); but C damage is, I think, the gist of the action. If the domestic servant was careless but broke nothing, the master would have no cause of action. If the chauffeur inadvertently failed to keep a good look-out, but there was no accident, the master could not sue him for damages. He might not even be able to dismiss him, because it is not every piece of carelessness which justifies dismissal.

All this leads me to think that the action against a servant must be founded on D tort; and when you turn to the books you will find that there are many authorities, old and new, which go to support this view. In 1794, FITZHERBERT in his NEW NATURE BREVIUM 94D said that

> " if a smith prick my horse with a nail . . . I shall have my action upon the case against him, without any warranty by the smith to do it well . . .
> E For it is the duty of every artificer to exercise his art rightly and truly as he ought."

In 1802 in *Govett* v. *Radnidge, Pulman & Gimblett* (5) (3 East, 62), where the defendant undertook to load a hogshead of treacle on a cart, but, in doing so, negligently broke it open, LORD ELLENBOROUGH said that the action was founded " on neglect of duty, and not upon breach of promise ". In 1895 in *Taylor* v. F *Manchester, Sheffield & Lincolnshire Ry. Co.* (6) ([1895] 1 Q.B. 134), where a passenger was injured by the negligence of the railway company who were carrying him under contract, it was held that the action was founded on tort. In 1952 in *Jackson* v. *Mayfair Window Cleaning Co., Ltd.* (7) ([1952] 1 All E.R. 215), where cleaners were cleaning a chandelier under contract with the owner, but carelessly broke it, BARRY, J., held that the owner's claim was founded on G tort and not on contract. Those were cases where the negligence occurred in carrying out a contract for services. All the more so when it occurs in a contract of service. I am aware that an action for negligence against a solicitor is founded on contract (see *Groom* v. *Crocker* (8), [1938] 2 All E.R. 394); but that is very different, because there is no physical damage and the duty arises out of contract only (see *Candler* v. *Crane, Christmas & Co.* (9), [1951] 1 All E.R. 426).

H Now take the case where the servant's negligence does not injure the master himself but a third person. If the master is sued by the third person and found liable, the master's claim against the servant does not properly lie in contract in this case any more than it does in the other. Indeed, in the one case where it was suggested that the master might have a remedy, it was put by WARRINGTON, L.J., on a breach of duty by the servant, not on a breach of contract; see I *Weld-Blundell* v. *Stephens* (10) ([1919] 1 K.B. at p. 536). Here again test the position by seeing whether damage is an essential ingredient. Can the master sue the servant before any claim is made on him or before he knows that he is liable to the third person? I think not. Take the facts of this very case, but suppose that it had happened before 1935. Under the law as it then existed, the father would have had no claim against the plaintiffs at all. He would have been defeated by his own contributory negligence and by the doctrine of common employment. Can anyone suppose that at common law the plaintiffs could have sued the defendant for negligence when the plaintiffs were under no liability themselves? Clearly not. Damage must be the gist of the action here too. This shows that the action does not lie in contract, but, if it lies at all, it is in tort.

So far as tort is concerned, I find it difficult to see how the law of tort can give an indemnity to the master. The master is made liable for a tort. Can he sue his servant for the self-same tort ? The common law regards the master as a tortfeasor; see *The Koursk* (11) ([1924] P. 140, per SCRUTTON, L.J., at p. 155). The case comes within the rule that there is no contribution between tortfeasors. There is, of course, an exception which permits an innocent person to claim contribution or indemnity, but that exception only applies where the innocent person can rely on a contract for contribution or indemnity, express or implied. The master has no such contract. I do not think, therefore, that the common law would have permitted the master to sue in tort.

So far as statute is concerned, however, it is clear that the master has a remedy. By s. 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935, Parliament has given the master a right to contribution or indemnity from his servant whenever it is just and equitable that he should have it. A master is clearly a tortfeasor within that section. In every case where the owner of a vehicle which is driven by a servant claims contribution from another vehicle, he claims as a tortfeasor, because it is only to a tortfeasor that the right to contribution is given.

It is significant that the only cases in the books in which a remedy has been given are cases under the statute. There is no recorded case where a master has sued his servant at common law for contribution or indemnity. But even supposing that there was a remedy at common law, I do not think it can survive the Act of 1935. That Act covered the ground so fully that it cannot be supposed that Parliament intended that a separate and distinct remedy should still remain at common law. Are we now, I would ask, to set about the task of defining a remedy which has never been defined before in the whole eight hundred years of the common law? It would, I suggest, be a work of supererogation to embark on such a task. When Parliament has stated the principle to be applied in a given situation, the lawyers should not proceed to write another one of their own.

In the result I adhere to the view which I stated in *Jones* v. *Manchester Corpn.* (1) ([1952] 2 All E.R. at p. 132) that:

> "In the absence of an express contract on the matter, the master has no right at law to an indemnity or contribution from his servant. It is entirely a matter for the discretion of the court under the [Law Reform (Married Women and Tortfeasors) Act, 1935] whether it should order any, and, if so, what, contribution or indemnity between them."

If this is right, it means that the preliminary point succeeds. It has been decided that under the statute a master's claim does not arise until his liability is ascertained by judgment or admission (see *George Wimpey & Co., Ltd.* v. *British Overseas Airways Corpn.* (12), [1953] 2 All E.R. 915; [1954] 3 All E.R. 661); and even if he had a claim at common law, it likewise does not arise until he has suffered damage.

I turn, therefore, to the merits of the case. Under the statute, if there had not been any insurance questions involved, the task of the court would have been comparatively simple, viz., to find out what would be just and equitable as between master and servant having regard to the extent of their respective responsibility for the damage and to order the defendant to pay his proper share (see s. 6 (2) of the Act of 1935). This case is much complicated, however, by the insurance factor.

The plaintiffs were insured under two policies. First, they were insured against liability to their employees under an employers' liability policy. Secondly, they were insured against liability for motor accidents under a motor vehicle policy which enured for the benefit of themselves and their drivers, but it did not cover liability to their employees. The father's claim was clearly covered by the employers' liability policy. The insurers have paid under that policy and are the real plaintiffs in the action.

Counsel for the plaintiffs invited us to ignore this question of insurance, but I do not think we should blind ourselves in this way. It is undoubtedly true as a general rule that the court is not concerned with the fact that the plaintiff is insured or that he has been paid by his insurance company. That has been so ever since the days of LORD MANSFIELD; but it is equally true that the insurers who stand behind the action take their plaintiff as they find him, and if, for some reason or other, he is debarred from making a claim, they fall with him (see *Simpson* v. *Thomson* (13) (1877), 3 App. Cas. 279).

It is one thing to say that, as between strangers, insurance is irrelevant, but quite another thing to say that as between master and servant it is irrelevant. If the master relies on an implied contract to make the servant liable, the servant may well rely on an implied term to exempt himself.

What, I ask, is the position when an insurance company brings an action against a servant, without the employer having any say in the matter? Take this very case where the insurers issue a writ in the employer's name against the servant without consulting either the employer or the servant beforehand. When the servant receives the writ he will take it to his employer and say " Why are you suing me? Surely you have got the money from your insurance company. So you cannot sue me ". This natural comment between master and man throws a flood of light on the implied understanding of the parties. When the man was taken on, he knew that his employer was insured. If anyone standing by were to ask what was to happen if the servant was involved in an accident, both employer and man would say at once: " The insurance company will pay ". They would not expect that the man would have to pay out of his own pocket. This shows that there is an implied term in these cases whereby, if the employer is insured, he will not seek to recover contribution or indemnity from the servant. I cannot help thinking that the insurers undertook the risk on the very same understanding. The premium was fixed no doubt on the basis that they would foot the bill themselves. No allowance would be made for the possibility of any contribution being obtained from the plaintiffs' servants. Yet, if this action is well founded, it means that in every one of these cases, the insurance company can turn round and bring an action in the name of the employer against the servant. Nothing could be more detrimental to good relations between an employer and his servants. Nothing could be further from the contemplation of the parties.

In my opinion, no such action lies. If and in so far as the claim rests in contract, which I dispute, it is defeated by the implied term which I have just mentioned. If and in so far as the claim rests on the statute it comes within the express power of the court " to exempt any person from liability to make contribution ". This seems to me to be an appropriate case in which the court should exercise this power. Whichever way it is put, however, I am clearly of opinion that an employer, who has been fully indemnified by his own insurance company, should not be allowed to turn round and sue his servant for a contribution or indemnity. It follows that I do not agree with the decision of *Semtex, Ltd.* v. *Gladstone* (14) ([1954] 2 All E.R. 206).

That is sufficient to decide this case: but in case I am wrong on this point, I go on to consider the further argument based on the provisions for compulsory insurance under the Road Traffic Acts. Counsel for the defendant said that, under those Acts, the driver should have been insured against liability not only to the public but also to his fellow servants. It follows, on the one hand, that, if the employer did not effect such an insurance, he was guilty of a breach of his duty towards the driver and could not recover in this action; but, on the other hand, if the employer had effected an insurance to cover the driver, the servant would have the benefit of it and the employer could not sue him.

This raises a question of the first importance. It depends on the true interpretation of s. 35 (1) of the Road Traffic Act, 1930, which is in these terms:

> " Subject to the provisions of this Part of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third-party risks as complies with the requirements of this Part of this Act."

The problem is to apply that section to the various cases which arise when a servant is driving a motor vehicle belonging to his master. It seems to me that, when a master employs a servant to drive his motor vehicle and the servant drives it in the course of his employment, then the master is using the vehicle and so is the servant. Both of them are using it. In such cases it is important to distinguish between the master's user and the servant's user. So far as the user by the master is concerned, if he can point to an effective policy of insurance which covers the user by him of the vehicle at the material time, then no offence is committed by the master. That was the position in *John T. Ellis, Ltd.* v. *Hinds* (15) ([1947] 1 All E.R. 337), when a youth of sixteen drove a car for his employers without having a driving licence. The employers were in fact quite innocent people. The youth had deceived them into thinking that he was of age and held a driving licence. On examining the insurance policy the court held that the user by the employers was covered by the policy because they did not know that the youth did not hold a driving licence. They were, therefore, not guilty of an offence. But the youth himself was, I think, clearly guilty of an offence under the section. The user of the vehicle by him (as distinct from the user by his employers) was not covered by insurance. He could not escape by relying on their innocent use of the vehicle when his own use of it was guilty.

Next take the case where a servant is driving a car on a frolic of his own outside the course of his employment. In that case the servant is using the car but the master is not using it; nor is the master causing or permitting it to be used. The master is not caught by s. 35 (1) at all. He is not bound to have a policy covering such user: see the observations of LORD GODDARD, C.J., in *John T. Ellis, Ltd.* v. *Hinds* (15), when commenting on *Sutch* v. *Burns* (16) ([1944] 1 All E.R. 520 n.). The driver, however, is caught by s. 35 (1), because he is a person using the car and his user ought to be covered by insurance. He is guilty of an offence unless he has taken out a policy covering his user, which he will not usually have done. The injured party will not suffer, however, because it is a case where the Act requires the liability to be covered by insurance and, as such, the Motor Insurers Bureau will pay the injured party just as if the driver had taken out a policy as he ought to have done.

The present case is the difficult one when a servant injures a fellow servant. Suppose that a servant, whilst driving in the course of his employment, runs down a fellow servant in the road. In that case the master is using the vehicle and so is the servant. Both are using it. But the effect of the section is different for each. We must consider the master's user separately from the servant's user. (i) The master's user. So far as the master's user is concerned, he is not bound to have a motor policy which covers injury to his own employees: see s. 36 (1) (b) (i) of the Act. The reason is, no doubt, because his responsibility to his own employees is discharged by his contribution to the National Insurance Fund or by his employers' liability policy. (ii) The servant's user. So far as the servant's user is concerned, there must, I think, be a policy in force which covers him in case of injury to his fellow servants. The section says that it is not lawful for him to use a motor vehicle on the road unless there is in force, in relation to the user by him, such a policy of insurance against third-party risks as complies with the Act. When you are considering the user by him, the fact that he is a servant is irrelevant. His user must be covered just the same as if he were not a servant. The policy must cover his user of the vehicle, no matter whom he runs down. It makes no difference that he runs down a fellow servant. He must be covered for that risk. (iii) The master's causing or permitting. The section also makes it an offence to " cause or permit any other person " to use a motor vehicle on the road unless there is in force, in relation to the user by that person, such a policy of insurance as complies with the Act. When that section is applied to the use by a servant, it is plain that a master must not cause or permit his servant to use the lorry, unless there is in force, in relation to the servant's user, a policy which complies with the Act; that is, a policy such as I have described under (ii) above, which covers injuries to his fellow servants. This means that an employer's motor policy, in order to comply with the Act, should be extended so as to cover cases where his servants, whilst driving in the course of their employment, cause injuries to others, including their fellow servants.

I appreciate that in *Lees* v. *Motor Insurers Bureau* (17) ([1952] 2 All E.R. 511), LORD GODDARD, C.J., held that a servant need not be covered for injury to his fellow servants: but he seems to have approached the case on the footing that, in such a case, there was only user by one person, namely, the master, and that, so long as there was a policy in force in relation to the master's user, the Act was satisfied. I am quite clear, however, that, in addition to the user by the master, there is at the same time a user by the servant. Under the Act there must be a policy in force in relation to the servant's user also and this must cover fellow servants. The authority of *Lees* v. *Motor Insurers Bureau* (17) is greatly impaired by the fact that, when an appeal was brought to this court, the bureau did not resist it, but preferred to pay the widow her full claim and costs; I do not think that the decision in *Lees* v. *Motor Insurers Bureau* (17) was correct.

What is then the position? When the plaintiffs sent the defendant out with his lorry, they ought to have seen that there was in force a policy which covered his user of it in respect of claims by anyone, including his fellow servants. The Act required that the defendant should be insured against this very risk. It would have been unlawful for the plaintiffs to send him out uncovered. It was a necessary implication in his contract of employment that the plaintiffs would not ask him to do anything unlawful, and thus it was implied that the plaintiffs would see that his user was covered by insurance. That means that he would not be called on personally to pay.

I do not stop to consider whether the plaintiffs did fulfil their obligation in this case. There is much to be said for the view that the motor policy did cover their servants in respect of injuries to fellow servants. The wording of the policy is ambiguous, but it might well be construed so as to give the cover which the plaintiffs were bound in law to effect (see *Richards* v. *Cox* (18), [1942] 2 All E.R. 624). Whether the motor policy did or did not cover the son, the plaintiffs cannot claim an indemnity against the defendant when they were under an obligation to see that he was covered.

Counsel for the plaintiffs, however, submitted that all this discussion about the Road Traffic Act, 1930, was beside the mark, because this particular accident did not occur on a road but in a yard. I do not think that it can be put on one side in this fashion. Counsel for the defendant, I think, gave the correct answer when he pointed out that, in order to comply with the Act, the motor policy had to cover " injury to any person caused by or arising out of the use of the vehicle on a road " (see s. 36 (1) (b)). The injury to the father was not caused by the use of the lorry on a road, but it did, I think, arise out of it. The lorry was used for transport on roads and, in the ordinary course of its work, it had to pull into yards and forecourts, and so forth, so as to load and unload. Many accidents may occur whilst so doing. It would be very strange if there was no obligation to insure the lorry during these incidental operations. If an accident happened whilst it was backing from a public road into a private drive, so as to turn, the injury would clearly arise out of the use of the vehicle on a road. So also if it is backing from a main road into a private yard so as to load or unload; and that is this case. I agree that, if the lorry was being used for something unconnected with road transport, as, e.g., if it was taking fodder to animals across a field, there would be no need to insure it. When it is engaged, however, in operations incidental or ancillary to a journey on a road, then any injury during those operations arises out of the use of the vehicle on a road and must be covered by insurance. It seems that the insurance companies accept this view, because I notice that all motor policies in common form cover the use of motor vehicles anywhere, not only on a road, but also in a yard or elsewhere. Any other view would make a deplorable gap in our system of compulsory insurance.

My conclusion is that the plaintiffs were bound under the Act to insure the defendant in regard to this injury to the father, and being so bound they cannot claim indemnity from the defendant now. In my opinion, the appeal should be allowed; in the first action on the ground that it was premature; in the second action (i) on the ground that a master, who has himself recovered indemnity from his insurers, cannot go on to recover indemnity from his servants; (ii) on the ground that, under the Road Traffic Act, 1930, the plaintiffs were bound to insure the defendant against this injury to his father.

BIRKETT, L.J.: I have come to a different conclusion from the one expressed in the judgment of my Lord to which we have just listened, and it is scarcely necessary to say that I differ from him with diffidence and regret. This appeal raises some questions of great interest and great difficulty. The defendant and his father were both employed by the plaintiffs. On Jan. 26, 1949, the defendant drove a Bedford lorry belonging to the plaintiffs into the yard of a slaughter-house off the Romford Road, in order to collect some material for the plaintiffs. The defendant's father accompanied him as a part of his duty with the plaintiffs, and whilst the son was backing the lorry, he ran into and injured the father.

On Jan. 29, 1953, McNair, J., awarded the father £1,600 damages and costs against the plaintiffs because of the negligence of the defendant, but found the father one-third to blame. The plaintiffs had two policies of insurance which are material to this appeal, the first being an employers' liability policy covering them for personal injuries to their servants arising out of the employment; and quite clearly the liability to the father was covered by this policy. The second policy was a motor vehicle policy which covered the plaintiffs for all sums they might become liable to pay for death or bodily injury to any person, caused by or arising out of the use of the vehicle, but excluding persons in the employment of the plaintiffs; but an extension was made in the case of a person in the employment of the plaintiffs who was driving the vehicle for the purposes of the plaintiffs. This extension covered the defendant if he was injured when driving the lorry, but it is contended that it did not avail to cover him for liability to fellow servants injured by his default.

On Jan. 23, 1953, some six days before the trial of the father's action, a writ was issued in the name of the plaintiffs, claiming an indemnity or contribution from the defendant for any damages the plaintiffs might have to pay to the father because of the defendant's negligence.

Now, by condition 2 of the Lloyd's employers' liability policy, the underwriters were allowed

> "to prosecute in the name of the assured for their own benefit any claim for indemnity or damages or otherwise, and shall have full discretion in the conduct of any proceedings, and in the settlement of any claim, and the assured shall give all such information and assistance as the underwriters may require."

It was by virtue of this clause that the writ was issued, and it was issued without consultation with the plaintiffs. I do not think this contributes anything to the solution of the legal problems in the present appeal, but a word or two perhaps might be said on what is a somewhat unusual state of affairs. By entering into a policy of the kind we are considering, containing the condition which I have recited, the master delivers himself into the hands of the underwriters completely. His servant may have been in his employment for many years and rendered him loyal and devoted service; yet, if he were to be found guilty of negligence, for which the master was in law responsible, and the underwriters had paid the damages under the master's policy, the underwriters could sue the servant in the master's name, although the master himself would never have dreamt of doing so; and the underwriters could recover damages which might conceivably ruin the servant completely. The underwriters would then have received the premium on the policy from the master, and the damages which they had paid on the master's behalf from the servant. I cannot but think that, when the premium on the policy was fixed, it was fixed without any thought of obtaining damages from the servant. This view receives some support from the fact that until recently no such action as the present one appears in the law reports.

In *Semtex, Ltd.* v. *Gladstone* (14), FINNEMORE, J., dealt with the case of a servant being sued by his master, and referred to the earlier case of *Digby* v. *General Accident Fire & Life Assurance Corpn., Ltd.* (4), where Miss Merle Oberon, the actress, sued her own chauffeur and recovered £5,000 damages against him. The House of Lords decided in that case that the policy of insurance taken out by Miss Oberon protected the chauffeur also; but the right of the master to sue the servant was not doubted. In *Semtex, Ltd.* v. *Gladstone* (14), FINNEMORE, J., said ([1954] 2 All E.R. at p. 207):

> "The next question is whether the master can sue the servant if the servant has not directly injured the master, or his property, but has injured other people in such a way that the master is called on, as being responsible for the torts of the servant, to pay large sums of money. The principle, which I believe to be the true principle, is summarised in SALMOND ON THE LAW OF TORTS (11th Edn.), p. 92: 'It would seem clear on principle that in all cases of true vicarious liability the person held vicariously liable for the tort of another should have a right of indemnity as against that other. Thus, a master who has paid for the negligence of his servant should be able to sue that servant for indemnity. That this is generally so cannot be doubted, provided that the negligence of the employer himself or one of his other servants has not contributed to the damage'."

It is agreed that when the first writ in this action was issued and served the underwriters had paid nothing under the policy. It was submitted that that fact disables them from exercising their rights of subrogation; but condition 2 of the policy, which I have recited, gives to the underwriters a contractual right as there set out, and in those circumstances the underwriters do not need to rely on their rights, other than the contractual rights under the policy. In so far as the claim was made under the Law Reform (Married Women and Tortfeasors) Act, 1935, *Wimpey's* case (12) in 1953 decided that the claim of the plaintiffs under that Act could not arise until they had either admitted their liability or been found liable.

When the appeal first came before this court, it was felt desirable to allow a second action to be brought and consolidated with the first action, so that the appeal should not be decided on a mere preliminary technical point. In view of the decision in *Wimpey's* case (12), I am of opinion that the writ in the first action was premature in so far as the writ was based on the Act of 1935. But perhaps the most important question in the case is whether the claim of the plaintiffs as set out in paras. 8 and 9 of the statement of claim can be sustained. That is a claim for damages for breach of contract based on the implied term in the contract of service made between the plaintiffs and the defendant, that the defendant would drive the plaintiffs' lorries with reasonable care and skill. If that claim can be sustained, then the claim cannot be dismissed as premature, because the breach of contract alleged took place on Jan. 26, 1949. But can the claim be sustained?

It is submitted that the plaintiffs and the defendant are to be regarded as joint tortfeasors in law, and, apart from statute, there can be no contribution between joint tortfeasors. In *Semtex, Ltd.* v. *Gladstone* (14), FINNEMORE, J., said ([1954] 2 All E.R. at p. 208):

> " For some reason which I have never been quite able to understand, the master who is vicariously responsible for his servant is referred to, and, apparently, treated, as a joint tortfeasor . . . I could never see why an employer, whose only liability is the vicarious liability of being responsible for what his servant does, should be called a joint tortfeasor, which should mean a person who took some part in the tort which is the subject of the action."

In *The Koursk* (11), SCRUTTON, L.J., said ([1924] P. at p. 155):

> " The substantial question in the present case is: What is meant by 'joint tortfeasors'? and one way of answering it is: 'Is the cause of action against them the same?' Certain classes of persons seem clearly to be 'joint tortfeasors': The agent who commits a tort within the scope of his employment for his principal, and the principal; the servant who commits a tort in the course of his employment, and his master . . . These seem clearly joint tortfeasors; there is one tort committed by one of them on behalf of, or in concert with another."

SARGANT, L.J., said (ibid., at p. 159):

> " And the discussion in SALMOND ON TORTS (5th Edn.), p. 84, is to much the same effect. Stress is laid there on the feature that there must be responsibility for the same action, the imputation by the law of the commission of the same wrongful act to two or more persons at once. The examples given are under three heads: agency, vicarious liability and common action."

It is true that in SALMOND ON THE LAW OF TORTS (11th Edn.), at p. 92, there is a difference not only from the fifth edition, but also from the tenth edition as quoted by SINGLETON, L.J., in *Jones* v. *Manchester Corpn.* (1) ([1952] 2 All E.R. at p. 130).

In the pleadings in the present action, the plaintiffs, in paras. 8 and 9 of the statement of claim, pleaded that it was an implied term of the contract between the plaintiffs and the defendant that the defendant should carry out his duties with reasonable care and skill and that he did not do so, and in consequence the plaintiffs suffered damage; and in the alternative they claimed damages from the defendant for negligence or breach of contract. This was the ground which appealed to HODSON, L.J., in *Jones* v. *Manchester Corpn.* (1) and to FINNEMORE, J., in *Semtex, Ltd.* v. *Gladstone* (14). The damages would be the £1,600 and the costs the plaintiffs had been ordered to pay to the father, and this would in fact be an indemnity paid by one joint tortfeasor to another, whatever name was given to it. The question is: Is that permissible?

Merryweather v. *Nixan* (19) (1799) (8 Term Rep. 186) appeared to have decided that one joint tortfeasor could not get either an indemnity for the whole or contribution for any part of any sums he had paid if he had been sued to judgment alone. The note on p. 172 of SIR PERCY WINFIELD'S LAW OF TORT (5th Edn.), speaking of *Merryweather* v. *Nixan* (19), reads:

> " (1799) 8 T.R., 186: a decision of LORD KENYON, C.J., which was much criticised later both in and out of the courts . . . but mainly because the Chief Justice was regarded as having decided that there *never* can be contribution among joint tortfeasors, although he certainly did not go so far as that.

> In 1894, the House of Lords thought that it was too late to uproot the rule from English law, though they refused to force it upon Scots law, Lord Herschell, L.C., regarding it as destitute of any principle of justice, or equity, or even of public policy."

The language of Lord Herschell, L.C., is taken from *Palmer* v. *Wick & Pulteneytown Steam Shipping Co.* (20) ([1894] A.C. at p. 324):

> "Much reliance was placed by the learned counsel for the appellant upon the judgment in the English case of *Merryweather* v. *Nixan* (19). The reasons to be found in Lord Kenyon's judgment, so far as reported, are somewhat meagre, and the statement of the facts of the case is not less so. It is now too late to question that decision in this country; but when I am asked to hold it to be part of the law of Scotland, I am bound to say that it does not appear to me to be founded on any principle of justice or equity, or even of public policy, which justifies its extension to the jurisprudence of other countries. There has certainly been a tendency to limit its application even in England. In the case of *Adamson* v. *Jarvis* (21) (1827) (4 Bing. 66) Best, C.J., in delivering the judgment of the court, referred to the case of *Philips* v. *Biggs* (22) (1659) (Hard. 164), which he said was never decided; 'but the Court of Chancery seemed to consider the case of two sheriffs of Middlesex, where one had paid the damages in an action for an escape, and sued the other for contribution, as like the case of two joint obligors'. He then proceeded as follows: 'From the inclination of the court in this last case, and from the concluding part of Lord Kenyon's judgment in *Merryweather* v. *Nixan* (19), and from reason, justice, and sound policy, the rule that wrongdoers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act'. If the view thus expressed by the Court of Common Pleas be correct (and I see no reason to dissent from it), the doctrine that one tortfeasor cannot recover from another is inapplicable to a case like that now under consideration."

The severity of the criticism is largely due to the belief that Lord Kenyon was asserting that in no circumstances whatever could there be any contribution between joint tortfeasors, which now appears to have been a misreading of his judgment. It seems fairly clear, also, that the rule as laid down by Lord Kenyon was the application to the facts of the much wider rule, that, if an act is manifestly unlawful, or the doer of the act knows it to be unlawful, he cannot maintain an action for contribution to or indemnity against his liability arising therefrom. The plaintiffs in this case knew nothing of the acts of the defendant; they knew he drove their lorries as the necessities of the business demanded; but the manner in which he drove them was a thing over which they could exercise no control whatever. Save that in law they were to be held vicariously liable for his acts of negligence when driving their lorries, they did not share in the commission of any tort in any real sense of the word. The negligence which resulted in the injury to the father of the defendant was negligence to which the plaintiffs gave neither their authority nor their assent and of which in fact they had no knowledge whatever.

So long ago as 1827, Best, C.J., in *Adamson* v. *Jarvis* (21), said (4 Bing. at p. 73) that the rule in *Merryweather* v. *Nixan* (19):

> ". . . is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act."

In *Semtex, Ltd.* v. *Gladstone* (14), Finnemore, J., said he preferred Warrington, L.J.'s way of looking at the problem, as Warrington, L.J., expressed it in *Weld-Blundell* v. *Stephens* (10). Warrington, L.J., said without any qualification that the master could recover from the servant by an action at law. The words of Warrington, L.J., were these ([1919] 1 K.B. at p. 536):

> " . . . it may well be that if a servant by his negligent act inflicts an injury on a third person who recovers damages therefor from the master, the latter may recover the amount from the servant in an action against him for breach of his duty. But in such a case the right of action against the master and his legal liability themselves result from the servant's negligent act, and but for that act would not have existed."

In my opinion, the plaintiffs are not precluded from maintaining their action in this case against the defendant merely because in law they are regarded as joint tortfeasors, so that the third party can sue them as being vicariously responsible for the acts of their servant. This question relating to joint tortfeasors loomed large in the discussion of the rights of the plaintiffs in this case, and I have therefore spent a little time in dealing with it, but the question whether it was competent to the plaintiffs to bring an action founded in contract was scarcely more than mentioned. I have had the advantage of reading the judgment of ROMER, L.J., on this point and have considered the cases which are there cited by him in his judgment, and as I agree with his judgment I do not add further words of my own on this point. In my judgment, it was perfectly competent to the plaintiffs to sue their servant for breach of the contract of service.

Several other points were raised in argument and I can deal with them with brevity. I find it impossible to hold that there was an implied term in the contract of service between the plaintiffs and the defendant to the effect that, if the master was fully insured and recovered the amount that he had had to pay because of the servant's negligence, the master would not seek to recover from the servant. I do not think that any such consideration entered their minds. This action is brought by Lloyd's Underwriters in the name of the plaintiffs, who, because of condition 2 in the policy, have no say whatever in the matter. Had it been left to them, I do think that the action would never have been brought.

Some extremely interesting arguments were submitted on the construction of s. 35 of the Road Traffic Act, 1930. The Act became relevant and important in this way: It was submitted that it was an implied term of the contract of service that the defendant should not be required to act unlawfully, and that he should not be asked to drive the lorries for the plaintiffs unless he was covered by insurance giving him the indemnity required by s. 36 (1) of the Road Traffic Act, 1930. The defendant says that he should have been covered in respect of the bodily injury caused to any person by or arising out of the use of the vehicle on a road. " Road " is defined in the Act as meaning any highway and any other road to which the public has access. I confess that this point has caused me great trouble. Is the drive to a private house a road to which the public has access ? Tradesmen's vans, postmen on cycles or in cars, the servants of the local authority dealing with gas, electricity and water, and various other people use the drive, and they are members of the public with access to the road. No great reliance was placed on this aspect of the case, that this yard was a road within the meaning of s. 121 of the Road Traffic Act, 1930, but it was submitted that the injuries to the father of the defendant were not " caused by " the use of the vehicle on the road, but they " arose out of " the use of the vehicle on a road within the meaning of the Act. Put in its crudest form, the argument seems to be that, because it was impossible for the lorry to get to the yard where the accident took place without using a road, therefore the accident in the yard " arose out of " the earlier use of the lorry on the road.

It appears from the evidence of the father of the defendant, given before ORMEROD, J., that the father and son went twice a day to this yard on the business of the plaintiffs, driving down the Romford Road and turning off that road into the yard. It was conceded that when the accident took place, the lorry was not on a road but in the yard, and the negligent backing of the lorry in the yard was the cause of the accident. In the strict use of language, therefore, it is plain that the accident was not " caused by " the use of a vehicle on the road, nor did it " arise out of " the use of the vehicle on the road. Can it be said that, because the vehicle had to be driven along a road to get to the yard, and it was driven along without any accident, but an accident occurred in the yard, that accident " arose out of " the use of the vehicle on the road, that particular user having ceased when the accident took place ? It is true that, if the lorry had never been sent on to the Romford Road, the accident would never have occurred; and in that limited sense it may be said to have arisen out of the use of the vehicle on the road, the driving into the yard being the purpose for which the lorry made use of the road. I think the question whether an accident is " caused by " or " arises out of " the use of a vehicle on a road is a question of fact; and in the present case I take the view that the accident did not arise out of the use of the vehicle on the road. If this view be right, it is not necessary to discuss the interesting and difficult points arising under the application of the Act. My Lord has discussed them with some fullness in his judgment, and they are manifestly of very great importance; but I do not propose to do more on this part of the case than to say that the submission that the slaughter-house yard where the accident took place was not a " road " is, in my opinion, well founded, that the accident was not caused by, nor did it arise out of, the use of the vehicle on a road, and that the points do not therefore arise for decision in the present case.

I do not think that the damages claimed are too remote; they are the direct consequence of the negligence of the defendant, and were caused by the breach of contract to which I referred earlier in this judgment. I cannot think that, because the plaintiffs were insured in this case, that operated as a complete immunity to the defendant from being sued when his own breach of contract had occasioned the damage; and equally I cannot think that there was any implied term of the contract of service which would place on the plaintiffs the duty of insuring the defendant against liability for injuries such as arose in this case when the defendant's father, a fellow servant, was injured in the way described.

The learned judge granted the plaintiffs an indemnity under the provisions of the Law Reform (Married Women and Tortfeasors) Act, 1935. Section 6 (2) of the Act of 1935 gives the court power to exempt any person from liability to make contribution, and it is suggested that this is a proper case in which that discretionary power should be exercised. That discretion must, of course, be exercised judicially, and it should be exercised on the facts of the particular case. Ormerod, J., said in this case that the defendant was not entitled to anything by way of mitigation because the negligence was the negligence of the defendant. It is difficult to see how he could have come to any other conclusion on the facts, and, in my view, it is not open to us to say that on the facts of this case the defendant should be freed from any liability to make contribution. I think Ormerod, J., was right. I have already expressed the diffidence with which I differ from my Lord in a case of some complexity and difficulty; but, giving the case the best consideration I can, I would dismiss both appeals.

ROMER, L.J.: There is no doubt that these actions have been brought at the instance of the underwriters to the employers' liability policy which is held by the plaintiffs, and that the underwriters have at all times been and still are in control of the actions. This fact has given rise to the first preliminary objection which was taken by the defendant before the learned judge and which was relied on when the matter came on before us on appeal from the order made in the first action. This objection is that the underwriters are suing by subrogation to the plaintiffs and that they are precluded from doing so by the fact that they had not paid anything to the defendant's father at the date when the writ in this action was issued. I will assume that this objection is open to the defendant notwithstanding that the apparent plaintiffs are the Romford Ice & Cold Storage Co., Ltd., and that, if the action failed, the defendant would have no rights whatever against the underwriters, but he would have, against the plaintiffs, all the rights and remedies which our procedural law gives to a successful defendant against plaintiffs whose action is dismissed with costs. Even so, it does not appear to me that the objection should prevail. The underwriters admittedly had not paid any money to the defendant's father when these proceedings were instituted, because the liability of the plaintiffs to this employee had not then been established; and accordingly they could not claim to be subrogated to such rights as the plaintiffs possess against the present defendant. It is not necessary, however, for the underwriters to depend in any way on the principle of subrogation, because they have a contractual right under the policy itself to sue in the plaintiffs' name and so far as I know they have brought this action in pursuance of that right and of that alone. In my opinion, therefore, this preliminary objection fails.

The second objection is that the action is premature in that it sought indemnity from the defendant under the Law Reform (Married Women and Tortfeasors) Act, 1935, before the plaintiffs had been held liable to the defendant's father in the action which he had brought against them. The writ in the first action was in fact issued a week or so before the father's action came on for hearing and, accordingly, so far as the present proceedings are based on the Act of 1935, the objection of prematureness must prevail (*Littlewood* v. *George Wimpey & Co., Ltd.* (12)). By their statement of claim, however, the plaintiffs pleaded alternatively that it was an implied term of the defendant's contract of service with the plaintiffs that he should carry out his duties with reasonable care and skill and that they have suffered damage by reason of his failure to do so in the matter of running down his father. If this plea be true in fact and sustainable in law, the action was not, in my opinion, brought prematurely, because the breach of contract arising out of the negligence of the defendant had already occurred. In my judgment, there is little doubt but that the legal implication suggested by the plea is fully warranted. In *Harmer* v. *Cornelius* (2) WILLES, J., in delivering the judgment of the court, said (5 C.B.N.S. at p. 246):

> " When a skilled labourer, artizan or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes—Spondet peritiam artis. Thus, if an apothecary, a watch-maker, or an attorney be employed for reward, they each impliedly undertake to possess and exercise reasonable skill in their several arts . . . An express promise or express representation in the particular case is not necessary. (See also *Jenkins* v. *Betham* (23) (1855), 15 C.B. 168; and *Cuckson* v. *Stones* (24) (1858), 1 E. & E. at p. 257)."

In my judgment, the principle enunciated by WILLES, J., is clearly applicable to the defendant in the present case; for a man who is employed to undertake the responsible work of driving his employers' lorries impliedly promises, in my opinion, as part of his contract of service, that he will drive them with reasonable care and skill.

Did, then, the defendant commit a breach of this implied promise ? Inasmuch as the learned judge has found, on ample material, that the accident to the defendant's father was as to two-thirds due to the negligence of the defendant. this question can, in my judgment, only be answered in the affirmative. Prima facie, therefore, it would seem to me that the plaintiffs are entitled to recover damages from the defendant for breach of contract; and the amount of the damages would normally be the totality of damages and costs which they had to pay to the defendant's father under the judgment which he obtained against them.

It has been suggested, however (and the suggestion has found favour with my Lord, whose judgment I have had the advantage of reading), that the plaintiffs could not sue the defendant for damages in respect of his breach of contract and that their only remedy (if any) was to sue him in tort for negligence. For myself (and I differ from my Lord with natural regret and diffidence) I feel a considerable difficulty in accepting this view. If A makes an agreement (whether express or implied) with B and breaks it, then normally A can be sued by B for such damages as have naturally flowed from the breach; and I can see no reason why B should be deprived of this remedy either on the ground that A is his servant or on the ground that A's promise is of a particular character, namely, to perform his work with reasonable care and skill. In *Harmer* v. *Cornelius* (2), WILLES, J., said (5 C.B.N.S. at p. 247):

> "Misconduct in a servant is, according to every day's experience, a justification of a discharge. The failure to afford the requisite skill which had been expressly or impliedly promised, is a breach of legal duty, and therefore misconduct."

The "legal duty" to which WILLES, J., was there referring is in my judgment referable to, or at all events includes, the contractual obligation with which the learned judge had been dealing in the earlier part of his judgment, and which was indeed the essence of the judgment. So also in *Weld-Blundell* v. *Stephens* (10), WARRINGTON, L.J., said ([1919] 1 K.B. at p. 536):

> "Again it may well be that if a servant by his negligent act inflicts an injury on a third person who recovers damages therefor from the master, the latter may recover the amount from the servant in an action against him for breach of his duty."

In my opinion, the lord justice had in mind and was referring to the duty which the servant owed to his master under his contract of service and not to some duty which the common law imposed on him. In the recent case of *Jones* v. *Manchester Corpn.* (1), HODSON, L.J., founded his judgment on the view that a master can recover damages from a servant for breach of the servant's implied contract to perform his work with reasonable care and skill. I respectfully concur in this view, which commended itself also to FINNEMORE, J., in *Semtex, Ltd.* v. *Gladstone* (14). It may well be that in most cases, if not in all, the master could alternatively sue his servant for negligence, but for myself I can see no sufficient ground for depriving him of a promisee's ordinary remedy of an action for damages for breach of contract. I cannot but think that to recognise the existence of a contract but to exclude an action founded on its breach is to introduce an anomaly into our law which is both unwarranted and confusing. It is, of course, true that many a breach of the servant's implied warranty to exercise care and skill would either cause no damage to the master at all or so little damage that the master would overlook it. These considerations, however, are not confined to contracts of service, but are common to most agreements, and they cannot, as I think, displace the right of the master to sue if the servant's breach occasions him material damage. Subject, therefore, to the point which I will next consider, the plaintiffs were, in my judgment, entitled to found their claim for damages against the defendant in the first action on his breach of contract.

It was further submitted, however, that, even so, the plaintiffs' claim could not succeed because the plaintiffs were co-tortfeasors with the defendant, and tortfeasors cannot have redress or contribution from one another. The first question which arises on this is whether the plaintiffs ought properly to be regarded as joint tortfeasors with the defendant in the act which resulted in injury to the defendant's father. In *Semtex, Ltd.* v. *Gladstone* (14), FINNEMORE, J., said ([1954] 2 All E.R. at p. 208):

> "I could never see why an employer, whose only liability is the vicarious liability of being responsible for what his servant does, should be called a joint tortfeasor, which should mean a person who took some part in the tort which is the subject of the action."

If this question were free of authority, I should be glad to adopt this view, which certainly has some appeal to common sense. It has been authoritatively stated more than once, however (see, e.g., the judgment of SCRUTTON, L.J., in *The Koursk* (11) ([1924] P. at p. 155), that a servant who commits a tort within the scope of his employment and the master who employs him are joint tortfeasors in law and I think, therefore, that it must follow that both the plaintiffs and the defendant must be treated as joint tortfeasors in the present case.

Does it follow, however, that the plaintiffs are precluded by this consideration from suing the defendant for damages ? The general principle which the defendant invokes is certainly supported by venerable authority (see, e.g., *Merryweather* v. *Nixan* (19)), but it is not, in my judgment, a rule of universal application and I confess that, for myself, I feel great difficulty in applying it to the circumstances of the present case. Although the plaintiffs were liable in damages to the defendant's father for the accident which befell him, they themselves were morally blameless in the matter and their liability to the father arose solely from the fact that they were answerable for the negligence of the defendant himself. In these circumstances it would, in my opinion, be a flaw in our law, and against natural justice, to permit the defendant to rely on his own wrongful act as a defence to proceedings for breach of contract. I would only accept such a defence as valid under the guidance of compelling authority, but it appears to me that the current of such authority as was brought to our attention on the point is distinctly the other way.

It seems plain from the passage which I have already cited from the judgment of WARRINGTON, L.J., in *Weld-Blundell* v. *Stephens* (10) ([1919] 1 K.B. at p. 536), that the lord justice thought that a master who had to pay damages to a third party for an injury resulting from his servant's negligence could recover the amount from the servant, and a similar view has been taken in other cases (see, e.g., *Green* v. *New River Co.* (25) (1792) (4 Term Rep. 589); *Semtex, Ltd.* v. *Gladstone* (14), and the judgments of SINGLETON and HODSON, L.JJ., in *Jones* v. *Manchester Corpn.* (1)). The statement of the law in SALMOND ON THE LAW OF TORTS (11th Edn.), p. 92, also supports the view that employers can sue for damages caused to them by their servants' negligence notwithstanding their own vicarious liability to the person whom the servant injured. Moreover, BEST, C.J., in delivering the judgment of the court in *Adamson* v. *Jarvis* (21) said (4 Bing. at p. 72):

> " . . . from the concluding part of LORD KENYON'S judgment in *Merryweather* v. *Nixan* (19), and from reason, justice, and sound policy, the rule that wrongdoers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act ",

which certainly cannot be presumed of the plaintiffs in the present case in relation to the running down of the defendant's father. I have accordingly come to the conclusion that the plaintiffs' action in the present case, based on breach of contract, is not defeated by the suggested principle that there can be no contribution between joint tortfeasors.

It was further suggested, however, that, even on the assumption that the plaintiffs could sue in contract, the first action was premature in that the writ was issued before the liability of the plaintiffs to the defendant's father had been established and damages awarded against them. It does not appear to me that this contention is sound. If A believes that B has committed a breach of contract, he can sue for damages at once. If he fails to establish a breach of contract by B, he would, of course, lose the action. In that event, it could be said that the action should never have been brought at all; but, whether the action succeeds or fails, I am unable to see how it could be said that it had been brought too soon, merely because A was unable to quantify his damages at the date when he issued his writ or because, when the action came to trial, he recovered no more than nominal damages. I am accordingly of opinion that the second preliminary objection also fails.

A The next point with which I should like to deal is the defendant's contention based on the Road Traffic Acts. This contention was formulated in the re-amended defence as follows:

> "It was an implied term of the defendant's employment that he should not be required by the plaintiffs to do anything unlawful and in particular B that he should not be required to drive unless there was in force in relation to his user of the vehicle such a policy of insurance as would provide him with the indemnity which s. 36 (1) of the Road Traffic Act, 1930, requires."

So far as is relevant for present purposes, the policy which is required by that sub-section is one which insures the assured in respect of any liability which may be incurred by him in respect of the bodily injury to any person caused by C or arising out of the use of a vehicle on a road; and by s. 121 "road" is defined as meaning any highway and any other road to which the public has access. The accident to the defendant's father occurred in a yard situate within slaughter-house premises, and counsel for the defendant conceded that there was no evidence to show that the yard was a road within the meaning of this definition. He argued, however, that the accident to the father, while not "caused by" the D use of a vehicle on a road, "arose out of" such use. From that hypothesis he developed his contention that the accident was one in respect of which third-party insurance was required by the Act and that, as the plaintiffs had not taken out the necessary policy on the defendant's behalf, they caused him to perform an illegal act and are thereby disabled from founding any claim against him on the ground that he performed that act negligently.

E I am unable to accept the suggestion that the accident to the defendant's father "arose out of" the use of the defendant's lorry on a road. The argument to the contrary is, as I understand it, that the lorry could not have got to the yard if it had not been used on a road for the purpose of getting there and that, accordingly, the accident in the yard arose out of that use. It appears to me that in order to arrive at this result the language of s. 36 (1) has to be stretched beyond F permissible limits. An accident is caused by the use of a vehicle on a road if it runs over a pedestrian at a zebra crossing; an accident arises out of the use of a vehicle on a road if it skids off the road and injures a pedestrian who is walking on the pavement. If, however, it can be said that the accident now in question arose out of the use by the lorry of a road for the purpose of getting to the yard, the same thing could, I suppose, have been said if the accident had happened G after the lorry had been in the yard for a week. I cannot accept counsel's contention on this point and it follows that the interesting arguments which we heard on the supposition that the plaintiffs were in breach of some duty to the defendant under the Road Traffic Acts do not, in my opinion, arise; and for myself I would prefer to express no opinion on them.

It was alternatively argued that, in any case, it was an implied term of the H defendant's contract of service with the plaintiffs that they should insure him against liability for injuring a fellow servant, even if no such insurance were required by law. This seems to me to be an untenable proposition, for it would result in imposing on employers an obligation to provide insurance cover for their servants in respect of any negligence by the servants in their work which results in injury to third parties. No authority was cited to support so extensive I a proposition and it cannot, in my judgment, be accepted.

If I am right in the conclusions which I have so far expressed, what defences remain open to the claim for damages against the defendant for breach of contract? It was said that the damages claimed were too remote. I do not think they were, for they flowed directly from the defendant's breach of his obligation to carry out his duties with reasonable care and skill. It was alternatively contended that it was an implied term of the defendant's employment that he should not be sued by the plaintiffs for damage arising from his negligence if they were insured in respect of such damage. There is no question but that a man can sue a servant who, by his negligence, causes damage to the master.

> " . . . an employee is generally as much liable to his employer if he causes his employer damage by negligence as is anyone else . . . "

(per Lord Wright in *Digby* v. *General Accident Fire & Life Assurance Corpn., Ltd.* (4), [1942] 2 All E.R. at p. 329). I cannot think that, although this liability exists in general, it is excluded by implication if the employer is insured. I do not know whether it is suggested that it would still be excluded even if the servant was himself insured. In my opinion, the liability to which Lord Wright referred exists whether the master is insured or not.

On the question generally as to the reluctance with which (so it was suggested) the courts should entertain an action by a master against his servant in respect of damage caused to the employer by the negligence of the servant in relation to third parties, I would venture to make one or two observations. In the accident which led eventually to *Digby's* case (4), Miss Merle Oberon suffered injuries from the negligent driving of her car by her chauffeur, in respect of which she recovered no less than £5,000 damages against him; and I can see no reason in logic why the law should give an employer redress if the damage which he suffers from his servant's negligence is physical but deny it if the damage is financial. Further, I would again cite a passage from the judgment of Finnemore, J., in *Semtex, Ltd.* v. *Gladstone* (14) and respectfully adopt it as my own. He said ([1954] 2 All E.R. at p. 212):

> " That an employee who is negligent and causes grave damage to his employers should be heard successfully to say that he should not make any contribution to the resulting damage is a proposition which does not, in the least, commend itself to me, and I do not see why it should be so. Justice, as we conceive justice in these courts, requires that the person who caused the damage is the person who must in law be called on to pay damages arising therefrom."

For myself, I agree with these observations of the learned judge. It is not, in my opinion, in the public interest that workmen should assume that, whoever else may be called on to compensate the victims of their wrongdoing, they themselves will be immune. I say this for two reasons. First, it is not in accord with contemporary thought that any section of the public should be free from any liability to which the people as a whole are subject. Secondly, such freedom would tend still further to diminish that sense of responsibility which all should feel towards one another, but which can scarcely be regarded as an outstanding characteristic of modern life.

For the reasons which I have stated, I have arrived at the conclusion that the appeal in the first action should be dismissed. In the second action (an appeal which, by the defendant, was by consent treated as being before us) the plaintiffs are also entitled, in my judgment, to succeed on the same grounds; but in the second action they can also rely, and they do rely, on the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (2), and, in my judgment, the learned judge arrived at a right conclusion in granting them an indemnity under the Act on the ground, as stated in his judgment, that

> " the negligence was the negligence of the defendant and in those circumstances he is not entitled to anything by way of mitigation."

It follows that for myself I would dismiss the second appeal also.

Appeals dismissed.

Solicitors: *Sidney Torrance & Co.* (for the defendant); *J. F. Coules & Co.* (for the plaintiffs).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

LUTTMAN *v.* IMPERIAL CHEMICAL INDUSTRIES, LTD.

[LIVERPOOL ASSIZES (Jones, J.), June 16, 1955.]

Factory—Place used for purpose incidental to processes carried on in factory—Canteen for use of people employed in factory—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6 *c.* 67), *s.* 25 (2), *s.* 151 (6).

The plaintiff was employed by the defendants as a cleaner and worked at a building which was a canteen used for feeding and entertaining people working at the defendants' premises which were a factory. The canteen was a new building within the precincts of the general factory premises. In June, 1954, the plaintiff in the course of her employment went down a staircase in the canteen leading to the basement. She slipped, fell and sustained injury. The staircase had no hand-rail. In an action against the defendants for damages for breach of statutory duties under, among other sections, s. 25 (2) of the Factories Act, 1937, for failing to provide a substantial hand-rail, the defendants contended that the canteen was not part of the factory by reason of s. 151 (6)* of that Act,

Held: the Factories Act, 1937, s. 151 (6) did not exclude the canteen from being a part of the factory, because the canteen was not solely used for some purpose other than the processes carried on in the factory; the canteen was part of the factory, as it was used for feeding and entertaining people working in the factory which was a purpose incidental to the processes of manufacture carried on in the factory, and the defendants were in breach of s. 25 (2) of the Factories Act, 1937.

London Co-operative Society, Ltd. v. *Southern Essex Assessment Committee* ([1941] 3 All E.R. 252) applied.

[For the Factories Act, 1937, s. 5, s. 25 (2), s. 26, and s. 151 (6), see 9 HALSBURY'S STATUTES (2nd Edn.) 1004, 1017, 1018, and 1115.]

Cases referred to:

(1) *London Co-operative Society, Ltd.* v. *Southern Essex Assessment Committee,* [1941] 3 All E.R. 252; [1942] 1 K.B. 53; 111 L.J.K.B. 113; 165 L.T. 409; 105 J.P. 399; 2nd Digest Supp.

(2) *Thorogood* v. *Van Den Berghs & Jurgens, Ltd.,* [1951] 1 All E.R. 682; 115 J.P. 237; sub nom. *Thurogood* v. *Van Den Berghs & Jurgens, Ltd.,* [1951] 2 K.B. 537; 2nd Digest Supp.

Action.

The plaintiff, Mrs. Beatrice Luttman, who was employed by the defendants, Imperial Chemical Industries, Ltd., as a cleaner at their premises at Kirkby, Lancashire, claimed damages against the defendants for negligence and for breaches of their statutory duty under the Factories Act, 1937. The building in which the plaintiff was employed was a canteen, newly built in 1953. It was within the " close, curtilage, or precincts " of the defendants' premises at Kirkby which were a factory within the meaning of that term in the Factories Act, 1937, s. 151. At about 11 a.m. on June 10, 1954, the plaintiff, after finishing her cleaning work, went down a staircase to the basement of the building in order to put away her cleaning materials. There was no hand-rail to the staircase. The plaintiff, who was carrying a bucket and mop, slipped and fell as she was going down the staircase, and hurt the lower part of her back. In her statement of claim she alleged that the premises (including the canteen) were a factory; that the defendants were in breach of s. 25 (2) of the Factories Act, 1937, in that no hand-rail was provided for the staircase; and that there were also breaches of s. 5 and s. 26 of the Act, in that the premises were not properly lit and the staircase did not provide a safe means of access. The plaintiff further alleged that the defendants were negligent in failing to provide and maintain a safe working place for the plaintiff. The defendants contended, among other things, that the canteen was not part of the factory, and that, therefore, the provisions of the Factories Act, 1937, did not apply.

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* The terms of s. 151 (6) are printed at p. 482, letter C, post.

Edward Wooll, Q.C., and *A. D. Pappworth* for the plaintiff.
H. I. Nelson, Q.C., and *C. M. Clothier* for the defendants.

JONES, J., stated the facts and said: The defendants admit that their general premises were a factory, but they say that this canteen was not part of the factory and that the Factories Act, 1937, does not apply to the canteen. For that they rely on s. 151 (6) of the Act, which provides:

> " Where a place situate within the close, curtilage, or precincts forming a factory is solely used for some purpose other than the processes carried on in the factory, that place shall not be deemed to form part of the factory for the purposes of this Act, but shall, if otherwise it would be a factory, be deemed to be a separate factory."

The language of that sub-section certainly suggests that some building like a canteen might very well not be part of the factory, because, prima facie, it might be said that the canteen is not used solely for the processes of manufacture carried on in the factory. I was referred, however, to *London Co-operative Society, Ltd.* v. *Southern Essex Assessment Committee* (1) ([1941] 3 All E.R. 252), a decision under the Rating and Valuation (Apportionment) Act, 1928. In that case, which concerned the canteen of a laundry, the Divisional Court had to consider the words of s. 149 (4) of the Factory and Workshop Act, 1901, which were similar to the words of s. 151 (6) of the Act of 1937. The effect of that decision, which I need not go into in any detail, is that the Divisional Court held that the canteen was not a place which was solely used for some purpose other than the manufacturing process or handicraft carried on in the laundry.

Having regard to that case and to the fact that the decision in that case was approved and applied in *Thorogood* v. *Van Den Berghs & Jurgens, Ltd.* (2) ([1951] 1 All E.R. 682), it seems to me quite impossible that I should come to any conclusion other than that the canteen in the present case was not solely used for some purpose other than a process carried on in the factory, and that the use of the canteen for the purposes of feeding and entertaining the people working in the factory was a purpose that was incidental to the processes of manufacture carried on at the factory. In those circumstances, therefore, I have come to the conclusion that the canteen was part of the factory. I should not hold that it was a separate factory. In view of the case to which I was referred, I do not think that the process which was carried on there could be regarded as a process carried on in a factory, but the canteen is part of the factory, in my view, because it is not solely used for some purpose other than a process carried on in the factory. That being so, I have to hold that the Factories Act, 1937, applied to this building and, therefore, I have to consider whether there has been any breach of the provisions of the Act referred to in the statement of claim. The conclusion to which I have come is that there was a breach of s. 25 (2), because the sub-section provides:

> " For every staircase in a building or affording a means of exit from a building, a substantial hand-rail shall be provided and maintained . . . "

[HIS LORDSHIP held that the defendants were not in breach of s. 5 or of s. 26 of the Act, and that there was no negligence on their part. He awarded the sum of £220 as damages to the plaintiff, £70 of that sum being special damages.]

Judgment for the plaintiff.*

Solicitors: *E. Rex Makin & Co.*, Liverpool (for the plaintiff); *J. W. Ridsdale* (for the defendants).

[*Reported by* M. DENISE CHORLTON, *Barrister-at-Law.*]

Re PELLY (*deceased*).
RANSOME AND OTHERS *v.* PELLY AND ANOTHER.

[CHANCERY DIVISION (Wynn-Parry, J.), October 25, 1955.]

Settled Land—Repairs—Expenditure by tenant for life—Recoupment out of capital money—Improvements—Maintenance claim in respect of improvement under Income Tax Acts—Allowances received by tenant for life—Whether trustees entitled to deduct allowance from capital moneys—Settled Land Act, 1925 (15 *&* 16 *Geo.* 5 *c.* 18), *s.* 75, *s.* 107.

In exercising his powers under the Settled Land Act, 1925, s. 75, a tenant for life is by virtue of s. 107 acting as a trustee for all beneficiaries under the settlement. If therefore at his direction the trustees of the settlement apply capital moneys in payment for an improvement authorised by the Act to be paid for out of capital without repayment out of income, then, on the assumption that the capital money so applied does not fall to be regarded for the purpose of the Income Tax Acts either as his income or as a receipt of a trade carried on by him, he is accountable to the trustees for so much of any sum allowed to him under the Income Tax Acts on a maintenance claim as is referable to capital money expended on the improvement. The tenant for life is under an obligation to make such a maintenance claim whenever he is entitled to do so under the Income Tax Acts.

Dictum of HARMAN, J., in *Re Sutherland Settlement Trusts* ([1953] 2 All E.R. at p. 32) applied.

[**Editorial Note.** The proposition for which this decision is authority is limited to improvements whose cost is not liable to be replaced out of income. Primarily these are improvements within Part 1 of Sch. 3 to the Settled Land Act, 1925. The principle seems, however, to apply equally in relation to such expenditure on improvements within Part 2 of that schedule as is not required to be reimbursed out of income. On the obligation of the beneficiary, the tenant for life, to account for sums recovered from the Revenue, this case may be compared with the line of authority of which *Re Pettit* ([1922] 2 Ch. 765), *Re Kingcome* ([1936] 1 All E.R. 173), and *Re Lyons* ([1952] 1 All E.R. 34), are examples.

As to the application of capital money in payment for improvements under the Settled Land Act, 1925, see 19 HALSBURY'S LAWS (2nd Edn.) 389, para. 798.

For the Settled Land Act, 1925, s. 75, s. 107, see 23 HALSBURY'S STATUTES (2nd Edn.) 172, 229.]

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* On Oct. 3, 1955, an appeal by the defendants to the Court of Appeal was dismissed by consent.

Case referred to:

(1) *Re Sutherland Settlement Trusts*, [1953] 2 All E.R. 27; [1953] Ch. 792; 3rd Digest Supp.

Adjourned Summons.

The plaintiffs sought by originating summons a determination whether, on the true construction of the Settled Land Act, 1925, and in particular of s. 73 and s. 75 thereof, the trustees in applying capital money in payment for an improvement authorised by the said Act were entitled, on the assumption that the capital money so applied did not fall to be regarded for the purposes of the Income Tax Acts either as income of the tenant for life or as a receipt of the trade of farming carried on by him, to deduct and retain out of capital money so applied, money representing the whole, or any, and if so what part, of the relief from income tax recovered or recoverable by the tenant for life in respect of the expenditure incurred or to be incurred by him. The summons raised other questions also, but this report is confined to the one question.

By his will dated Feb. 22, 1940, and a codicil thereto dated Oct. 4, 1940, the testator Frederick Raymond Pelly, settled certain freehold property on trust for the first defendant for life with remainder in the events which had happened to the second defendant for life. The testator died on Oct. 16, 1940. Since October, 1940, the tenant for life had occupied the mansion house and had farmed the land comprised in the estate. In the course of his occupation and farming he had carried out improvements which came within the Settled Land Act, 1925, s. 73 (1) (iv) and had incurred losses.

Denys B. Buckley for the trustees of the settlement, the plaintiffs.

D. H. McMullen for the tenant for life, the first defendant.

A. W. L. Franklin for the tenant for life in remainder, the second defendant.

WYNN-PARRY, J.: The next question with which I am concerned on this summons raises an interesting problem which does not appear previously to have come before the court for consideration. The problem may be expressed in this way: suppose the tenant for life desires that capital moneys should be expended on an improvement of such a nature as will not result in his being asked to repay the amount expended, and after the payment is made the tenant for life becomes entitled to put in a maintenance claim which results or would result in relief being given to him, is he to be regarded as accountable to the trustees for such part of the amount by which he benefits under the maintenance claim as is referable to the amount spent on the improvement?

The question does not appear to be covered by authority, but it has been pointed out by HARMAN, J., in *Re Sutherland Settlement Trusts* (1) ([1953] 2 All E.R. 27), that the effect of s. 75 of the Settled Land Act, 1925, is that in giving a mandate to the trustees under that section the tenant for life is acting as trustee, and must have regard, as trustee, not only to the interests of himself and his assigns, but to the interests of the remainderman. That was a case in which the tenant for life made payment for the improvements without any expectation of being recouped. Subsequently, as a result of an alteration in the law, it was thought that he might be able to apply successfully for recoupment. In the course of his judgment HARMAN, J., said this ([1953] 2 All E.R. at p. 32):

> "It is said that it is not discretionary because the Duke has, in exercise of his powers under s. 75, directed the trustees to apply the capital money in this way, but, as I have already pointed out, the Duke, in giving that direction, was acting as a trustee for all parties, and, in my view, he cannot properly give a direction which puts money into his own pocket and the pockets of his own assign in respect of farmhouses and other property which he is himself occupying, and the repairs to which would be no good to the inheritance whatever, but merely to relieve his own pocket. It seems to me that as a trustee those are not directions which he can properly give. He can

> ask the trustees whether they will pay, and they must have a discretion whether they will or not, and, in my judgment, if that applied, they ought to decline, as they have done. I would come to the conclusion in this particular case, if the repairs be within the schedule and if the Duke purports to direct them to be done, that he is allowing his duty as a trustee, he having a duty towards the remaindermen, to be overridden by his interest, which is to have them done at capital expense in order that he as tenant of the farm may be better off. I, therefore, think it is not a case in which he can give such a direction."

That passage is not directly in point in this case, but it appears to me that the underlying principle is one which ought to be applied here. Once it is appreciated that under s. 107 of the Settled Land Act, 1925, the tenant for life in exercising any power under the Act is directed to have regard to the interests of all parties entitled under the settlement, and that in relation to the exercise of those powers he is to be deemed to be in the position and to have the duties and liabilities of a trustee for those parties, then I do not see how he can consistently retain the benefit of the whole of the money spent on the improvement and the benefit of any maintenance claim which comprises the expenditure of those moneys. If he were allowed to do so he would obviously be retaining a profit and, being a trustee, it is quite clear that he ought not to be allowed to do that. I think, therefore, that in answer to this question I should say that he must be accountable for any money paid or allowed on a maintenance claim to the extent to which the money so allowed is referable to the money expended on the improvement.

It must follow from the reasoning which has led me to the answer which I have given that there is a definite obligation on the tenant for life to make the necessary maintenance claim whenever he is entitled to do so under the Income Tax Acts. If that were not the case it would leave the whole question to the whim of the tenant for life; but once it is appreciated that he is a trustee then I think that it is only logical that there should be imposed on him every obligation, the enforcement of which will bring into the hands of the trustees moneys which otherwise would not be brought in.

Declaration accordingly.

Solicitors: *Ashley, Tee & Sons* (for the trustees of the settlement, the plaintiffs); *Fairfoot & Co.* (for the tenant for life, the first defendant and the remainderman, the second defendant).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

TRUSTEE OF ROUSOU (A BANKRUPT) *v.* ROUSOU AND ANOTHER.

[CHANCERY DIVISION (Danckwerts, J.), October 28, 1955.]

Practice—Service—Service out of jurisdiction—Action by trustee in bankruptcy—Quasi-contractual right—Recovery of money given by bankrupt to his children less than three months before date of presentation of petition in bankruptcy—R.S.C., Ord. 11, *r.* 1 (*e*).

Bankruptcy—Property available for distribution—Gift by bankrupt to children within three months before petition—Claim by trustee in bankruptcy to recover property—Quasi-contractual right—Service of writ out of jurisdiction.

Less than three months before a petition in bankruptcy was presented in England against him, R., through his attorney, withdrew a sum of £1,107 which was standing to his credit in a savings account in Cyprus and deposited the sum with a co-operative society in Cyprus in the joint names of his two children. Later, the children withdrew the money from the co-operative society. R. having been adjudicated bankrupt, his trustee in bankruptcy applied ex parte under R.S.C., Ord. 11, r. 1, for leave to serve a writ out of the jurisdiction in an intended action against the children, who were living in Cyprus, for recovery of the money on the grounds (a) that the transaction was an act of bankruptcy under s. 1 (1) (b) of the Bankruptcy Act, 1914, and that by virtue of s. 18, s. 37 (1) and s. 38 (a) of the Act, the money was part of the bankrupt's property and vested in his trustee on his bankruptcy; (b) alternatively, that the transaction was a voluntary settlement, and, therefore, under s. 42 (1) of the Act of 1914 was void as against the trustee in bankruptcy; and (c) that the transaction was a fraudulent conveyance which was voidable by the trustee under s. 172 of the Law of Property Act, 1925. The court held that the case came within R.S.C., Ord. 11, r. 1 (e), and an order was made on Mar. 30, 1955, allowing service out of the jurisdiction. The writ having been duly served on the children, the Official Solicitor, who had been appointed their guardian ad litem, now applied for the order of Mar. 30, 1955, to be discharged and for the service of the writ and all subsequent proceedings to be set aside. The Official Solicitor submitted that the case did not come within R.S.C., Ord. 11, r. 1 (e), because any rights which the trustee might have against the children were purely statutory and not based on any contract.

Held: service out of the jurisdiction had been rightly allowed, because (i) although any right which the trustee might have to avoid the transaction was purely statutory, his right to repayment of the money, if the transaction were set aside, was not a statutory right, there being no provision for repayment in such a case in the enactments relied on by the trustee, but was a quasi-contractual right, imposed by law, and a quasi-contract came within the meaning of " contract " in R.S.C., Ord. 11, r. 1 (e).

Bowling v. *Cox* ([1926] A.C. 751) applied.

(ii) in the case of a quasi-contract or similar obligation, the word " made " in R.S.C., Ord. 11, r. 1 (e) (i), should be read as " arising "; and, if the trustee were successful in his action to set aside the transaction, an obligation would be imposed on the children by English law to repay the money wrongfully transferred to them, and thus the obligation would be one which was governed by English law, within R.S.C., Ord. 11, r. 1 (e) (iii).

[As to service out of the jurisdiction, see 26 HALSBURY'S LAWS (2nd Edn.) 31, para. 44; and for cases on the subject, see DIGEST (Practice) 343-351, *605-666*.

For the Bankruptcy Act, 1914, s. 1, s. 37, s. 38 and s. 42, see 2 HALSBURY'S STATUTES (2nd Edn.) 342, 372, 373, and 379.

For the Law of Property Act, 1925, s. 172, see 20 HALSBURY'S STATUTES (2nd Edn.) 785.]

Cases referred to:

(1) *Re An Intended Action, Trustee of Rousou* v. *Rousou*, [1955] 2 All E.R. 169.

(2) *Brook's Wharf & Bull Wharf, Ltd.* v. *Goodman Bros.*, [1936] 3 All E.R. 696; [1937] 1 K.B. 534; 106 L.J.K.B. 437; 156 L.T. 4; Digest Supp.

(3) *Bowling* v. *Cox*, [1926] A.C. 751; 95 L.J.P.C. 160; 135 L.T. 644; Digest (Practice) 309, *354*.

(4) *Sinclair* v. *Brougham*, [1914] A.C. 398; 83 L.J.Ch. 465; 111 L.T. 1; 35 Digest 167, *8*.

(5) *Moses* v. *Macferlan*, (1760), 2 Burr. 1005 (97 E.R. 676); 1 Wm. Bl. 219 (96 E.R. 120); 12 Digest (Repl.) 605, *4679*.

Motion.

The Official Solicitor, as guardian ad litem to the two infant defendants in an action brought by the trustee in bankruptcy of Panayis Kyriacou Rousou, applied to set aside the order dated Mar. 30, 1955, whereby leave was given to serve the writ on the infant defendants out of the jurisdiction.

On Mar. 30, 1955, the trustee in bankruptcy applied ex parte under R.S.C., Ord. 11, r. 1, for leave to serve a writ out of the jurisdiction in an intended action against a daughter and son of the bankrupt (both of whom were minors). The action was intended to be brought for the purpose of obtaining (a) a declaration that the transfer by the bankrupt to the defendants on or about June 17, 1951, of the sum of £1,107, or alternatively, the sum of £484 7s. 6d., was void; (b) alternatively, a declaration that the defendants held the said sum of £1,107, or, alternatively, the sum of £484 7s. 6d., and the interest accrued thereon in trust for the trustee; and (c) an order that the defendants should pay to the trustee the said sum of £1,107 or, alternatively the said sum of £484 7s. 6d., together with the interest accrued thereon.

In the affidavit in support of the application the trustee said, among other things, that the bankrupt was born in Cyprus and became domiciled in this country in 1935; that the defendants were born in England and were domiciled and resident in this country at all material times, and, in particular, were so domiciled and resident on June 17, 1951; that on June 17, 1951, there was standing to the credit of the bankrupt and his wife in the book of the church committee funds of the church of Agios Chrissosdiros, Akanthou, Cyprus, sums amounting to £1,107 1s. 6d., being as to £484 7s. 6d., in the name of the bankrupt, and as to £622 14s. in the name of the bankrupt's wife; that, on that date, the bankrupt's attorney, acting on the bankrupt's instructions, withdrew the sum of £1,107 1s. 6d., from the said church funds and deposited a sum of £1,107 with the Akanthou Co-operative Credit Society, in the joint names of the defendants; that the second defendant left England about August, 1951; that the bankrupt was adjudicated bankrupt by an order dated Dec. 5, 1951; that the bankrupt left England about August, 1952; and the first defendant left England about September, 1953; and that between June 3 and 6, 1954, the said sum of £1,107 with interest was withdrawn from the Akanthou Co-operative Credit Society by the defendants, who were accompanied by the bankrupt.

DANCKWERTS, J., held that the case came within R.S.C., Ord. 11, r. 1 (e), and granted the application for service out of the jurisdiction: see *Re An Intended Action, Trustee of Rousou* v. *Rousou* (1) ([1955] 2 All E.R. 169). The writ was issued on Apr. 6, 1955, and was personally served on both defendants in Cyprus on May 22, 1955. Neither of the defendants entered an appearance. On July 8, 1955, on an application by the trustee in bankruptcy, an order was made by Master HAWKINS appointing the Official Solicitor as guardian of the two defendants as they were both minors. The Official Solicitor now applied to have the order of Mar. 30, 1955, discharged and the service of the writ and all subsequent proceedings set aside, on the ground that the defendants had not committed any breach of contract (to enforce which the action had been brought) which was made within the jurisdiction of this court or which was by its terms or implication to be governed by English law or which otherwise came within R.S.C., Ord. 11, r. 1. It was submitted by the Official Solicitor that such rights as the trustee might have were purely statutory rights and, accordingly, did not come within any sub-rule of R.S.C., Ord. 11, r. 1.

Peter Foster for the Official Solicitor, guardian ad litem of the infant defendants.

Muir Hunter for the trustee in bankruptcy.

DANCKWERTS, J.: This is an application to set aside the service of the writ in this action which has been made in Cyprus in pursuance of an order giving leave, made by me on Mar. 30, 1955. I made the decision after hearing argument by counsel for the plaintiff, the trustee in bankruptcy of Mr. Rousou, as I was not quite satisfied when the application for leave to serve the writ was first made that it came within R.S.C., Ord. 11, r. 1; and the decision is reported (*Re An Intended Action, Trustee of Rousou* v. *Rousou* (1), [1955] 2 All E.R. 169). The writ was issued on Apr. 6, 1955, and served on May 22, 1955*, in pursuance of that order. The defendants are two infants resident in Cyprus at the present time and they took no step to enter an appearance themselves or by anyone acting as guardian ad litem. As a result, however, of the activities of the plaintiff, the Official Solicitor has been appointed guardian ad litem of the two infant defendants and it is at his instance that this application is made to set aside the service of the writ.

As the propriety of the leave which I gave on that occasion is challenged now, it is necessary to examine again the actual facts of the case. The bankrupt, Mr. Rousou, was adjudicated a bankrupt on Dec. 5, 1951, the petition having been presented on Sept. 7. The bankrupt was born in Cyprus, but became domiciled in this country in 1935 and remained here until August, 1952. The defendants were domiciled in this country and resided here until they also went abroad. The first defendant, who is seventeen years old or thereabouts, left England about September, 1953—that is, after the bankruptcy—but the second defendant, who is about twenty years old, left England in or about July or August, 1951, and, consequently, left at a date earlier than the bankruptcy. The transaction which is intended to be impugned in the action is this. On June 17, 1951, there was standing to the credit of the bankrupt and his wife in the books of the church committee funds of the church of Agios Chrissosdiros, Akanthou, Cyprus, sums amounting to £1,107 1s. 6d., being as to £484 7s. 6d. in the name of the bankrupt and as to £622 14s. in the name of the bankrupt's wife. Apparently, the bankrupt failed to disclose either of these sums in his public examination or at any other time, and he denies that he has ever had such funds. On June 17, 1951, another person, whom I take to be a Cypriot, who was the attorney of the bankrupt, on his instructions withdrew the sum of £1,107 1s. 6d. from the church funds and on the same day deposited a sum of £1,107 with the Akanthou Co-operative Credit Society in the joint names of the two defendants. That sum with interest was withdrawn by the defendants accompanied by their father, the bankrupt, between June 3 and 6, 1954. The withdrawals were made after an order had been made by the judge of the district court of Famagusta on the application of the trustee in bankruptcy for a private examination of the said attorney of the bankrupt in regard to the said moneys. I am told that the order for examination in Cyprus was made as a result of a direction given in the courts of this country.

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* As the Sunday Observance Act, 1677 (29 Car. 2 c. 7) is regarded as not applying to service effected outside the United Kingdom, the service on the defendants in Cyprus on May 22, 1955, a Sunday, was not void under s. 6 of the Act.

There is, at any rate, a prima facie case, having regard to the dates and circumstances, suggesting that the transfer of funds made by, or with the assistance of, the bankrupt may have been intended to defeat the creditors in his bankruptcy. The trustee started proceedings, for which leave to serve the writ was obtained, as I have mentioned, with the object of having that transaction set aside and also claiming payment of the moneys in question. He claims that the transaction is void, or, at any rate, that it is not effective, and that the moneys are payable to him on three different grounds. The transaction is said to be an act of bankruptcy under s. 1 (1) (b) of the Bankruptcy Act, 1914, with the result that by the combined effect of s. 18 (1) of the Act, which vests the property of the bankrupt in the trustee, and s. 37, which makes the trustee's title relate back to earlier acts of bankruptcy within three months of the presentation of the petition, the funds in question belong to the trustee and ought, therefore, never to have been received by the defendants or disposed of by them in any way. Alternatively, it is claimed that the transaction by which the defendants were given the funds in question was a settlement which was avoidable under the provisions of s. 42 (1) of the Bankruptcy Act, 1914. The third ground is that the transaction is claimed to be voidable or void under the provisions of s. 172 of the Law of Property Act, 1925.

I am not trying the action in question and I do not have to decide whether the plaintiff's claim is well founded or not. All I have to consider is whether there is a reasonable case, or, as it is sometimes called, an arguable case or a prima facie case, under which the action may properly be maintainable by the plaintiff, the trustee in bankruptcy. The plaintiff, however, has to bring his action within the principles allowing service out of the jurisdiction, contained in R.S.C., Ord. 11, r. 1, and he has to show that he was entitled to obtain an order for service out of the jurisdiction, otherwise the order for service would not be effective and, no doubt, would be set aside.

The strength of the argument of counsel for the Official Solicitor, who is appearing for the two infant defendants, is this. He says that, whichever of these three grounds one takes as the ground of the action brought by the trustee in bankruptcy, they all involve purely statutory rights. Indeed, that was the view which appealed to me when the application was first made for leave to serve out of the jurisdiction. Counsel says that such rights as the trustee in bankruptcy has, therefore, are purely statutory rights and that there is no head or sub-head under R.S.C., Ord. 11, r. 1, which could possibly cover a statutory right of action in that way. He submits that the trustee is seeking to set aside this transaction under statutory jurisdiction. No doubt that is so, but, on the other hand, the trustee in bankruptcy claims that the service was properly allowed under the provisions of R.S.C., Ord. 11, r. 1 (e), the terms of which are as follows:

> "The action is one brought against a defendant not domiciled or ordinarily resident in Scotland to enforce, rescind, dissolve, annul or otherwise affect a contract or to recover damages or other relief for or in respect of the breach of a contract—(i) made within the jurisdiction, or (ii) made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction, or (iii) by its terms or by implication to be governed by English law . . ."

Counsel for the Official Solicitor is on strong ground when he points out that there is no sort of contract in respect of any obligation by the infant defendants to repay any money which they may have received as a result of any transaction which may be set aside by the courts in this country. There is no consensus of any sort or description.

The matter was put very truly, if I may say so, by Lord Wright, M.R., in *Brook's Wharf & Bull Wharf, Ltd.* v. *Goodman Bros.* (2), where he said ([1936] 3 All E.R. at p. 707):

> "These statements of the principle [to which he had just been referring] do not put the obligation on any ground of implied contract or of constructive or notional contract. The obligation is imposed by the court simply under the circumstances of the case and on what the court decides is just and reasonable, having regard to the relationship of the parties. It is a debt or obligation constituted by the act of the law, apart from any consent or intention of the parties or any privity of contract."

Thus, quite plainly, it is not a contract in the ordinary sense of the term. The case, however, on which I was persuaded to allow the service, and which was relied on by counsel for the trustee in bankruptcy, is *Bowling* v. *Cox* (3) ([1926] A.C. 751), which brings in quasi-contractual obligations as being within s. 29 of ch. X of the Consolidated Laws of British Honduras, 1914, which is in somewhat similar terms to R.S.C., Ord. 11, r. 1. In that case, Viscount Haldane, who gave the judgment of the Judicial Committee of the Privy Council, treated a quasi-contractual obligation as being within the terms of the section in question, and, so far as I can see, the relevant part of the section, in substance, is not really distinguishable from R.S.C., Ord. 11, r. 1 (e). In that case the debtor, after being adjudicated bankrupt in England, became domiciled in British Honduras, where he died possessed of property but undischarged from the bankruptcy. After his death his will was proved in British Honduras by an attorney for the executor, the respondent, who was in Chicago. The attorney having remitted money from the estate to the executor in Chicago, the English trustee in bankruptcy, the appellant, brought an action against the bankrupt's estate in British Honduras in respect of statutory interest remaining due to creditors in the bankruptcy and obtained leave to issue a concurrent writ for service on the executor in Chicago. An obligation did or might arise to pay to the trustee in bankruptcy moneys obtained by the attorney, but, obviously, that obligation was not in any way a matter of contract. It was an obligation imposed by the law. It was treated by Viscount Haldane in his judgment as a quasi-contractual obligation within s. 29 of ch. X of the Consolidated Laws of British Honduras which allowed service out of the jurisdiction when the action related to a contract which was sought to be enforced and was made or entered into within the jurisdiction. Viscount Haldane said ([1926] A.C. at p. 754):

> "The estate had been fully administered in the colony, excepting so far as the payment of the interest due to the appellant was concerned. To that interest the appellant claimed to have a legal right and to have it tried. The surplus of the estate in British Honduras, in the hands of the respondent and his attorney, might well be money had and received to the use of the appellant. If so, this title to it arose when the respondent and his attorney received it, and not in England or at the time of the bankruptcy in 1889. The money was rather money had and received, in which case the title to it arose, when it was got in by the executor, under an implied contract which the law imputes, and which renders him liable to proceedings in the nature of an assumpsit at common law. For the reasons why this is so it is only necessary to refer to the explanation given in the decision of the House of Lords in *Sinclair* v. *Brougham* (4) ([1914] A.C. 398). In another view, the

> A executor had become a trustee in British Honduras of the surplus of the estate. In either aspect the case comes within the enactment above referred to, and the court below ought to have given effect to this view."

The point of the case is that the quasi-contractual obligation was held to be one within the words of the British Honduras section allowing service in respect of B a contract made within the jurisdiction.

Counsel for the Official Solicitor pointed out, perfectly correctly, that the facts in that case are different from those in the present case, in that in *Bowling* v. *Cox* (3) the money in question was situated originally in the country in which the proceedings were being taken by the trustee in bankruptcy. The money had been transferred to the principal who was now no longer in the C jurisdiction but was in Chicago. I agree that the facts are different in that respect. The reason, however, why the case was cited to me by counsel for the trustee in bankruptcy and relied on by him was that the quasi-contractual obligation existed in no respect by reason of the consensus of the parties or the will of the respondent, but was imposed by the law as being recognised within the terms of the contract in a rule of this kind. Therefore D that seems to me to dispose of any objection by counsel for the Official Solicitor that the rule is limited to the cases of contract in the ordinary narrow sense of the term.

Counsel for the Official Solicitor, however, went on to argue that in the present case there was no quasi-contractual obligation of any kind: that the obligation, if it existed, on the part of the defendants to repay the money arose by reason of E the enactments setting aside the transaction which is impugned. I asked him to point out where the enactments said that the money was repayable, but he contended that it was common form, when a transaction was set aside, for the court, in similar cases to this, to order repayment. It is clear that there is no provision in any of the sections on which the trustee relies* for re-transfer of the property or repayment of the money with regard to a void transaction. F Counsel for the Official Solicitor said, however, that the law implies such an obligation, and that that supports, therefore, his contention that it is purely a statutory right and not one which raises even any such shadowy matter as a quasi-contract. He referred me to MAXWELL ON THE INTERPRETATION OF STATUTES (10th Edn.), p. 393, in which there is a statement suggesting that, where a statute produces certain results, what the author describes as " a corres- G ponding right " is thereby impliedly given. I find it, however, difficult to see exactly what the author means by " a corresponding right ", and, as it seems to me, the statement is not at all specific. On the other hand, CRAIES ON STATUTE LAW (5th Edn.), p. 316, contains a passage which strongly suggests that the contrary is really the case, and it is true, when the setting aside of a transaction is obtainable under a statute, that it is by reason of that result that an obligation H is imposed by the law on the man, who improperly has property or money, to re-transfer it or repay it to the successful party in the action. It seems to me that that is the true view. It was unnecessary for the statute in those cases to create any right of action for recovery of the money, because, once the transaction had been set aside, the property or money was wrongfully in the hands of the person who had it and, therefore, by operation of law, as stated by LORD WRIGHT, I M.R., in *Brook's Wharf & Bull Wharf, Ltd.* v. *Goodman Bros.* (2) ([1936] 3 All E.R. at p. 707) became re-transferable or repayable to the successful party. Therefore, it seems to me that the right to the recovery of the money is not a statutory right in a case like the present. It is a right imposed by the law which LORD MANSFIELD, C.J., in *Moses* v. *Macferlan* (5) (1760) (2 Burr. 1005)† called a quasi-contractual right and which the Privy Council in *Bowling* v. *Cox* (3) have recognised as being within the description of a contract, inept though it may be in one respect so to describe any provision of this kind.

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* See p. 489, letters B to E, ante.

† See 2 Burr. at p. 1008.

There is, however, this further point: whether the right is something which is "made within the jurisdiction", within R.S.C., Ord. 11, r. 1 (e) (i), or is "by implication to be governed by English law", within r. 1 (e) (iii) of that order. One of those two conditions would have to be satisfied before service out of the jurisdiction could be allowed. With regard to the first it appears to me that the word "made" is very inapt, because it is appropriate to a contract made by the parties and not appropriate to an obligation which is imposed against the will of one of the parties and really without any desire or wish on his part to undertake such an obligation at all. If, however, one must treat a quasi-contract, as the Privy Council, in *Bowling* v. *Cox* (3), said that one must, as coming within the terms of such a rule as R.S.C., Ord. 11, r. 1 (e), one must treat the word "made" as being equivalent, in the case of a quasi-contract or other obligation of that kind, to "arising"; that is to say that it is a quasi-contract or other obligation arising within the jurisdiction, or, it may be, is one which by its terms or by its implication should be governed by English law. One must not pay too much attention to the literal meaning of the word "made".

In the present case, it seems to me that, if, and only if, the plaintiff trustee is successful in his action to set aside the transaction on June 17, 1951, an obligation will be imposed by English law on the defendants to repay the money which was wrongfully transferred, and that is an obligation which arises on the decision of a court in England and is one which is governed by English law. Dealing with the matter in regard to service out of the jurisdiction in the way in which one must, one has to see whether it is a reasonable and proper case in which the action might succeed, and, therefore, I must come to the conclusion that the service out of the jurisdiction was correctly allowed by me and should stand. Accordingly, the application of the Official Solicitor must be dismissed. The costs will be reserved.

Application dismissed.

Solicitors: *Official Solicitor*; *Sidney Pearlman* (for the trustee in bankruptcy)

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

SHARKEY (INSPECTOR OF TAXES) *v.* WERNHER.

[HOUSE OF LORDS (Viscount Simonds, Lord Porter, Lord Oaksey, Lord Radcliffe and Lord Tucker), July 19, 20, 21, November 7, 1955.]

Income Tax—Profits—Transfer of horses from stud farm to racing stable in same ownership—Credit figure in farm accounts—Cost of breeding or market value—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5 *c.* 40), *Sch. D, Case* I.

The taxpayer's wife carried on a stud farm, the profits of which were assessable to income tax under the Income Tax Act, 1918, Sch. D, Case I. She also trained horses and ran them at race meetings as a recreation, in respect of which no liability for tax arose. In 1948 she transferred five horses from the stud farm to her racing stables. In her farm account she showed the cost of breeding the horses as a debit and she claimed that the same figures should be credited in respect of the transfer for income tax purposes.

Held (LORD OAKSEY dissenting): the horses must be treated as having been disposed of by way of trade, and the sum which should be regarded as having been received on the disposal of the horses must be a sum equivalent to their market value.

Watson Bros. v. *Hornby* ([1942] 2 All E.R. 506) approved.

Per LORD RADCLIFFE: the principle of *Watson Bros.* v. *Hornby*, supra, is applicable to all those cases in which the income tax system requires that part of the taxpayer's activities should be isolated and treated as a self-contained trade (see p. 505, letter I, post).

Decision of the COURT OF APPEAL ([1954] 2 All E.R. 753) reversed.

[For the Income Tax Act, 1918, Sch. D, Case I, and the Finance Act, 1941, s. 10, and the Finance Act, 1948, s. 31, see 12 HALSBURY'S STATUTES (2nd Edn.) 153, 514, 831; the relevant replacing enactments are s. 123 (1) and s. 124 (1), (2) of the Income Tax Act, 1952, for which, see 31 HALSBURY'S STATUTES (2nd Edn.) 116, 121.]

Cases referred to:

(1) *Watson Bros.* v. *Hornby*, [1942] 2 All E.R. 506; 168 L.T. 109; 24 Tax Cas. 506; 2nd Digest Supp.

(2) *Briton Ferry Steel Co., Ltd.* v. *Barry*, [1939] 4 All E.R. 541; [1940] 1 K.B. 463; 109 L.J.K.B. 250; 162 L.T. 202; 23 Tax Cas. 414; 2nd Digest Supp.

(3) *Dublin Corpn.* v. *M'Adam* (*Surveyor of Taxes*), (1887), 2 Tax Cas. 387; 28 Digest 21, *l*.

(4) *Gresham Life Assurance Society* v. *Styles*, [1892] A.C. 309; 62 L.J.Q.B. 41; 67 L.T. 479; 56 J.P. 709; 3 Tax Cas. 185; 28 Digest 59, *302*.

(5) *Inland Revenue Comrs.* v. *Ransom* (*Wm.*) *& Son, Ltd.*, [1918] 2 K.B. 709; 88 L.J.K.B. 342; 119 L.T. 369; 12 Tax Cas. 21; Digest Supp.

(6) *Laycock* v. *Freeman, Hardy & Willis, Ltd.*, [1938] 4 All E.R. 609; [1939] 2 K.B. 1; 108 L.J.K.B. 270; 160 L.T. 41; 22 Tax Cas. 288; Digest Supp.

(7) *Tennant* v. *Smith*, [1892] A.C. 150; 61 L.J.P.C. 11; 66 L.T. 327; 56 J.P. 596; 3 Tax Cas. 158; 28 Digest 17, *87*.

(8) *Inland Revenue Comrs.* v. *Cornish Mutual Assurance Co.*, [1926] A.C. 281; 95 L.J.K.B. 446; 134 L.T. 545; 12 Tax Cas. 841.

(9) *New York Life Insurance Co.* v. *Styles*, (1889), 14 App. Cas. 381; 59 L.J.Q.B. 291; 61 L.T. 201; sub nom. *Styles* v. *New York Life Insurance Co.*, 2 Tax Cas. 460; 28 Digest 59, *300*.

(10) *Glasgow Water Comrs.* v. *Inland Revenue*, (1875), 1 Tax Cas. 28; 12 Sc. L.R. 466; 2 R. (Ct. of Sess.) 708; 28 Digest 8, *p*.

(11) *Back* v. *Daniels*, [1925] 1 K.B. 526; 94 L.J.K.B. 304; 132 L.T. 455; 9 Tax Cas. 183; 28 Digest 15, *78*.

Appeal.

Appeal by the Crown from an order of the Court of Appeal, dated July 7, 1954, and reported [1954] 2 All E.R. 753, reversing an order of VAISEY, J., dated July 24, 1953, and reported [1953] 2 All E.R. 791, whereby he dismissed an appeal by the Crown by way of Case Stated from a decision of the Special Commissioners of Income Tax.

The taxpayer, Sir Harold Wernher, was assessed to income tax in respect of profits of his wife, Lady Zia Wernher, arising from her stud farm. In the year ending Dec. 31, 1948, Lady Wernher transferred five horses from her stud farm to her racing stables, which she carried on as a recreation and not as a trade. The cost of breeding the horses had been debited in the stud farm accounts, and it was common ground that, for income tax purposes consequent on the transfer of the horses, some figure had to be brought into the stud farm accounts as a receipt. The market value of the horses was considerably in excess of their cost. The taxpayer contended that the figure proper to be brought into the accounts was the cost of breeding and not, as contended by the Crown, the market value of the horses.

The Attorney-General (*Sir Reginald Manningham-Buller, Q.C.*), *R. Borneman, Q.C.*, and *Sir Reginald Hills* for the Crown.

L. C. Graham-Dixon, Q.C., and *P. M. B. Rowland* for the taxpayer.

The House took time for consideration.

Nov. 7. The following opinions were read.

VISCOUNT SIMONDS: My Lords, this appeal arises on an assessment to income tax for the year 1949-50 made on the respondent, Sir Harold Wernher, in respect of profits made by his wife, Lady Zia Wernher, from a stud farm owned and carried on by her. The question in dispute is what amount should be entered on the credit side of the trading account of the stud farm in respect of animals bred there and transferred to a racing establishment also carried on by her. It is common ground between the parties that some amount must be credited in respect of these animals on their transfer (a matter on which I shall say something later), and the issue has been whether this amount should be the cost of production of the animals so transferred or their market value at the date of transfer.

The course of proceedings before the matter reached your Lordships' House has been as follows: An estimated assessment in an amount of £5,000 was made on the respondent for the year 1949-50 in respect of the profits arising from the stud farm. He appealed from this assessment to the Special Commissioners, the only material ground of appeal being that which I have already indicated, that, in principle, the assessment was based on crediting the trading account of the stud farm with the market value of the transferred animals, instead of with the cost of their production. The Special Commissioners allowed his appeal and, at the request of the present appellant, stated a Case for the opinion of the High Court. The case duly came before VAISEY, J., and on July 24, 1953, that learned judge gave judgment allowing the appeal. In his opinion, the case was indistinguishable in principle from *Watson Bros.* v. *Hornby* (1) ([1942] 2 All E.R. 506), and he was bound by it. I shall have to consider this case in some detail presently. The respondent appealed to the Court of Appeal, which unanimously reversed the judgment of VAISEY, J., being, I think, largely influenced to that course by a previous decision of the Court of Appeal in *Briton Ferry Steel Co., Ltd.* v. *Barry* (2) ([1939] 4 All E.R. 541). The question at issue has, therefore, so far been resolved by saying that, in principle, the stud farm trading account must be credited only with the cost of production of the transferred animals. The question of figures is still at large. The Crown now appeals and contends that it is the market value of the transferred animals, not the cost of their production, with which the account must be credited.

Before I examine the rival contentions and the authorities by which they are supported, I must make certain further observations which are not, I think, controversial. It is not in dispute that the enterprise of a stud farm carried on by Lady Zia Wernher is what has been called a taxable activity, which is another way of saying that the respondent is chargeable in respect of any profits arising therefrom in accordance with the Rules of Case I of Sch. D to the Income Tax Act, 1918, relating to trades. Nor is it in dispute that the racing establishment carried on by Lady Zia is not a taxable activity; her profits, if any, of that activity are not subject to taxation; her losses, if any, cannot be set off against any other taxable income. This has been called a recreational activity. Further, it is common ground that the stud farm enterprise is a farming enterprise which is, by virtue of s. 10 of the Finance Act, 1941, and s. 31 (1) (a) of the Finance Act, 1948, to be treated as the carrying on of a trade, and, accordingly, that its profits are chargeable in the way that I have mentioned. Again, it is not disputed that (to take the year ending Dec. 31, 1948, as an example) Lady Zia transferred five horses from her stud farm to her racing establishment and that their then market value exceeded their cost of production. Nor, I think, is it in doubt that a main purpose, if not the main purpose, of the stud farm was to supply the racing establishment.

These, my Lords, are the simple facts of the case and it is, perhaps, surprising that in 1955 there should be any room for doubt about a position which cannot, in its essentials, differ from a great many other cases. I wish at the outset to say that I attach no importance to the fact that, of Lady Zia's two activities to which I have referred, the one is taxable and the other is not. I do not understand how her taxable profits in respect of the stud farm can, in principle, be the greater or the less because the profits of the racing establishment are, or are not, taxable. The problem, therefore, in all its simplicity is whether a person, carrying on the trade of farming or, I suppose, any other trade, who disposes of part of his stock-in-trade not by way of sale in the course of trade but for his own use, enjoyment, or recreation, must bring into his trading account for income tax purposes the market value of that stock-in-trade at the time of such disposition. But for the fact that this case has throughout proceeded on the footing as stated in the Special Case that

> "some figure in respect of the transferred horses fell to be brought into the stud farm accounts as a receipt"

I should have stated the problem differently. I say this because, since it is the respondent's case that Lady Zia did not dispose of the transferred horses in the way of trade, I do not understand why it is admitted that she should be credited as a receipt with the cost of production. In fact, as a trader, she received no more the cost of production than the market value; I do not understand, therefore, why the argument did not proceed that, as she received nothing, her trading account should be credited with nothing; that she suffered, so far as her trade was concerned, a dead loss in respect of these animals, and that the accounts of the stud farm should be made up so as to show this like any other dead loss. I do not understand how the adjustment could take the form of the fictitious entry of a receipt which had not been received.

My Lords, I am the more puzzled by the basis on which this case has proceeded, because learned counsel for the respondent has throughout insisted on what is an elementary principle of income tax law that a man cannot be taxed on profits that he might have, but has not, made: see, e.g., *Dublin Corpn.* v. *M'Adam* (*Surveyor of Taxes*) (3) (1887) (2 Tax Cas. 387), *Gresham Life Assurance Society* v. *Styles* (4) (1892) (3 Tax Cas. 185). But this is only saying in another way that a trader is not to be charged with the receipt of sums that he might have, but has not, received, and this is equally true whether the sum with which it is sought to charge him is market value or production cost, whether it will result in a notional profit or a notional balancing of receipts with expenditure and whether the reason for his not, in fact, receiving such a sum is that the goods which are his stock-in-trade have perished in the course of nature, or that he has chosen to use them for his own pleasure or otherwise dispose of them. The true proposition is not that a man cannot make a profit out of himself but that he cannot trade with himself. The question is whether, and how far, this general proposition must be qualified for the purposes of income tax law.

An attempt has been made to justify the notional receipt of a sum equal to the cost of production by treating such a receipt as the equivalent of an expenditure which, in the event, proved not to have been for the purpose of trade, since the article was not disposed of in the way of trade. But this is pure fiction. Up to the very moment of disposition (in this case the transfer of a horse from stud farm to racing stable), the article was part of the trader's stock-in-trade, and the cost of its production was properly treated as part of his expenditure for income tax purposes. I see no justification for an ex post facto adjustment of account which, in effect, adds to a fictional receipt a false attribution of expenditure. This is, however, the position with which we are faced. Your Lordships may not think it necessary to express any opinion on the question whether, if the Crown is not right in requiring market value to be brought into account in the present case, it is, nevertheless, entitled to require the cost of production to be brought in. This is said to be of no importance in this case, though it might well be of great importance in other cases. Yet I cannot refrain from calling attention to what must be fundamental to the solution of the question. For I cannot escape from the obvious fact that it must be determined whether, and why, a trader, who elects to throw his stock-in-trade into the sea or dispose of it in any other way than by way of sale in the course of trade, is chargeable with any notional receipt in respect of it, before it is asked with how much he should be charged. It is, as I have said, a surprising thing that this question should remain in doubt. For unless, indeed, farming is a trade which, in this respect, differs from other trades, the same problem arises whether the owner of a stud farm diverts the produce of his farm to his own enjoyment, or a diamond merchant, neglecting profitable sales, uses his choicest jewels for the adornment of his wife or a caterer provides lavish entertainment for a daughter's wedding breakfast. Are the horses, the jewels, the cakes and ale to be treated for the purpose of income tax as disposed of for nothing, or for their market value or for the cost of their production ?

It is convenient at this stage to refer to *Watson Bros.* v. *Hornby* (1), which I have already mentioned. In that case the taxpayers, who were the appellants in the appeal, carried on a business of poultry dealers and breeders of poultry at a hatchery belonging to them which was conceded to be an enterprise chargeable as a trade under Case I of Sch. D to the Income Tax Act, 1918. The business of the hatchery was to produce and sell day-old chicks. They also carried on farming activities which were conceded to be for income tax purposes a separate enterprise from the hatchery business and, as the law then stood, were an income tax source chargeable under Sch. B to the Income Tax Act, 1918. Most of the produce of the hatchery was sold, but a substantial number

A of day-old chicks were from time to time transferred to the farm, and became part of the stock of poultry of the farm. The question in the appeal was whether, in computing the profits of the hatchery business, the day-old chicks transferred to the farm should be brought in at cost or market value. The market value was at the material times much below cost, viz., 4d. as against 7d. per chick. It was contended for the taxpayers that market price, and for the Crown that B cost of production, should be adopted as the appropriate figure in the accounts. It was decided by MACNAGHTEN, J., that the taxpayers' contention was right and they were, accordingly, chargeable on the footing that, as traders in respect of their hatchery business, they received 4d. only per chick. This decision which your Lordships were told has ever since been adopted as the basis of assessment by the Revenue in similar cases involves two things, first, that the C taxpayer may, in certain cases, be subject to a sort of dichotomy for income tax purposes and be regarded as selling to himself in one capacity what he has produced in another, and, secondly, that he is regarded as selling what he sells at market price. It is a decision on which the appellant relies in the present case, and which, as I have said, VAISEY, J., regarded as an authority binding him. The learned judge also derived some assistance from *Inland Revenue* D *Comrs.* v. *Wm. Ransom & Son, Ltd.* (5) (1918) (12 Tax Cas. 21), in which it was at least recognised that, for tax purposes, two parts of an enterprise carried on by a taxpayer should be treated as distinct. But it was not, I think, an issue in that case at what price goods should be deemed to be transferred from one part of the enterprise to the other.

In the Court of Appeal, two cases were relied on which appear not to have E been cited to MACNAGHTEN, J., in *Watson Bros.* v. *Hornby* (1). They were *Laycock* v. *Freeman, Hardy & Willis, Ltd.* (6) ([1938] 4 All E.R. 609), and *Briton Ferry Steel Co., Ltd.* v. *Barry* (2). The value of these cases lies less in their direct bearing on the present case than in the observations of the late LORD GREENE, which must always have great weight with any court. In the former case, the primary question was whether there had been a succession for the F purpose of r. 11 (2) as enacted in s. 32 of the Finance Act, 1926, of Cases I and II of Sch. D to the Income Tax Act, 1918, and, though the decision contains a valuable exposition of the general principle that income tax is payable on profits that are actual not imaginary, the court, in fact, held that there had been no "succession" and the question of the price of transfer of goods from predecessor to successor did not arise. In the *Briton Ferry* case (2), on the other hand, the G court held that there was a "succession" for the purpose of the relevant rule and, though the learned Attorney-General was, I think, right in saying that in that case the real issue was what the basis period should be rather than how the profits of that period when ascertained should be computed, once again the observations of LORD GREENE justified the Court of Appeal in the present H case in thinking that they ought to regard the cost price rather than the market value of transferred commodities as affording the correct method of computation.

I do not think that there is any other authority to which I can usefully call your Lordships' attention, and it appears to emerge from the cases that I have cited that VAISEY, J., was amply justified in saying that, if any of them was correctly decided, the legislature had made inevitable some invasion of the I principle that the taxpayer cannot make a profit by selling to himself. For I repeat that I see no valid distinction between a trader crediting himself with a price (market value) which produces a profit or with a price (production cost) which strikes a balance or reduces his loss. Yet it is the basis equally of the judgment of MACNAGHTEN, J., in *Watson Bros.* v. *Hornby* (1) and of the observations of SIR WILFRID GREENE, M.R., in the *Laycock* (6) and the *Briton Ferry* (2) cases, that something has to be brought into account where the legislature recognises a sort of artificial dichotomy and a taxpayer is regarded as carrying on more than one taxable activity. And so, also, as I have more than once pointed out, in this case it is conceded by the taxpayer that some figure must appear in the stud farm account as a receipt in respect of the transferred horses, though Lady Zia, in her capacity as transferee, did not carry on a taxable activity. In the same way, it would, I suppose, be claimed that, if Lady Zia were to transfer or re-transfer a horse from her racing establishment to her stud farm, some figure would have to appear in the stud farm accounts in respect of that horse, though it cost her nothing to make the transfer. If it were not so, and she subsequently sold the transferred horse and the proceeds of sale were treated as receipts of the stud farm, she could justly complain that she had been charged with a fictitious profit.

My Lords, how far is this principle, which is implicit in the judgments that I have cited and in the admission on which this case has proceeded, supportable in law ? That it conflicts with the proposition taken in its broadest sense, that a man cannot trade with himself is, I think, obvious. Yet it seems to me that it is a necessary qualification of the broad proposition. For, if there are commodities which are the subject of a man's trade but may also be the subject of his use and enjoyment, I do not know how his account as a trader can properly be made up so as to ascertain his annual profits and gains unless his trading account is credited with a receipt in respect of those goods which he has diverted to his own use and enjoyment. I think, therefore, that the admission was rightly made that some sum must be brought into the stud farm account as a receipt though nothing was received, and, so far at least, the taxpayer must be regarded as having traded with himself. But still the question remains, what is that sum to be. I suppose that, in the generality of cases in which the question arises in a farming or any other business, e.g., where the farmer supplies his own house with milk, or a market gardener with vegetables, an arbitrary or conventional sum is agreed. The House was not given any information as to the prevailing practice. Now the question precisely arises. In answering it I am not influenced by the fact that a change in the law has made the farmer liable to tax under Sch. D instead of under Sch. B, nor does s. 10 of the Finance Act, 1941, affect my mind beyond the fact that it emphasises the artificial dichotomy which the scheme of income tax law, in many instances, imposes. But it appears to me that, when it has been admitted or determined that an article forms part of the stock-in-trade of the trader, and that, on his parting with it so that it no longer forms part of his stock-in-trade, some sum must appear in his trading account as having been received in respect of it, the only logical way to treat it is to regard it as having been disposed of by way of trade. If so, I see no reason for ascribing to it any other sum than that which he would normally have received for it in the due course of trade, that is to say, the market value. As I have already indicated, there seems to me to be no justification for the only alternative that has been suggested, namely, the cost of production. The unreality of this alternative would be plain to the taxpayer, if, as well might happen, a very large service fee had been paid so that the cost of production was high and the market value did not equal it.

In my opinion, therefore, the judgment of the Court of Appeal was wrong and should be reversed, and the judgment of Vaisey, J., restored.

LORD PORTER: My Lords, I have had an opportunity of reading the opinion of my noble and learned friend, Viscount Simonds, and the opinion about to be delivered by my noble and learned friend, Lord Radcliffe, and I agree with them both.

LORD OAKSEY: My Lords, the question in this case is whether a farmer or market gardener is liable, under s. 10 of the Finance Act, 1941, to pay income tax under Sch. D, Case I, on the market values of goods which he does not sell but takes or uses for his own purposes. The respondent's wife, Lady Zia Wernher, owns two studs of horses at which she breeds racehorses, some of which she sells and some of which she puts into training. It is common ground that stud farms are trades for the purposes of income tax and that a racing stable is not. The Crown contend that the respondent is liable under s. 10 of the Act of 1941 for income tax on the market value of the horses his wife puts into training as well as the prices she obtains for the horses she sells.

The words of s. 10 of the Act of 1941 are, so far as material, as follows:

> "(1) Subject, as respects farming and farm land, to the provisions of the next succeeding section, farming and market gardening shall be treated as trades for the purposes of income tax and accordingly—(a) the profits or gains thereof shall be charged under Case I of Sch. D; and (b) income tax shall not be charged under Sch. B in respect of the occupation of any farm land or market garden land: . . .
>
> "(2) For the purposes of this and the next succeeding section the following expressions have the meanings hereby respectively assigned to them, that is to say,—'market garden land' means land occupied as a nursery or garden for the sale of the produce (other than land used for the growth of hops) and 'market gardening' shall be construed accordingly; 'farm land' means land wholly or mainly occupied for the purposes of husbandry, not being market garden land, and includes the farm house and farm buildings, if any, and 'farming' shall be construed accordingly; . . ."

In my opinion, the Court of Appeal and the commissioners were right in holding that the respondent is not liable. His wife has not, in my opinion, made a profit or gain on the horses in question within the meaning of s. 10 of the Act of 1941. I think this follows from two principles which have long been established on the construction of the Income Tax Acts. The first principle is that the "profits or gains" taxed are actual commercial profits and not mere benefits (see *Tennant* v. *Smith* (7) (1892) (3 Tax Cas. 158) and *Gresham Life Assurance Society* v. *Styles* (4) (1892) (3 Tax Cas. 185). The second is that a man cannot trade with himself in the sense in which the word "trade" is used in the Income Tax Acts.

As PALLES, C.B., said in *Dublin Corpn.* v. *M'Adam* (*Surveyor of Taxes*) (3) (1887) (2 Tax Cas. at p. 397):

> "On the other hand, I think it is perfectly clear that, in order to bring this case within the operation of the Income Tax Act, it is necessary that there shall be this trading in its strict true sense. There must be, at least, two parties—one supplying water, and the other to whom it should be supplied and who should pay for it. If these two parties are identical, in my opinion there can be no trading. No man, in my opinion, can trade with himself; he cannot, in my opinion, make, in what is its true sense or meaning, taxable profit by dealing with himself; and in every case of this description it appears to be a question on the construction of the Act whether the two bodies—the body that supplies and the body or class that has to pay—were either identical, or, upon the true construction of the Act, must be admitted to have been held by the legislature to be identical, and so legislated for upon that basis."

In my opinion PALLES, C.B., was right, and no authority inconsistent with his view was cited to your Lordships. The idea of a person trading with himself is inconsistent with the idea of ownership. An owner can do as he likes with his own property apart from legislation; he cannot be compelled to sell his own property to himself, either at the market or any other value apart from legislation to that effect. Any sale so called which a trader makes to himself must be " notional " and not " actual ". He cannot make a commercial profit or loss by transferring an asset from himself to himself or by a gift to someone else, no matter what price he notionally ascribes to the transaction.

It may be said that such things rarely happen and that the maxim de minimis is applicable, but it is impossible to answer the difficulty in that way because a trader's assets may be of great value, e.g., a diamond tiara or, for that matter, a thoroughbred two-year-old. It follows from this that an owner in trade can withdraw any asset he chooses from his trade for his own use provided, of course, that he does so bona fide and not with the intention of selling it outside his trade to someone else.

But then it is argued that, even if Palles, C.B., was right that a trader cannot trade with himself and the words " profits or gains " have the meaning of actual commercial profits in Sch. D, s. 10 of the Finance Act, 1941, by transferring the trades of farming and market gardening to Sch. D, has altered the meaning of the words " profits or gains " in such a way that a farmer is taxable on the market value of the produce he uses for his own consumption. It is clear, however, from the definition of market gardening that this is not the rule in reference to that trade, but it is said that husbandry is different and that the dictionary definition of husbandry has no reference to sale of the produce of the land. In my opinion, the meaning of the words " profits or gains ", in s. 10 (1) (e) of the Act of 1941, must be the same as their meaning in Sch. D. It cannot be that, by such words as those of s. 10 of the Act of 1941, the legislature intended to introduce a new principle with reference to the profits or gains of farming and market gardening, i.e., to tax the profits or gains of farming and market gardening on one principle under Sch. D and all other trades on another principle under the same schedule.

The argument of the Crown was also supported on the ground that Lady Zia Wernher's stud account, which had been debited with the cost of rearing the yearlings which she subsequently transferred to her racing stable, was then credited with the same figure. In my opinion, there is no substance in this argument. Traders must show in their trading accounts the value of their assets. If they sell those assets they must credit the price obtained. If they do not sell them, but get rid of them either by using them themselves or in any other way, they must credit the figure at which the assets stand in their accounts, or the profits of the account will be improperly diminished by the amount entered in the account as the value of the asset. Taxation under Sch. D is imposed on the balance of profits and gains. Profits and gains are actual commercial profits and gains and, similarly, the deductions allowed by the Act which produce the balance are deductions which are considered to be properly attributable to the profits as being commercial expenses incurred in order to earn the profits. It follows, in my opinion, that such expenses as have been incurred to produce an asset which is withdrawn from the trade cannot properly be deducted and must, therefore, be withdrawn from the account which can only be done in accordance with accounting practice by crediting the amount of the expenses.

For these reasons, I am of opinion that the findings of the commissioners and the judgment of the Court of Appeal were right.

LORD RADCLIFFE: My Lords, this is a short, but very difficult point. I believe that the most convenient way of expressing an opinion is to discuss in order some of the lines of argument that seem to have been most dwelt on during the course of the case.

First, there is the point that the respondent's wife carries on a stud farm and the activities of the stud farm constitute " farming " within the meaning of s. 10 of the Finance Act, 1941. This much is common ground, and it is given to us by para. 2 of the Case Stated. It is worth observing that what is common ground is that the activities themselves constitute farming, not that only such of them constitute farming as can be seen ex post facto to have been devoted to the production and rearing of foals subsequently sold or to the obtaining of stallion fees. What follows, according to the appellant, is all quite simple. The Act has declared that farming is to be treated as a trade for the purposes of income tax and its profits or gains charged under Case I of Sch. D; therefore, stock taken over by the owner or given away which was trading stock at the moment of disposal must be treated as if sold in the course of trade, and a receipt equivalent to its market value entered accordingly. Such an entry, it is said, is required by the principles of ordinary commercial accountancy. Your Lordships need not pause on the figure of market value. The Case states that the market value of the transferred horses was considerably in excess of their cost.

Now I think that this line of argument offers the right introduction to the question, but it is too much of a simplification to say that it solves it. For the trader who supplies himself out of his stock-in-trade is a special case, by no means confined to the farmer, and we must not begin by assuming, without any evidence, that " ordinary commercial accounting " has any settled rule for such a case which would make it necessary to enter a receipt equivalent to market value in place of the stock disposed of. What we can say is that, prior to the Finance Act, 1941, the occupation of land for the purpose of husbandry was a source of income charged under Sch. B and, prima facie, the computation of the tax was based on an imputed profit taxed as income, whether the occupier consumed some, or even the whole, of the produce of the activity. The respondent's argument would lead to what would certainly be the odd result that the transfer to Case I of Sch. D effected in 1941 would give a complete exemption from tax to the occupier who supplies all his produce to himself. Moreover, it would be wrong to treat the question now before us as if it originated with the enactment of s. 10 of the Finance Act, 1941. Rule 5 of the Sch. B Rules in the Income Tax Act, 1918, allowed any person " occupying lands for the purposes of husbandry only " to elect to be assessed and charged under Sch. D instead of under this schedule. What was the fate of the farmer who made such an election and then proceeded to show that all, or some, of his produce went to himself at cost or even, more logically, at no charge at all ? Again, r. 6 gave an occupier a chance of satisfying the general commissioners that the profits from the occupation during the year fell short of the assessable value of the land under Sch. B and, if he did, the imputed income so assessed was reduced to the " actual amount " of the profit and any tax paid adjusted accordingly. What happened when an occupier came forward and showed little or no " actual " profit in the year because he had taken most of the produce at cost price ?

I do not know the answers to these questions. But I think that they are relevant enough to make me feel rather suspicious of the respondent's tempting scheme of marking everything out to the owner at cost. On the other hand, I think that it throws too much weight on the bare enactment that farming is to be treated as a trade for income tax purposes to deduce from it that all disposals are to be assumed to have been made in the course of trading and that, consequently, a receipt must be entered equivalent to the market value of the stock disposed of. That may, indeed, be the right result, but, if there is any general principle of income tax law with which it conflicts, as the respondent says that there is, then I would not say that the mere wording of the statute stands in his way.

What, then, is the importance to this case of a general proposition such as that of PALLES, C.B. (in *Dublin Corpn.* v. *M'Adam* (*Surveyor of Taxes*) (3) (1887) (2 Tax Cas. at p. 397)):

> "No man, in my opinion, can trade with himself; he cannot, in my opinion, make, in what is its true sense or meaning, taxable profit by dealing with himself . . ."?

Later decisions have shown that this simple proposition may cover what are to be regarded as two separate questions, whether a man can trade or deal with himself, and whether a man can make taxable profit by so doing (see, for instance, *Inland Revenue Comrs.* v. *Cornish Mutual Assurance Co.* (8) (1926) (12 Tax Cas. 841)). Having regard to the explanation of the decision in *Styles* v. *New York Life Insurance Co.* (9) (1889) (2 Tax Cas. 460), which is afforded by the last mentioned case, I think that it must now be said that people can carry on trade or business with themselves, as by way of mutual insurance, but that, if they do, a resulting surplus from their operations is not a profit from a trade for the purposes of income tax, or, put another way, their operations do not, for the same purposes, constitute a trade from which a profit can result.

In my opinion, the composite proposition that a man cannot make taxable profit out of trading with himself is of unquestioned validity when it is applied to the two kinds of activity with which it is habitually associated in income tax history, mutual insurance and certain public utilities financed by rates. The one line of cases stems from *Styles* v. *New York Life Insurance Co.* (9), the other from *Glasgow Water Comrs.* v. *Inland Revenue* (10) (1875) (1 Tax Cas. 28). Moreover, the proposition is a truism if it is merely resorted to to emphasise that no sale in the legal sense can take place between an individual as trader and the same individual as supplier; or that the taxable pocket from which the thing supplied comes is not likely to be refilled with money or money's worth from the taxable pocket into which the thing supplied goes. But, when we are asked to treat such a proposition as providing a universal solution that covers even the difficult problem which we are now faced with, it is necessary to remember that, in the mutual insurance and water supply cases, there was no question that the accounts of the operations did show a surplus; the question was whether the surplus shown constituted a profit within the meaning of the Income Tax Act. The situation presented to us is a different one. For we are required to assume, what those decisions in effect denied, that the activities to which the accounts relate do constitute a trade for income tax purposes; and our problem is to determine what, on that basis, are the proper entries to make in those trading accounts in relation to certain transactions with trade stock. I doubt very much whether the result of those decisions could have been what it was if the income tax statute had declared that the operations in question were to be regarded as a trade and, as such, a source of taxable profit. So, all things considered, I do not think that we ought to treat the respondent's general proposition as precluding the possibility that the income tax scheme may be found to require that, in certain situations, a taxpayer should be treated as if he had dealt with himself on commercial terms.

To begin with, I am not prepared to forget that the tax code already achieves this fictitious separation in various ways. The owner-occupier of business premises charges against his trade receipts the annual value of those premises for the purposes of his Case I, Sch. D, assessment (Income Tax Act, 1918, Rules Applicable to Cases I and II of Sch. D, r. 5). No money passes, but he is treated as his own lessor. The non-resident producer or manufacturer, who is liable to tax because he markets in the United Kingdom, is entitled to have his assessment based on merchanting profit only (Income Tax Act, 1918, General Rules, r. 12). For the purposes of assessment he is treated as if he, as producer or manufacturer, had sold to himself as merchant or retailer, and had made the sale on trade terms. The provisions which are contained in treaties for relief against double taxation habitually set up a system under which the profits

A made by the producer or manufacturer of one country but sold through a "permanent establishment" of his in another are divided between the two taxing jurisdictions on the basis of a similar fictitious division of the taxpayer's personality and a similar fictitious trading with himself.

My Lords, it may be objected that these situations are all provided for and regulated by statutory enactment, that these, indeed, are planned departures B from what would otherwise be the general rule, and that it is just because there is no provision which deals with the present type of case that our decision should be for the respondent. I do not see great force in this. The statutory enactments have, of course, settled the matter wherever they operate by providing definite rules for their particular occasions; but what we are looking for is some principle to determine the respondent's assessability to taxation, and I C think that it is a wrong sort of approach to look for principles in judicial decision only and to treat the whole income tax code as if it made law but could not itself contain principle. But, apart from that, it seems to me that we are dealing with a problem that must have arisen in hundreds of thousands of cases under various forms, and I think that there are traces that the courts have not found this general proposition that a man cannot trade with himself or make profit D out of himself a satisfactory guide for all purposes.

To begin with, there is *Watson Bros.* v. *Hornby* (1) ([1942] 2 All E.R. 506), which explicitly decided that it may be necessary, for a proper assessment of trade profits under Case I of Sch. D, to treat a man who supplies himself in his trade as trading with himself on ordinary commercial terms. The decision was given in 1942. It laid down a principle that must continually E affect a great many taxpayers, and only now is it said that the case was wrongly decided. I find another instance in *Back* v. *Daniels* (11) (1924) (9 Tax Cas. 183), which raised again the difficult problem of taxing part of a taxpayer's activities under Sch. B and another part under Sch. D. The taxpayers in that case were a firm of wholesale potato merchants who carried on business in London, where they sold all the potatoes raised by them on land in the Fen district. F The effect of the decision was that the Sch. B assessment on the profits of occupation prevented any assessment under Sch. D in respect of the profit the firm made when they sold the potatoes as wholesale merchants in London. But the interesting point is that the taxpayers did not dispute that (9 Tax Cas. per ROWLATT, J., at p. 195):

> G "they may be taxable, in addition to their Sch. B amount, with something in the nature of a commission to themselves for selling their own potatoes, as they sell other people's in London on the market."

The admission did not seem a strange one to the learned judge. On the contrary, "It seems to me", he said, "that that is the limit of their liability". But the "limit" required them to include in the receipts of their London H business a commission from themselves, which, of course, they never paid, for selling for themselves their own potatoes. The accounts, as between the growing department and the wholesale business, were, in fact, kept on the basis of the one being charged and the other receiving such a commission at the same rate as was charged to other growers. The Special Commissioners, I who had heard the original appeal, had approved a Sch. D assessment on this basis and the taxpayers did not challenge that computation in the courts.

Back v. *Daniels* (11) went to the Court of Appeal, but the only member of that court who made any reference to the commission was SCRUTTON, L.J., whose judgment (9 Tax Cas. at p. 201) refers to the Special Commissioners' assessment as including a

> "conventional commission assigned to them as salesmen for selling their own potatoes",

but makes no comment on the computation. I ought, too, to refer to the excess profits duty case of *Inland Revenue Comrs.* v. *Wm. Ransom & Son, Ltd.* (5) (1918) (12 Tax Cas. 21) since it was cited to us in argument. It does afford an instance of the " disintegration " for tax purposes of the profits of a business carried on by a taxpayer in two departments. The produce of one department was transferred to another for processing and distillation, and the internal accounts, on which the separation depended, showed that the producing department was credited with a transfer price equal to the market value of the produce on the day of transfer. There was no dispute about figures before the learned judge (SANKEY, J.), the point before him being whether a part of the profits assessed to excess profits duty should be excluded as being profits of husbandry and exempt as such. He decided that it should. It would not be right to attribute to him any view on the question of principle which is now before your Lordships, but it is fair to say that he decided in favour of attributing separate profits to one department of a business which, on the available accounts, was being charged at market price for the stock transferred from another department.

The last point that I must mention before I can offer my opinion to your Lordships on the present appeal is the place that we should assign to the two decisions, *Laycock* v. *Freeman, Hardy & Willis, Ltd.* (6) ([1938] 4 All E.R. 609), and *Briton Ferry Steel Co., Ltd.* v. *Barry* (2) ([1939] 4 All E.R. 541). To the Court of Appeal they have seemed to have so direct a bearing on the present question as to leave them no option but to decide the appeal in favour of the respondent. I am bound to say, with sincere respect for their point of view, that I cannot follow that. I do not regard those decisions as having any true bearing at all on this appeal. As decisions, obviously, they have not. They are decisions on the difficult and, often, unsatisfactory question of what constitutes succession to a trade for the purpose of the relevant section of the income tax code. That is a long way from the question now before us. But even the expository passages on which reliance was placed appear to me to fall short of suggesting any general principle that should guide us, unless it be that, if inter-departmental transfers of stock are made at cost, that, somehow, represents a " real " figure, whereas a transfer at cost plus a figure of conventional profit represents an unreal one. I am afraid that I do not think that metaphysical distinctions of this sort assist to solve the problem. What do " real " and " unreal " mean in this connection ? If reality depends on the existence of a genuine contract of sale between two independent parties, neither figure is more real than the other. Whether the transfer is between two departments of one legal entity or between two limited companies under the same control, the transfer is effected either by an entry in account or by a dictated sale at a prescribed price. On the other hand, if cost is supposed to be more real than cost plus as a transfer figure, because it represents (or by sufficient analysis of general overheads can be thought to represent) expenditure actually incurred, this seems to me a very unsatisfactory test of reality. When transfer is in question, it is the current realisable value of what is transferred that presents itself as the natural figure to enter rather than the historical record of what has previously been spent on it. It is the article, having a current monetary equivalent, that is disposed of, not the previous expenditure. I do not doubt that either figure could be defended as reasonable business practice, but I do demur to a preference for the cost figure being supported by the plea that it somehow enjoys a greater measure of " reality ".

My Lords, with these considerations in mind, I must now say what I believe to be the right way to deal with the present case. When a horse is transferred from the stud farm to the owner's personal account, there is a disposition of trading stock. I do not say that the disposition is made by way of trade, for that is a play on words which may beg the question. At least three methods have been suggested for recording the result in the stud farm's trading accounts. There might be others. Your Lordships must choose between them.

First, there might be no entry of a receipt at all. This method has behind it the logic that nothing, in fact, is received in consideration of the transfer, and there is no general principle of taxation that assesses a person on the basis of business profits that he might have made, but has not chosen to make. Theoretically, a trader can destroy or let waste or give away his stock. I do not notice that he does so in practice, except in special situations that we need not consider. On the other hand, it was not argued before us by the respondent that this method would be the right one to apply; and a tax system which allows business losses to be set off against taxable income from other sources is, in my opinion, bound to reject such a method because of the absurd anomalies that it would produce as between one taxpayer and another. It would give the self-supplier a quite unfair tax advantage.

Secondly, the figure brought in as a receipt might be cost. That is what the respondent contends for. It is not altogether clear what is to be the basis of such an entry. No sale in the legal sense has taken place, nor has there been any actual receipt. The cost basis, therefore, treats the matter as though there had been some sort of deal between the taxpayer and himself but maintains that, in principle, he can only break even on such a deal. I do not understand why, if he can be supposed to deal at all, he must necessarily deal on such self-denying terms. But then the respondent argues that the cost figure entered as a receipt is to be understood as a mere cancellation of the cost incurred to date. The item of stock transferred to the owner's private account is shown by that very event to have been " withdrawn " from the trade, and the only practical course is to write out of the trader's accounts the whole of the cost bona fide, but mistakenly, entered in respect of it. I think this a very attractive argument, but its weakness is that it does not explain why such cancellation should take place. This is not put to us as a case in which, there being no market, cost is the best available estimate of value. The fact that an item of stock is disposed of not by way of sale does not mean that it was any the less part of the trading stock at the moment of disposal. On the contrary, it was part of the stock of the venture at every moment up till then, and whatever was spent on it was rightly entered as a part of the costs and expenses of the trade. Its disposal does not alter that situation. The trade of which the receipts and expenses are in question is the whole activity of farming, and the disposal of the produce is only one, though a very important, incident of that activity. I think it a fallacy, therefore, to suppose that the method of disposal can give any warrant for treating costs hitherto properly charged to the trade as if, ex post facto, they never ought to have been charged at all. Yet, if a cancelling entry is not to be made, there must either be a figure entered as a receipt which, admittedly, does not represent any actual legal transaction or the costs incurred up to the date of disposal must remain on the books to create or contribute to a " loss " of income which common sense suggests to be a fiction.

In a situation where everything is to some extent fictitious, I think that we should prefer the third alternative of entering as a receipt a figure equivalent to the current realisable value of the stock item transferred. In other words, I think that *Watson Bros.* v. *Hornby* (1) was rightly decided, and that its principle is applicable to all those cases in which the income tax system requires that part of a taxpayer's activities should be isolated and treated as a self-contained trade. The realisable value figure is neither more nor less " real " than the cost figure, and, in my opinion, it is to be preferred for two reasons. First, it gives a fairer measure of assessable trading profit as between one taxpayer and another, for it eliminates variations which are due to no other cause than any one taxpayer's decision as to what proportion of his total product he will supply to himself. A formula which achieves this makes for a more

equitable distribution of the burden of tax, and is to be preferred on that account. A
Secondly, it seems to me better economics to credit the trading owner with the current realisable value of any stock which he has chosen to dispose of without commercial disposal than to credit him with an amount equivalent to the accumulated expenses in respect of that stock. In that sense, the trader's choice is itself the receipt, in that he appropriates value to himself or his donee direct instead of adopting the alternative method of a commercial sale and B
subsequent appropriation of the proceeds.

LORD TUCKER: My Lords, I would allow this appeal for the reasons which have been stated by my noble and learned friend, LORD RADCLIFFE.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue*; *Withers & Co.* (for the taxpayer). C

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

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NOTE.

Landlord and Tenant—Lease—Breach of covenant—Sub-letting without consent—Forfeiture—Relief. F

In *House Property & Investment Co., Ltd.* v. *James Walker, Goldsmith and Silversmith, Ltd.* ([1947] 2 All E.R. 789), the order for costs as drawn up directed that the plaintiffs should pay three-fifths of the defendants' costs of the claim as well as of the counterclaim, and the passage between brackets at p. 792, letter D, of [1947] 2 All E.R. should be amplified accordingly. F.W.

GREGSON *v.* HICK HARGREAVES & CO., LTD.

[COURT OF APPEAL (Singleton, Jenkins and Parker, L.JJ.), October 24, 25, 1955.]

Factory—Dust—" All practicable measures " to be taken—Dust likely to be injurious—Substantial quantity of dust of any kind—Iron foundry—Moulders not provided with masks—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6 *c.* 67), *s.* 47 (1).

From 1934 to 1951 the plaintiff was employed as a moulder in the defendants' foundry. In 1951 he was certified as suffering from silicosis and it was agreed that he had contracted this disease in the course of his employment with the defendants. The plaintiff worked in the defendants' moulding shop where three processes, all of which were found to give off a substantial quantity of dust, were carried on. First, there was the process of " easing " which involved the removal of steel grids from the mould while it was still warm. During this process two moulders worked in the mould for a two-minute stretch, the heat being too excessive for them to remain longer, and those two men whilst so engaged wore respirators provided by the defendants. The other moulders on the job remained nearby, waiting to go down into the mould in pairs and take their turn. The second process known as " knocking off ", which involved the breaking down of the moulds and which was done by labourers, was carried on while the moulders were working between ten and fifteen feet away, but at intervals of about six weeks. During the two processes the moulders other than those working in the mould at the easing process were not provided with respirators or masks, although a mark IV mask approved in 1938 was available for employers to provide and gave protection against this dust, nor were the moulders instructed to keep away from the spot where the dust was given off. During the third process, known as tipping up, which involved tipping the debris of the moulds into a dust ruck, the moulders were instructed to leave the shop and remain outside until the dust had settled. In an action brought by the plaintiff for breach of statutory duty under the Factories Act, 1937, s. 47 (1)*,

Held: the defendants, not having provided masks for moulders to wear during the first two processes when near a place where a substantial quantity of dust was given off, and not having instructed their employees to keep away, had not taken all practicable measures to protect them against inhalation of dust and were in breach of duty under s. 47 (1) of the Factories Act, 1937; in the circumstances the damage suffered by the plaintiff accrued from the breach of statutory duty and the plaintiff was entitled to recover damages.

Decision of DONOVAN, J. ([1955] 2 All E.R. 860) reversed.

[For the Factories Act, 1937, s. 47 (1), see 9 HALSBURY'S STATUTES (2nd Edn.) 1038.]

Appeal.

The plaintiff appealed from an order of DONOVAN, J., at Manchester Assizes, dated May 3, 1955, reported [1955] 2 All E.R. 860, whereby he dismissed the plaintiff's claim for damages against the defendants on the ground of their breach of statutory duty.

From 1934 to 1951 the plaintiff, Mr. Gregson, was employed as a moulder by the defendants in their foundry at Bolton, Lancashire. In January, 1951, the plaintiff was certified as suffering from silicosis and it was agreed that the disease was contracted in the course of his employment with the defendants. The cause of the disease was the inhalation by the plaintiff over a long period of minute and invisible fractured particles of sand known as silica floating in the atmosphere.

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* The relevant terms of the sub-section are printed at p. 508, letter H, post.

In the defendants' moulding shop, which was some one hundred yards long, large castings were made. The moulds used for the purpose were built up of bricks and loam, loam being moulding sand mixed with manure and being used wet. When the moulds were baked preparatory to casting, the loam became hard and dry. There were three processes carried on in the moulding shop which were found to give off a substantial quantity of dust. First, there was the easing process which involved removing steel grids embedded in the hard moulds. This took place while the mould was still warm; the moulds broke apart when the grids were removed and dust was given off. The heat from the mould caused the dust to rise. Secondly, there was the process known as "knocking off" which was the breaking down of the moulds by manual labour. Thirdly, there was the "tipping up" process which involved the tipping up by a crane of the steel plate on which the mould was originally built up, so that the residue of the debris of the mould was removed into a dust ruck. During the first process two men at a time worked in the mould for two minutes at a stretch, the heat being too excessive for them to remain longer, and those two men, whilst in the mould, were provided with respirators. The other men on the job, between six and eight in number, remained nearby and waited to go down into the mould in pairs and take their turn. These men, while waiting nearby, did not wear respirators nor were they told not to stand near the spot whence the dust came. During the second process, which was done by labourers, the moulders, of which the plaintiff was one, were said by the defendants' foreman to be standing or working between ten and fifteen feet away, and were not provided with respirators or masks. The process, however, took place only at intervals of about six weeks. During the third process, the moulders were instructed to leave the shop and stay outside until the dust had settled. It was not known until the present case arose that dust from loam contained silica.

In an action under the Factories Act, 1937, s. 47 (1), the plaintiff alleged that the defendants had not taken all practicable measures to protect him against inhalation of the substantial quantity of dust given off during those three processes and were, therefore, in breach of their duty under that sub-section. DONOVAN, J., held that they had taken all practicable measures and dismissed the plaintiff's claim.

F. Atkinson, Q.C., and *G. Heilpern* for the plaintiff.
H. I. Nelson, Q.C., and *C. M. W. Elliott* for the defendants.

SINGLETON, L.J., stated the facts and continued: In this court counsel for the plaintiff directed our attention to s. 47 (1) of the Factories Act, 1937, and said that he was not raising any other point. Section 47 is headed: "Removal of dust or fumes", and sub-s. (1), as far as is material, reads:

> "In every factory in which, in connection with any process carried on, there is given off any dust or fume or other impurity of such a character and to such extent as to be likely to be injurious or offensive to the persons employed, or any substantial quantity of dust of any kind, all practicable measures shall be taken to protect the persons employed against inhalation of the dust or fume or other impurity and to prevent its accumulating in any workroom . . ."

That sub-section has two distinct branches; the first deals with

> "dust or fume or other impurity of such a character and to such extent as to be likely to be injurious or offensive to the persons employed",

and the second refers to "or any substantial quantity of dust of any kind".

A In either case

> "all practicable measures shall be taken to protect the persons employed against inhalation of the dust or fume."

Counsel for the plaintiff does not place any reliance on what I have described as the first branch of the section; he recognises that on some of the authorities B there might be considerable difficulty in his way. Counsel for the plaintiff relied on the second branch. He submitted that it was quite clear that in certain parts of the processes which were carried on in this foundry a considerable quantity of dust was given off, and, that being so, that the employers were under a duty to take

> "all practicable measures to protect the persons employed against C inhalation of the dust."

He submitted further that on the evidence it was clear that the defendants had not taken all practicable measures to protect the persons employed against such inhalation. The learned judge found that "a substantial quantity of dust" was given off in the moulding shop when each of the following operations were carried on, namely: first, the removal of steel grids embedded in the mould; D secondly, the breaking down of the mould by manual labour after casting had taken place; and thirdly the tipping up by a crane of the heavy steel plate on which the mould was originally built up.

The question which arises is whether the defendants took all practicable measures to protect the persons employed against inhalation of that dust. One measure which could have been taken was to provide a mask which would have E covered the nose and mouth of the person employed, and thus would have prevented inhalation of the dust. Counsel for the plaintiff submitted that the persons who were near or within range of the place at which the dust was given off in any one of the processes which I have mentioned should have been provided with and made to use masks, or, at least, should have been warned and directed not to remain near the place at which the substantial quantity of dust was F given off.

The learned judge dealt with the three occasions on which dust in his view would be given off in substantial quantities in this way ([1955] 2 All E.R. at p. 863):

> "The measures which the defendants took to protect work-people against G inhaling the aforesaid dust were these. When the steel grids were being removed from the mould, masks were provided for and were worn by the men doing this job. To these masks a tube some thirty feet long was fitted, and the other end of the tube usually tied to a stanchion some five or six feet from the ground, the idea being that the worker should breathe uncontaminated air. So far as anyone could tell, this was the result. This mask H and tube were primarily a protection against fumes which were released when the grid was taken away from the casting, although they served to protect against the inhalation of dust as well. Due to the heat, any one man could work only two minutes or so at this job and would then be relieved by another moulder who would wear the same mask, as a rule, as the man he relieved. While waiting to take their turns, the other moulders I would stand around the job, and one of the plaintiff's contentions is that they were not protected at all while so waiting. I am satisfied that no such moulder was ever inconvenienced by dust while so waiting. There were no complaints. The dust, as I say, rose vertically with the heat and the waiting moulders were free to stand where they liked while awaiting their turn at the work of dislodging the grids."

There were six moulders employed; at one point it was suggested that there were six standing in the vicinity at the same time, and I am not sure whether the total number of moulders was six or eight. Two moulders at one time went down inside the mould, and the others were waiting nearby. A considerable quantity of dust was given off, as the evidence shows, when the grids were pulled up. The grids consisted of cast iron, and they were pulled out by a crane. The plaintiff was asked some questions about this, and he said that two men would go down, but they could only remain there for about two minutes; they took it in turns, and when the other men were waiting their turn they would be standing a few yards away. It would appear that the next two men had to be near so that when the first two had done their two minutes' turn and came up they would be ready to go down. If a substantial quantity of dust was given off in the operation of pulling up the grids, it is obvious that the men would be at some risk of inhaling dust unless some precautions were taken. The two men who were down in the mould were provided with masks; those who were standing near were not so provided, nor were they given any instructions, so far as I can find in the evidence, that they should keep some distance away so as to be out of range of the substantial quantity of dust. No precaution was taken to prevent them inhaling dust, apart from the fact that the premises were ventilated. The premises were found by the learned judge to have been well ventilated, although it is a fact that soon after this trouble arose a better and more elaborate system of ventilation was introduced. It is said by counsel for the defendants that practicable means had been taken by way of ventilation. In my view it would have been possible for the defendants to have taken further steps than that, and their duty to take all practicable measures in such circumstances would include either the provision of masks for, or the giving of instructions to, the men who were waiting nearby to keep away from the place where the substantial quantity of dust was given off until it had gone. They did not take those steps, and it appears to me that, in that respect, they did not fulfil their duty under the statute.

The learned judge said ([1955] 2 All E.R. at p. 863):

> "While waiting to take their turns, the other moulders would stand around the job, and one of the plaintiff's contentions is that they were not protected at all while so waiting. I am satisfied that no such moulder was ever inconvenienced by dust while so waiting."

It is difficult to see how far that finding goes, although it is right to say that on the evidence there was nothing to show inconvenience, or it may be that no one had complained of inconvenience at that stage. The duty under the statute, however, is to take all practicable measures to protect the persons employed against inhalation of the dust. It appears to me that there were further practicable measures which could have been taken, such as were mentioned in the evidence, and in particular in that of Mr. Hepburn, a witness who had at one time been a factory inspector and chairman of a joint standing committee in connection with foundries to review problems in the industry.

[His Lordship then read Mr. Hepburn's evidence in which he described a mask called a mark IV respirator, approved in 1938, as being specially designed to prevent inhalation of dust and said that the mask was available to employers and provided an alternative practical means if the ventilation was not adequate and that in his opinion the ventilation of the whole of this foundry was not adequate. His Lordship continued:] I would add that the defendants' foreman, Mr. Hardman, when he gave evidence said that the men who were waiting would be fairly near. Furthermore, it was not suggested by the defendants that the mark IV respirator, or some other form of mask, would not be a help against the inhalation of dust. It appears to me that the defendants, and no doubt other employers, looked on s. 47 of the Factories Act as creating a duty to provide only against dust, fumes or other impurities of such a character and of such an extent as were likely to be injurious; they did not realise that the dust which was given off in their factory contained silica. The protection demanded by the Act is not only against impure dust or fumes but also against inhalation if any substantial quantity of dust of any kind is given off. Here there was a substantial quantity of dust given off, and the provision of a mark IV respirator or a mask of a similar kind would have been something which would have helped to prevent this workman inhaling dust.

In dealing with the second operation the learned judge said ([1955] 2 All E.R. at p. 863):

> " As regards the breaking down of a mould when no longer required, this was done by labourers and not by moulders. The labourers were not made to wear masks, although they were available, nor were the labourers pressed to wear them. If the plaintiff had been a labourer who had had to do this work, different considerations might arise, but as a moulder the plaintiff was sixty to seventy yards from where this process, known as ' knocking off ', was done and there was nothing to suggest that any dust was reaching him and being inhaled by him."

Thus the learned judge recognised that different considerations would arise if the plaintiff had been a labourer who had to break down the mould. It seems that in such circumstances he would have found that the labourers should have been provided with masks while doing the breaking down, for there was a substantial quantity of dust given off when that was being done, and it was the duty of the defendants to take all practicable measures to protect those employed by them against inhalation of the dust. DONOVAN, J., thought, however, that that did not apply to the plaintiff, who was a moulder, because, according to his view of the evidence, the plaintiff was sixty to seventy yards from the place at which the operation known as " knocking off " was done, and there was nothing to suggest that any dust was reaching him and being inhaled by him. When Mr. Hardman, the foreman of the shop and the responsible official with the defendants, was asked about these three operations he gave some answers which I propose to read. He was asked first about the easing of the bars and the pulling out of the grids, and he agreed that there was a substantial quantity of dust given off then. He was asked:

> " The next stage is the knocking off process—and is it right that with the big castings the labourers come and knock to pieces the main part of the mould actually in the pit where the casting has been done? A.—They break it down in the pit where it has been done. Q.—And that is, of course, ten to fifteen feet from where a moulder is working at some other job? A.—Yes, approximately."

The defendants' foreman said ten to fifteen feet. It may be that DONOVAN, J., had not a note of that part of the evidence, for in his judgment he said that as a moulder the plaintiff would be sixty to seventy yards away from where the " knocking off " was done. That may have had something to do with the conclusion at which the learned judge arrived. [HIS LORDSHIP read a further extract from the witness' evidence concerning the process of " knocking off " in which the witness said that a substantial quantity of dust might be given off and that the moulders might be near enough to get the dust, that the process took place once in six weeks and that it took one whole day to strip a mould. HIS LORDSHIP continued:] The foreman's evidence agreed to some extent with that of the plaintiff as to the different processes, and with the estimate of time that the plaintiff gave for these different processes. The plaintiff said that the men inside the mould who had to get the grids away would be occupied on that work for most of the day and that the knocking off, or the breaking up process, would take two days or more. To be employed, as Mr. Hardman said the plaintiff was, ten or fifteen feet from the place where the knocking off was going on, is quite a different thing from his being employed sixty or seventy yards from it. If it was necessary, as it was in the learned judge's view, for the labourers to be protected by the provision of respirators or masks, equally, I should have thought, precautions should have been taken in respect of a moulder who was perhaps ten or fifteen feet away. He ought to have been provided with a mask or he ought to have been warned of the risk and told to keep out of the way when the concentration of dust was heavy, but it was not regarded by his employers as necessary to provide him with a mask or to give him any particular warning.

The same applies, in my view, to the third process, the final tipping, as to which the learned judge said ([1955] 2 All E.R. at p. 863):

> " With regard to the final tipping of the plate, this is the operation which gives off most dust. It takes place about twice a month, and when it was being done the doors were opened and the moulders were sent out of the shop until the resulting cloud of dust, which at times might fill the whole shop for a few moments, had dispersed. It was, whenever possible, done on a Saturday morning, when few moulders were in the shop."

It does appear from that passage that more precautions were taken when that was done than during either of the other processes. The judge found that the moulders were sent out of the shop until the resulting cloud of dust, which at times might fill the whole shop for a few moments, had dispersed. There is nothing to show who told the men when they could come back. However, the work was done, when possible, on a Saturday morning when there were few moulders about.

Counsel for the plaintiff submits that in the course of those three processes which were carried out in the shop it is clearly shown that the defendants did not perform their duty under the statute. He submitted that in relation to each of the processes, if a moulder was near the work which was being done, he ought to have been provided with a mask; that a mask is something which is recognised as preventing, or at least lessening, the risk of inhalation; and that if employers carry out in their shop a process which gives off any substantial quantity of dust of any kind they are under a duty to take all practicable measures to protect the persons employed against inhalation of the dust. They ought, he submitted, to provide masks; furthermore, they ought to have taken some steps to warn the men not to be near the accumulation of dust which was there at a particular time, and here neither of those things was done. On the learned judge's findings on the admission as to the plaintiff's illness, and the cause of it, counsel submitted that the judgment should have been in favour of the plaintiff. He said it was clear that the plaintiff's illness was caused by inhalation of dust, and that the defendants could not be heard to say that their breach of the statute was not the cause of the damage. In other words, he submitted that once there was proved a breach of the statute, followed by damage of a kind which the section is designed to prevent, the onus was then on the defendants to show, if they could, that if they had taken all practicable measures the damage would not have occurred. He added that the defendants did no such thing; they called no medical evidence, and on the findings of the learned judge there should have been judgment for the plaintiff.

Counsel for the defendants submitted that on the evidence as a whole it was shown that the defendants had taken all practicable measures to prevent the inhalation of dust. He said that the two men who had to go inside the mould in order to get out the grids were provided with masks; furthermore, the defendants watered their floor, and when the tipping process was going on the men

A were sent out and that work was done as a rule on a Saturday morning. He drew our attention to the fact that Mr. Hepburn, the witness for the plaintiff, said that masks or respirators were for use primarily by people who were near to the dust, and that is quite right. No one could successfully contend on this evidence that if a considerable quantity of dust was given off at one end of this shop, which was a hundred yards long, everyone down to the other end of the
B shop should be provided with a mask. Against that, if there be workmen quite near to the point at which a substantial quantity of dust is given off, there is a duty to take all practicable measures to prevent their inhaling the dust. They are at risk because they are near; they are near because of the nature of their work, they have to be there, and the duty on the employers is to take all practicable measures. Those measures appear to me to include a warning to the men
C to keep away while the substantial quantity of dust is there and, I think, the provision of respirators or masks for the men who have to be close to the place at which the substantial quantity of dust is given off, and the men ought to be instructed to wear their masks at that time. I recognise that that places a considerable obligation on the defendants. I understand they are now undertaking that duty. It was argued at one time that they ought not to have so
D high a duty put on them because no one knew of the risk of silica in this class of work, but that question to my mind does not arise. On the latter part of s. 47 (1) on which counsel for the plaintiff relies, he is entitled to say there was given off a substantial quantity of dust, and thus the defendants were under a duty to take all practicable measures to protect the plaintiff and others employed against inhalation of the dust. I am inclined to think that DONOVAN, J., might have
E taken a different view except for the mistake in the distance in one case, on the defendants' own admission. I see no difference between the position of a labourer engaged in the second process, i.e., the knocking off process, and that of a moulder who is working ten or fifteen feet away from that labourer. As counsel for the defendants has said, it is really a question of degree. I am
F satisfied on this evidence that the defendants did not fulfil the duty they owed to this workman under s. 47 (1) of the Factories Act, 1937. I am further satisfied on this evidence that the court should hold that the damage which accrued to the plaintiff arose from that breach. It follows that the appeal should be allowed and judgment entered for the plaintiff for the amount of damages provisionally assessed by the learned judge, namely, the sum of £1,750 by way
G of general damage, to which must be added the sum of £658 3s. 5d., special damage.

JENKINS, L.J.: I agree. It is clear that the defendants' iron foundry was, within the meaning of s. 47 (1) of the Factories Act, 1937, a factory in which a process was carried on, namely, the process of moulding, in connection with which substantial quantities of dust were given off. It follows that, as from the
H commencement of that Act, the defendants were under a statutory duty to their workmen employed on this moulding process to take all practicable measures to protect them against inhalation of the dust. The question in this case is whether the defendants have discharged their statutory duty in that regard to the plaintiff.

The learned judge came to the conclusion, if I understand him correctly, that
I the defendants had in fact already taken all practicable measures, and that there was nothing further which they could be called on to do under the section. In reaching that conclusion the learned judge described the three stages or phases in the moulding process which produced significant quantities of dust, and he dealt with them in this way: The first was the easing process, which involved two men having to go into the mould to break out the grids. As to that, the learned judge pointed out that the two men who were actually working in the mould were equipped with respirators, and as to the others he said that the dust

produced rose vertically and that these men need stand no nearer than they chose to the source of the dust. As to the second process, the knocking off process, which undoubtedly produced a great deal of dust, the learned judge thought that moulders at all events, as distinct from labourers, were not affected by that because it took place sixty or seventy yards away. As my Lord has pointed out, that distance is inaccurate, and on the evidence of Mr. Hardman, the defendants' foreman, the defendants cannot put it higher than, say, twenty feet away. Finally, there was the tipping up process, which was the end of the knocking off. In that case, as the learned judge observed, the men were told to leave the shop, the doors were opened, and the men were supposed to stay outside until the dust, which for the time being filled the foundry, had settled or dispersed.

As to the precautions taken in these three stages I can only regard those taken in the third as adequate. As the plaintiff pointed out with regard to the easing off, the men waiting while two of their number were inside the mould breaking out the grids could not be far away because they would be wanted to take their turn. The learned judge's reference to the dust going up vertically came from Mr. Hardman's evidence, but other witnesses described it differently. The plaintiff and another man named Gregory gave evidence to the effect that the dust spread about a great deal, and the plaintiff's expert, Mr. Hepburn, said that the dust came up and diffused and there was no strong current of air. In my view, it is impossible to hold that in this easing off operation the dust rose in a course so completely vertical, and with such rapidity, that a person standing within a few yards of the ascending dust was not exposed to any risk of inhalation. Accordingly, in my view, there were at least two phases in this moulding process which did involve exposing the workmen, and in particular the moulders, such as the plaintiff was, to the inhalation of dust; and, with respect to those two phases of the process at least, it cannot be said that all practicable measures were taken to protect the men against the inhalation of dust. It follows, in my view, that this appeal should succeed.

In reaching a contrary conclusion, the learned judge seems to have founded himself to some extent on the fact that the injurious constituent in the dust produced in an iron foundry is what is known as free silica which consists of minute fractured particles of sand, the presence of which in iron foundry dust has only recently become known. The learned judge, taking the view that all practicable measures had been taken against the dust which the defendants could see, or of the existence of which they knew, came to the conclusion that they could not be held liable for damage done by the silica dust, which was treated by him as a distinct and invisible cloud of minute particles. With due respect to him, I think it is wrong for the present purpose to treat the silica dust as separate from the rest. No one, I apprehend, would suggest that under s. 47 (1) employers such as the defendants are required to guard against elements the existence of which is unknown and the presence of which cannot be detected. The defendants' duty under the second branch of the sub-section is to protect against dust so far as practicable. That, as it seems to me, means to protect against the ordinary, visible, dust arising in the course of the foundry operations. Once it became known that there was some other noxious element produced by the process, it would be their duty under the first branch of the section to guard against it; but prima facie, as matters stood at all events in 1938, their duty was simply to prevent so far as practicable the inhalation of dust, that is to say, the dust manifestly produced by their moulding operations. In my judgment, however, if they had taken all practicable measures to prevent the inhalation of that dust, the result in all probability would have been to protect the plaintiff against the injurious element in that dust in the shape of free silica, even though the presence

A of that injurious element may not have been known. As my Lord has observed, the sub-section is divided into two branches, the first of which refers to

> "any dust or fume or other impurity of such a character and to such extent as to be likely to be injurious or offensive to the persons employed",

whilst the second branch, with which we are here concerned, deals simply with B dust of any kind, and provides that where there is

> "any substantial quantity of dust of any kind, all practicable measures shall be taken to protect the persons employed against inhalation of the dust . . ."

C Cases of this sort may be said to bear to some extent heavily on employers, certainly cases covering periods, say up to 1950, because it has only comparatively lately become known that the dust produced in an iron foundry contains this noxious constituent in the shape of free silica. Their duty is clearly set out, however, in s. 47. It is to take all practicable measures to protect their workpeople from the inhalation of dust, and their duty to do that does not depend on the question whether the dust is known or believed to be noxious or not.

D I will only add in conclusion one word about a submission made by counsel for the defendants with regard to the damages. He pointed out that the plaintiff had been employed as a moulder by the defendants and others for a considerable number of years before 1934, and for a still greater number of years down to the commencement, in 1938, of the Factories Act, 1937, which created the statutory E duty sued on. He pointed out further that silicosis is a disease which is produced by contact with free silica, involving more or less continuous contact over a long period, and he invited us to infer merely from the dates that this plaintiff had already contracted silicosis in 1938. There was, so far as I have been able to discover, no medical or other evidence whatever to show from what time the plaintiff's disability should be treated as having begun. It is a matter on F which we cannot speculate; we cannot treat it as progressing by degrees from year to year from the moment of his first employment in an iron foundry. I take it that the length of time required to contract this disease, and the progress made by the disease when contracted, must vary greatly from case to case, and it is impossible for us, without any evidence, to come to any conclusion on the matter. In my view the damages should be dealt with on the footing that the G plaintiff's disability is wholly attributable to the period of his employment with the defendants.

PARKER, L.J.: I have come to the same conclusion. I confess that I have considerable sympathy with the defendants in this case. Until the plaintiff became ill, they did not know, and it was not suggested that they ought to have known, that the dust which was given off in the course of certain processes H carried on in their factory was injurious. They had no reason to think it would do more than to cause some discomfort if the workmen got too close to it. Thus, to a large extent they left it to the workmen to stay away from any concentration of dust and, where this was impossible, as in the case of the men going down into the mould, they provided masks, and in the case of the tipping of the plate they told the workmen to leave the building. They were, as the learned judge I found, enlightened employers, anxious to introduce all possible amenities for their workmen, and who, if the workmen complained, would have sought to remedy the position. However that may be, the sole question here is whether they have, on the facts of this case, fulfilled their duty under the statute, it being clear that in, at any rate, three processes a substantial quantity of dust was given off. Their duty under s. 47 (1), in those circumstances, was to take all reasonable measures to protect the workmen against inhalation. The meaning of the word "practicable" has been discussed in several recent cases. The introduction of the word, as qualifying the measures to be taken, clearly negatives an absolute duty to protect against inhalation, since only measures which, in the light of current knowledge, are feasible can be regarded as practicable. Nevertheless, it seems to me that the words " practicable measures ", as opposed to the other expression to be found in the Act " so far as is reasonably practicable ", import a high duty.

The learned judge, as I understand him, is saying this: Having regard to the ventilation provided, and the position in which the men were allowed to work, they were not inhaling dust given off in substantial quantities in those three processes, and accordingly no special or further measures were called for. He appears to treat the dust, which has turned out to be dangerous and which is in fact of such fine particles as to be invisible, as something apart from what may be called the visible dust. Thus, he says this ([1955] 2 All E.R. at p. 864):

> " Then, unhappily, the truth became known that some invisible dust must have remained in the atmosphere and was of such a kind that breathing it over a long period of years, albeit in small quantities, had produced silicosis in the plaintiff."

I do not think on the evidence that such a view was justified. On that point, Mr. Rogers, an expert called by the defendants, was asked this question by their counsel in re-examination:

> " You said that it is not the breathing of this visible dust which constitutes the danger of silicosis, it is some other dust? A.—Yes, it is the breathing of the dust which is less than five microns in size, which is the dust you cannot see. Q.—Which is not visible? A.—It is not a heavy dust.. It does not fall in still air, it does not fall at any appreciable rate and, consequently, if you have any current of air out of the building at all it will get carried on that current."

So it would appear to be the case that if the ventilation in the foundry was proper—and there is a finding here that it was—then this invisible dust would be carried out with the current of air. The matter does not rest there, because Mr. Rogers was further questioned by the learned judge:

> " Therefore, I suppose, if you reduce the amount which is inhaled you reduce the risk of silicosis? A.—Yes. As far as I understand the conditions, to get a dangerous atmosphere you have to have something of the order of two thousand particles of silica or dust per cubic centimetre. In other words, it has to be a fairly substantial dust cloud."

It seems to me, therefore, that the danger in fact was that a man would be within range of substantial quantities of visible dust given off in one of these processes, and that in inhaling that dust he would be inhaling some of this dangerous silica. The facts in this case show that the plaintiff must have so inhaled. The learned judge, I think, was misled in the passage to which my Lord has referred when he said that in the knocking off process, which is the occasion of the breach on which counsel for the plaintiff so strongly relies, the moulders were sixty to seventy yards away. It is quite clear, as the defendants' foreman himself said, that in the case of heavy castings a moulder might well be within ten to fifteen feet. Counsel for the defendants rather suggested that that was probably a rare occurrence, but on the evidence of the foreman, as I read it, it was something which occurred regularly every six weeks when one of these very large castings was knocked off, and when it did occur it occupied no less than two days. If the learned judge had had that passage of the evidence in mind, he might well have thought—as, indeed, he envisaged in the case of the labourers—that such a moulder ought to have some protection. The obvious protection that leaps to the mind is a mask, or that the men should be asked to

A move to a different part of the factory whilst the knocking off process was taking place.

Once that position is reached, and once it is shown that the defendants are in breach, it seems to me that the onus is then on them to show that no practicable step would have prevented the damage. There was no suggestion in this case that any mask, other than a mark IV mask, would have been used if a mask
B had to be provided for this purpose; and, although no direct evidence was given, it seems to have been assumed, if only by the absence of cross-examination of Mr. Hepburn, that a mark IV mask would have prevented the inhalation of these very small particles. Counsel for the defendants did advance the argument that, even if his clients were liable, this was merely a case of aggravation of a disease which must have existed before July 1, 1938. It is sufficient to say as
C to that argument that there are no facts found and no evidence on which that argument can be advanced.

Before leaving the case, I would like to say that in my view there is considerable unreality in these cases, in that nobody can possibly tell whether a mask, if provided, will ever be worn. Those who have had experience of these cases are always having evidence put before them to the effect that even when a danger
D is appreciated by employers and work-people alike, it is almost impossible to make the men wear the masks which are provided. Where, as in this case, no danger was appreciated by anybody, it may well be almost impossible to make the workmen wear them. But, the onus being on the defendants, once a breach is proved, and there being no evidence in this case whether a mask would or would not be worn, it is impossible to speculate as to what would happen. By the
E defendants' breach the plaintiff has never had the opportunity of choosing whether he will or will not wear a mask. For these reasons, as well as for the reasons given by my Lords, I would allow this appeal.

Appeal allowed. Leave to appeal to the House of Lords refused.

Solicitors: *W.H.Thompson* (for the plaintiff); *Carpenters,* agents for *G. Keogh & Co.,* Bolton (for the defendants).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

BONSOR *v.* MUSICIANS' UNION.

[HOUSE OF LORDS (Lord Morton of Henryton, Lord Porter, Lord MacDermott, Lord Keith of Avonholm and Lord Somervell of Harrow), June 27, 28, 29, 30, July 4, November 7, 1955.]

Trade Union—Action by member against union—Expulsion—Right to damages for breach of contract.

B., a professional musician, was a member of the respondent union, which was a registered trade union. In 1949 the union purported to expel him from its membership by virtue of one of the union's rules, on the ground that he had failed to pay his weekly contributions. Thereafter he was excluded from the union. In an action against the union, he was granted a declaration that his expulsion was null and void, and an injunction restraining the union, its servants and agents, from acting on the purported expulsion, but his claim for damages for breach of contract was dismissed. On appeal against that dismissal,

Held: (i) (per LORD MORTON OF HENRYTON, LORD PORTER and LORD KEITH OF AVONHOLM; LORD MACDERMOTT dissenting) a registered trade union was capable of being sued for breach of contract as a legal entity although it was not an incorporated body (see p. 524, letter G, p. 527, letter C, and p. 539, letter C, post; p. 535, letter G, post).

Dictum of FARWELL, J., in *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants (1900)* ([1901] A.C. at p. 429) approved.

(ii) the wrongful expulsion of B. amounted to a breach of contract for which the union were liable in damages because

either (a) (per LORD MORTON OF HENRYTON, LORD PORTER and LORD KEITH OF AVONHOLM) there was a breach of a contract between the union as a legal entity and B. whereby the union impliedly agreed that B. should not be expelled otherwise than in accordance with the union's rules,

or (b) (per LORD MACDERMOTT and LORD SOMERVELL OF HARROW) on the basis that the rules of the union constituted a contract between the members, B. was entitled to recover damages for having been wrongfully expelled in breach of the union's rules.

Kelly v. *National Society of Operative Printers' Assistants* (1915) (84 L.J.K.B. 2236) disapproved.

Per LORD MACDERMOTT, LORD KEITH OF AVONHOLM and LORD SOMERVELL OF HARROW: if a registered trade union is sued to judgment, the judgment creditor can look only to the funds of the union, as distinct from the assets of individual members, for recovery of the amount of his judgment (see p. 536, letter C, p. 539, letter B, and p. 543, letter H, post).

Decision of the COURT OF APPEAL ([1954] 1 All E.R. 822) reversed in part.

[**Editorial Note.** The liability of a registered trade union for damages for breach of contract may be limited in other cases by s. 4 of the Trade Union Act, 1871 (see p. 529, letter E, p. 542, letter A, post), which renders certain contracts unenforceable. The principle that a member of an unincorporated association, when wrongfully expelled from that association, can bring an action for breach of damages against other members of the association where the wrongful expulsion amounts to a breach of contract with them, which is the ground on which LORD MACDERMOTT and LORD SOMERVELL OF HARROW concurred in overruling the decision in *Kelly* v. *National Society of Operative Printers' Assistants*, cited above, seems to be equally applicable to expulsion from unincorporated associations other than trade unions, e.g., an unincorporated members' club; compare, as regards the law on this, 5 HALSBURY'S LAWS (3rd Edn.) 264.

As to the legal status of a trade union, see 32 HALSBURY'S LAWS (2nd Edn.) 459, para. 742, and as to expulsion from membership of a trade union, see ibid., 481, para. 770; and for cases on the subject, see 43 DIGEST 92, 93, *962-967*, 98-101, *1032-1047*.

For the Trade Union Acts, 1871 to 1940, see 25 HALSBURY'S STATUTES (2nd Edn.) 1244-1280.]

Cases referred to:

(1) *Kelly* v. *National Society of Operative Printers' Assistants*, (1915), 84 L.J.K.B. 2236; 113 L.T. 1055; 43 Digest 99, *1038*.

(2) *Russell* v. *Amalgamated Society of Carpenters & Joiners*, [1912] A.C. 421; 81 L.J.K.B. 619; 106 L.T. 433; 43 Digest 94, *987*.

(3) *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants* (*1900*), [1901] A.C. 426; 70 L.J.K.B. 905 n.; 83 L.T. 474; 43 Digest 92, *957*.

(4) *Wolfe* v. *Matthews*, (1882), 21 Ch.D. 194; 51 L.J.Ch. 833; 47 L.T. 158; 43 Digest 107, *1123*.

(5) *Strick* v. *Swansea Tin-Plate Co.*, (1887), 36 Ch.D. 558; 57 L.J.Ch. 438; 57 L.T. 392; 43 Digest 109, *1143*.

(6) *Rigby* v. *Connol*, (1880), 14 Ch.D. 482; 49 L.J.Ch. 328; 42 L.T. 139; 43 Digest 98, *1035*.

(7) *Yorkshire Miners' Assocn.* v. *Howden*, [1905] A.C. 256; 74 L.J.K.B. 511; 92 L.T. 701; 43 Digest 107, *1127*.

(8) *Osborne* v. *Amalgamated Society of Railway Servants*, [1909] 1 Ch. 163; 78 L.J.Ch. 204; 99 L.T. 945; *affd.* H.L. sub nom. *Amalgamated Society of Railway Servants* v. *Osborne*, [1910] A.C. 87; 79 L.J.Ch. 87; 101 L.T. 787; *subsequent proceedings*, C.A. sub nom. *Osborne* v. *Amalgamated Society of Railway Servants*, [1911] 1 Ch. 540; 80 L.J.Ch. 315; 104 L.T. 267; 43 Digest 93, *963*.

(9) *Amalgamated Society of Carpenters, Cabinet Makers & Joiners* v. *Braithwaite*, [1922] 2 A.C. 440; 91 L.J.Ch. 688; 128 L.T. 65; 43 Digest 100, *1043*.

(10) *R.* v. *Cheshire County Court Judge & United Society of Boilermakers, Ex p. Malone*, [1921] 2 K.B. 694; 90 L.J.K.B. 772; 125 L.T. 588; 43 Digest 100, *1044*.

(11) *National Union of General & Municipal Workers* v. *Gillian*, [1945] 2 All E.R. 593; [1946] K.B. 81; 115 L.J.K.B. 43; 174 L.T. 8; 2nd Digest Supp.

(12) *Tone River Conservators* v. *Ash*, (1829), 10 B. & C. 349; 8 L.J.O.S.K.B. 226; 109 E.R. 479; 13 Digest 295, *265*.

(13) *Wise* v. *Perpetual Trustee Co.*, [1903] A.C. 139; 72 L.J.P.C. 31; 87 L.T. 569; 43 Digest 763, *2065*.

(14) *Berry* v. *Transport & General Workers' Union*, 1933 S.N. 110.

Appeal.

Appeal in part from an order of the Court of Appeal, dated Feb. 16, 1954, and reported [1954] 1 All E.R. 822, affirming an order of UPJOHN, J., dated Apr. 17, 1953. The facts appear in the opinion of LORD MORTON OF HENRYTON.

H. Lester and *D. A. E. Hart* for the appellant.

I. J. Lindner, Q.C., and *L. B. Schapiro* for the respondent union.

The House took time for consideration.

Nov. 7. The following opinions were read.

LORD MORTON OF HENRYTON: My Lords, this appeal arises out of an action in which Mr. Harry Bonsor was plaintiff and the respondent union was defendant. Mr. Bonsor joined the respondent union, which is a registered trade union, some time before the year 1947. In the year 1949 the union purported to expel him from its membership. The results of that expulsion were described by UPJOHN, J., in his judgment as follows:

> " The plaintiff is aged some fifty years and has all his life been a professional musician. He joined the Musicians' Union through the Liverpool

> branch sometime before 1947. The Musicians' Union is what is familiarly known as a 'closed shop union'. That is to say, it is virtually impossible to get employment or engagement as a musician unless the musician is a member of the union. That, indeed, has been strikingly illustrated in this case, for after his expulsion the plaintiff was unable to obtain any employment except at Cheltenham for a short time with a non-union orchestra. He was, apart from that, unable to get any employment and he has had to seek his livelihood in entirely different spheres. He was at one time even reduced to accepting employment to remove rust from a Brighton pier, and he is now earning a wage of some £6 a week in some engineering works, whereas formerly, earning his livelihood as a musician, he was earning sums certainly well in excess of £10 a week."

On Oct. 8, 1952, Mr. Bonsor issued the writ in the present action, claiming a declaration that his expulsion was wrongful, null and void, an injunction restraining the respondent union, its servants and agents, from acting on the purported expulsion, damages and costs.

Upjohn, J., granted the declaration and injunction and costs, but dismissed the claim for damages, holding himself bound so to do by reason of the decision of the Court of Appeal in 1915 in *Kelly* v. *National Society of Operative Printers' Assistants* (1) (1915) (84 L.J.K.B. 2236). The respondent union appealed against the part of the judgment which granted the declaration and injunction, and Mr. Bonsor cross-appealed against the dismissal of his claim for damages. The Court of Appeal dismissed the respondent union's appeal and dismissed the cross-appeal by a majority (Sir Raymond Evershed, M.R., and Jenkins, L.J., Denning, L.J., dissenting). The Master of the Rolls and Jenkins, L.J., were of opinion, rightly, in my view, that *Kelly's* case (1) was binding on the court, but Denning, L.J., felt himself entitled to disregard that case and delivered a judgment in favour of Mr. Bonsor, which I have found of great assistance. It is the dismissal of the cross-appeal which gives rise to the appeal now before your Lordships' House. Mr. Bonsor died on Feb. 18, 1954, and the present appellant is his widow and legal personal representative. On Aug. 5, 1954, it was ordered that these proceedings should be carried on between the present appellant and the respondent union.

It is convenient to turn at once to *Kelly's* case (1). The plaintiff was a printer's assistant, and the defendant was a trade union registered under the Trade Union Acts. The plaintiff claimed a declaration that a resolution expelling him from membership of the union was ultra vires and void, an injunction restraining the union from enforcing the said resolution, and damages. The case was first heard in the county court, and there the plaintiff obtained a declaration and injunction as asked and £68 damages for loss of employment owing to his expulsion from the union. It is unnecessary for the present purpose to refer to the proceedings on appeal in the Divisional Court, but, when the case reached the Court of Appeal, that court upheld the grant of the declaration and injunction but held that the plaintiff could not recover any damages. The union was ordered to pay the costs of the appeal.

My Lords, I can see no ground on which *Kelly's* case (1) can be distinguished from the present case, but I am of opinion that *Kelly's* case (1) was wrongly decided in so far as the plaintiff's claim for damages was rejected. I think the basis of the decision appears most clearly in the following passage from the judgment of Phillimore, L.J. (84 L.J.K.B. at p. 2238):

> "Damages for tort cannot be given since the Trade Disputes Act, 1906 . . . These damages can only be supported as damages for breach of contract. With whom did the plaintiff contract ? Not, I think, with the trade union, which, as Lord Macnaghten says, in [*Russell* v. *Amalgamated Society of Carpenters & Joiners* (2) ([1912] A.C. 421)], is merely an unincorporated society of individuals. I think that the plaintiff contracted with each and

> A every of the members, and if anybody has broken any contract with him, it is each and every member. Further, the officers of the society are agents for him quite as much as for the other members, and if he sues the trade union for what it has done, he is suing himself among others. I am not sure whether, according to the very loose form in which the judgment is drawn up, there is any judgment against the trade union as such. But if there is, B it is open to these objections. I also think that there can be no charge upon the funds of the society for any breach of contract . . ."

My Lords, in my opinion the action in *Kelly's* case (1) was an action by a member against his union as an entity recognised by the law and distinct from the individual members thereof, for breach of a contract between the plaintiff C and his union. If this is so, the foundation for the refusal to award damages is gone. I base the view which I have just expressed on a line of authorities, of which the first is the well-known case of *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants* (*1900*) (3) ([1901] A.C. 426). In that case, it was held by this House that a trade union registered under the Trade Union Acts, 1871 and 1876, could be sued in tort for the wrongful conduct of its servants in D the course of a strike. I find it unnecessary to set out the relevant provisions of these Acts, since they are sufficiently summarised for the present purpose in passages which I am about to quote from the judgment of FARWELL, J., in the *Taff Vale* case (3). That learned judge said ([1901] A.C. at p. 427):

> "The defendant society have taken out a summons to strike out their name as defendants, on the ground that they are neither a corporation E nor an individual, and cannot be sued in a quasi-corporate or any other capacity . . . Now it is undoubtedly true that a trade union is neither a corporation, nor an individual, nor a partnership between a number of individuals; but this does not by any means conclude the case."

After referring to s. 16 of the Trade Union Act, 1876, and to an argument advanced on behalf of the defendant, the learned judge continued (ibid.):

> F "The questions that I have to consider are what, according to the true construction of the Trade Union Acts, has the legislature enabled the trade unions to do, and what, if any, liability does a trade union incur for wrongs done to others in the exercise of its authorized powers? The Acts commence by legalising the usual trade union contracts, and proceed to establish a registry of trade unions, give to each trade union an exclusive G right to the name in which it is registered, authorize it through the medium of trustees to own a limited amount of real estate, and unlimited personal estate 'for the use and benefit of such trade union and the members thereof'; provide that it shall have officers and treasurers, and render them liable to account; require that annual returns be made to the registry of the assets and liabilities and receipts and expenditure of the society; provide that it H shall have rules and a registered office, imposing a penalty on the trade union for non-compliance; and permit it to amalgamate with other trade unions, and to be wound up. The funds of the society are appropriated to the purposes of the society, and their misappropriation can be restrained by injunction: *Wolfe* v. *Matthews* (4) (1882) (21 Ch.D. 194); and on a winding-up, such funds are distributed amongst the members in accordance with I the rules of the society: *Strick* v. *Swansea Tin-Plate Co.* (5) (1887) (36 Ch.D. 558). Further, the Act of 1871 contains a schedule of matters which must be provided for by the rules."

After referring to observations of SIR GEORGE JESSEL in *Rigby* v. *Connol* (6) (1880) (14 Ch.D. at p. 489), in regard to the limitations on legal proceedings imposed by s. 4 of the Trade Union Act, 1871, the learned judge continued ([1901] A.C. at p. 429):

> "But these limitations merely restrict the actual enforcement of trade

> union contracts by action or suit, and do not affect the question of the status of the association to which such members belong. Now, although a corporation and an individual or individuals may be the only entity known to the common law who can sue or be sued, it is competent to the legislature to give to an association of individuals which is neither a corporation nor a partnership nor an individual a capacity for owning property and acting by agents, and such capacity in the absence of express enactment to the contrary involves the necessary correlative of liability to the extent of such property for the acts and defaults of such agents. It is beside the mark to say of such an association that it is unknown to the common law. The legislature has legalised it, and it must be dealt with by the courts according to the intention of the legislature."

The Court of Appeal set aside the orders made by Farwell, J., but this House was unanimous in restoring them, and the judgment of Farwell, J., was accepted in toto by the Earl of Halsbury, L.C., Lord Shand and Lord Brampton. Lord Halsbury said (ibid., at p. 436):

> " My Lords, in this case I am content to adopt the judgment of Farwell, J., with which I entirely concur; and I cannot find any satisfactory answer to that judgment in the judgment of the Court of Appeal which overruled it. If the legislature has created a thing which can own property, which can employ servants, and which can inflict injury, it must be taken, I think, to have impliedly given the power to make it suable in a court of law for injuries purposely done by its authority and procurement."

Lord Shand ([1901] A.C. at p. 440) referred to

> " The admirable judgment of Farwell, J., in whose reasoning I entirely agree . . . "

Lord Brampton said (ibid., at p. 441):

> " . . . I entirely concur in the judgment and words of the Lord Chancellor in adopting the judgment of Farwell, J.",

and added (ibid., at p. 442) that the defendant society was " a legal entity . . . though not perhaps in the strict sense a corporation."
Lord Macnaghten said (ibid., at p. 436):

> " Although I should be well content to adopt the judgment of Farwell, J., and the reasons he has given, I will venture to add a few words of my own, partly out of respect for the Master of the Rolls, from whose opinion I never dissent without the greatest hesitation, and partly in deference to the argument of counsel, which, before your Lordships, has ranged over a wider field, and on the part of the respondents has, I think, assumed a somewhat bolder tone than in the court below."

In the course of his speech, the noble and learned Lord made some observations which would seem to indicate a view that the action was a representative one, wherein all the members of the union were sued in the registered name of the union. I think that these observations were obiter dicta, but, of course, I accord them the greatest respect. Nevertheless, I have formed the conclusion that they cannot be reconciled with the views of the majority of this House, expressed in the words of Farwell, J., which I have just read. It seems to me that the majority of this House regarded the " entity " or " thing " which was being sued as something separate and distinct in law from the individual members of the society. Moreover, the opposite view gives rise to great difficulties. For instance, the membership of a trade union is constantly changing, as old members die and new members come in. If the suit is to be regarded as having been brought against the individual members, it must have been brought against those who were members at the time when the writ was issued. Yet some of these persons may not have been members at the time when the tort was committed, and the tort cannot, therefore, have been committed by their agents.

Lord Lindley's speech contains passages which may be construed as expressing the view that all the members of the union were being sued in the name of the union, but he concluded his speech with these words ([1901] A.C. at p. 445):

> " Your Lordships have not now to consider how a judgment or order against a trade union in its registered name can be enforced. I see no difficulty about this; but, to avoid misconception, I will add that if a judgment or order in that form is for the payment of money it can, in my opinion, only be enforced against the property of the trade union, and that to reach such property it may be found necessary to sue the trustees."

If the action had been against all the members of the union, it is difficult to see why an order made in the action for the payment of money could only be enforced against the property of the union. Surely, on the hypothesis just stated, each member of the union would be liable in damages for the wrong done. The proceedings before Farwell, J., and in this House were interlocutory, but (as Denning, L.J., points out ([1954] 1 All E.R. at p. 837)) the case subsequently went for trial and a verdict was found for the plaintiffs against the union. The damages were assessed at £23,000 and that sum was paid out of the funds of the union.

My Lords, in my view, the *Taff Vale* case (3) goes far to decide the question now before your Lordships' House. It may be that Lords Macnaghten and Lindley thought that an action against the union was an action against all the individual members—indeed, that view was expressed again by Lord Macnaghten in *Russell's* case (2) ([1912] A.C. at p. 429) and by Lord Lindley in *Yorkshire Miners' Assocn.* v. *Howden* (7) ([1905] A.C. at p. 280)—but I am satisfied that it has never been more than a minority view, inconsistent with the relevant authorities from the *Taff Vale* case (3) onwards, with the solitary exception of *Kelly's* case (1).

The *Taff Vale* case (3) differs from the present case only in two respects—(i) The plaintiff was not a member of the defendant union, and (ii) the action was based on tort, not on contract. Prima facie, I should not have thought that these were vital differences, and this view is borne out by the cases to which I shall shortly refer. I need hardly say that I have not overlooked the provisions of s. 4 (1) of the Trade Disputes Act, 1906, which enacted that:

> " An action against a trade union . . . in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any court."

That section, however, had no operation as regards, for instance, a breach of contract, and it left undisturbed the principles laid down in the *Taff Vale* case (3).

I now pass to *Yorkshire Miners' Assocn.* v. *Howden* (7). The decision in that case turned on the construction of s. 4 of the Trade Union Act, 1871, but its importance for the present purpose lies in the fact that a member of a registered trade union got judgment against his union (and also against some of its officials and its trustees) for an injunction restraining a misapplication of the union's funds. In none of the speeches in this House was it suggested that a member could not bring an action against his union. In *Amalgamated Society of Railway Servants* v. *Osborne* (8) ([1910] A.C. 87), this House granted an injunction, at the suit of a member of a trade union, restraining the union and its trustees from applying the funds of the union for procuring or supporting parliamentary representation. This particular application of its funds by the union was held to be ultra vires at the suit of one of its members, and Lord Atkinson said (ibid., at p. 102):

> " . . . it is clear, in my view, that they [i.e., trade unions] are, when registered, quasi-corporations, resembling much more closely railway companies incorporated by statute than voluntary associations of individuals merely bound together by contract or agreement, express or implied."

In *Osborne* v. *Amalgamated Society of Railway Servants* (8) ([1911] 1 Ch. 540) ("the second Osborne case"), Mr. Osborne, who had been expelled from his union, brought an action against the union and its trustees to obtain reinstatement as a member on the ground that his expulsion was ultra vires and void. It was held by the Court of Appeal that the action was maintainable, and that the jurisdiction of the court to entertain it was not ousted by s. 4 of the Trade Union Act, 1871. This case carries the matter a stage further, since the plaintiff was asserting his own rights as a member against his union. The second *Osborne* case (8) was approved by this House in *Amalgamated Society of Carpenters, Cabinet Makers & Joiners* v. *Braithwaite* (9) ([1922] 2 A.C. 440), and the House held that Mr. Braithwaite and the other plaintiffs could obtain an injunction against their respective unions to restrain a threatened expulsion.

My Lords, it seems to me that *Braithwaite's* case (9) is really decisive of the present case. The action was based on a breach of a contract between the plaintiffs and their respective unions, and a threatened breach of that contract was restrained by injunction. If the breach had actually taken place I see no reason why damages should have been refused.

In the meantime, *Kelly's* case (1) had been criticised by the Court of Appeal in *R.* v. *Cheshire County Court Judge & United Society of Boilermakers, Ex p. Malone* (10) ([1921] 2 K.B. 694). LORD STERNDALE, M.R. (ibid., at p. 702), described it as

> " a decision of this court, which binds us till the House of Lords reverses it."

SCRUTTON, L.J. (ibid., at pp. 709, 710) made some trenchant comments on it, and YOUNGER, L.J., made it plain (ibid., at p. 712) that he would view its reversal with satisfaction. Finally, in *National Union of General & Municipal Workers* v. *Gillian* (11) ([1945] 2 All E.R. 593), the Court of Appeal, affirming BIRKETT, J., held that a trade union can sue for a libel on itself, and UTHWATT, J., said (ibid., at p. 604):

> " That decision [i.e., the decision in the *Taff Vale* case (3)] involves to my mind that a registered trade union is recognised by the law as a body distinct from the individuals who from time to time compose it."

With that observation I agree, and all the cases to which I have referred, with the solitary exception of *Kelly's* case (1), lead me to the following conclusions:— (i) The respondent union, though it is not an incorporated body, is capable of entering into contracts and of being sued as a legal entity, distinct from its individual members. (ii) When Mr. Bonsor applied to join the respondent union, and his application was accepted, a contract came into existence between Mr. Bonsor and the respondent union, whereby Mr. Bonsor agreed to abide by the rules of the respondent union, and the union impliedly agreed that Mr. Bonsor would not be excluded by the union or its officers otherwise than in accordance with the rules. (iii) The respondent union broke this contract, by wrongfully expelling Mr. Bonsor and Mr. Bonsor sued the union as a legal entity. He did not sue either all the members of the union at the date of the writ other than himself, many of whom must have joined since the breach of contract, or all the members of the union including himself. (iv) There is no reason in law why the appellant should not be granted against the respondent union all the remedies appropriate to a breach of contract. (v) The Court of Appeal in *Kelly's* case (1) should have awarded damages to the plaintiff.

I have not embarked on a fresh and detailed examination of the trade union legislation, so often examined by this House in the past, for it seems to me that

A the decisions of this House to which I have referred have settled the law on the lines set out in the conclusions just stated.

I would allow the appeal, and remit the case to the Chancery Division in order that the question of damages may be dealt with, on the basis that the respondent union has been guilty of a breach of contract and that the court has jurisdiction to award damages for that breach. The respondent union should, B in my opinion, pay the appellant's costs here and in the courts below, and the costs of any further proceedings in the Chancery Division should be dealt with by the judge before whom such proceedings come.

LORD PORTER: My Lords, the matter for your Lordships' consideration in this case is to determine the status of a registered trade union or, to put the more limited question to be decided, whether a member of a registered trade C union can recover from it damages for breach of contract.

The facts have been set out and I need not repeat them. Admittedly, Mr. Bonsor suffered from a breach of contract and damage was thereby caused to him, but the questions still remain who committed that breach and whether that damage can be recovered from the respondent union even if the commission was theirs. I should add that it is not contended that the appellant's claim is D nullified by the terms of s. 4 of the Trade Union Act, 1871. Though it is admitted that his contract has been broken, the respondent union submit that the union is not liable to pay damages for the breach. They are, they say, an unincorporated body of persons whose registered name is nothing more than a collective name for all its members. Moreover, they contend that Mr. Bonsor's contract was with his fellow members and not with the union, and, if he sues the union, E he is suing all the members, including himself, and no man can sue himself.

It was on this ground that *Kelly* v. *National Society of Operative Printers' Assistants* (1) (1915) (84 L.J.K.B. 2236) was decided, and, in determining the present case, the Court of Appeal found themselves bound to follow that precedent. I agree with them that the two cases are not to be distinguished and that, so far as the Court of Appeal was concerned, the problem has already been F determined. But your Lordships are not bound by that decision and it is open to review in this House.

The question with whom the member's contract is made, is, I think, closely allied with the other inquiry whether the trade union, as a trade union, can contract at all, or whether the agreement which a member makes is with his fellow members and not with the trade union as such. It is admitted that the G rules are neutral. They might, it is said, on their face indicate a contract either with the body itself or with the other members. The first question, therefore, is with whom was the contract of membership made. Membership is obtained through the officials of the union, but, except in r. 19 and r. 22, and the application form therein mentioned, I cannot find any provision regulating the election of members or prescribing who can, or cannot, decide whether an H applicant shall be elected or not. By r. 22 (2), however, candidates have to make application in writing to one of the secretaries and, prima facie, therefore, it is to the union whose secretaries they are, and not to the individuals composing it, to whom application for membership is to be made, and it is that body which accepts or rejects the election of a member.

It has still, however, to be determined whether that body consists of a number I of individuals or possesses some sort of entity. If it were not for the decision in *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants* (*1900*) (3) ([1901] A.C. 426), it might be possible to contend that no action could be brought against a trade union itself, but that the only right was to sue the trustees or authorised officers under s. 9 of the Act of 1871. Your Lordships' House has, however, decided otherwise, and in the light of that decision it has to be determined whether a trade union possesses some kind of existence which enables it to contract and to sue and be sued for damages for breach of contract.

In the *Taff Vale* case (3), FARWELL, J. ([1901] A.C. at p. 429), said:

> "Now, although a corporation and an individual or individuals may be the only entity known to the common law who can sue or be sued, it is competent to the legislature to give to an association of individuals which is neither a corporation nor a partnership nor an individual a capacity for owning property and acting by agents, and such capacity in the absence of express enactment to the contrary involves the necessary correlative of liability to the extent of such property for the acts and defaults of such agents. It is beside the mark to say of such an association that it is unknown to the common law. The legislature has legalised it, and it must be dealt with by the courts according to the intention of the legislature."

LORD MACNAGHTEN, whilst agreeing with FARWELL, J.'s judgment in the court of first instance, went on, however, to say (ibid., at p. 439):

> "The registered name is nothing more than a collective name for all the members",

and LORD LINDLEY (ibid., at p. 445) says:

> "My Lords, a careful study of the Act leads me to the conclusion that the Court of Appeal held, and rightly held, that trade unions are not corporations; but the court held further that, not being corporations, power to sue and be sued in their registered name must be conferred upon them; and further that the language of the statutes was not sufficient for the purpose. Upon this last point I differ from them. The Act appears to me to indicate with sufficient clearness that the registered name is one which may be used to denote the union as an unincorporated society in legal proceedings as well as for business and other purposes. The use of the name in legal proceedings imposes no duties and alters no rights: it is only a more convenient mode of proceeding than that which would have to be adopted if the name could not be used. I do not say that the use of the name is compulsory, but it is at least permissive."

On the other hand, LORD BRAMPTON in that case (ibid., at p. 442), and, in *National Union of General & Municipal Workers* v. *Gillian* (11) ([1945] 2 All E.R. 593), BIRKETT, J., in the court of first instance, and SCOTT, L.J., and UTHWATT, J. (afterwards LORD UTHWATT), in the Court of Appeal, thought that the Act had created some sort of legal entity which, subject to the limitations prescribed by the Act itself, could sue or be sued like any other legal entity which had existence apart from being a mere nomenclature embracing its several members. UTHWATT, J. ([1945] 2 All E.R. at p. 604) called it a "near-corporation".

How far LORD MACNAGHTEN intended to limit the status of a trade union I find it difficult to determine. He agreed with FARWELL, J., whose opinion more nearly accords with the view that the union possessed some sort of entity apart from its members than with the view that it merely consisted of a number of individuals. Great as is the respect which must be paid to the authority of LORD MACNAGHTEN and LORD LINDLEY, it has to be remembered that their opinions on this matter were "obiter". It is true that they were careful to avoid giving corporate status to a trade union, but, if they had meant that the Act merely provided a convenient name for a number of individuals, they must, in my opinion, have dealt with the difficulty which would arise in many and, perhaps, in almost all cases, viz., that the individuals composing the society would have altered between the date of the wrong complained of and the time at which action was brought, inasmuch as the union under its trade name must, when action was brought, have been composed of those who joined since the act complained of was done, and no longer include those who had died or otherwise ceased to be members meanwhile. If, then, they regarded an action against a

A trade union in its trade name as equivalent to a representative action against its individual members, I cannot agree with their view.

In my opinion, therefore, the decision by the Court of Appeal in *Kelly* v. *National Society of Operative Printers' Assistants* (1), is wrong and should be reversed, an opinion in which I am the more confirmed by the doubts cast on it by the Court of Appeal in *R.* v. *Cheshire County Court Judge & United Society* B *of Boilermakers, Ex p. Malone* (10) ([1921] 2 K.B. 694), and by the opinion of the same body in *National Union of General & Municipal Workers* v. *Gillian* (11), where they held that a trade union can sue for libel on itself.

Apart from the question with whom did the member make his contract, the Court of Appeal in *Kelly* v. *National Society of Operative Printers' Assistants* (1) held that he was unable to sue because the agent of the society who had done him C wrong was agent for himself as well as the other members, since the persons sued were an unincorporated body of which he was one. Looked at from this angle, he was suing his own agent and, therefore, suing himself, a thing he could not do. If, however, there has been, as I think there has, a thing created by statute, call it what you will, an entity, a body, a near-corporation, which, by statute, has, in certain respects, an existence apart from its members, then I do not see why that D body should not be sued by one of its members for a breach of contract.

The exact limits of the power of a trade union to bind itself need not be determined. It may well be that it does not possess the full powers of an incorporated society. Its position is, perhaps, best expressed by FARWELL, J., in the *Taff Vale* case (3), and I am content to adopt his wording as expressing my own view of a trade union's status. It is true that, in that case, the plaintiff was E an outside body and not one of its own members, but FARWELL, J.'s words seem to me to be wide enough to embrace its liabilities not only to third parties but also to its members, inasmuch as they imply an existence of the body apart from the members of which it is composed.

It will be observed that I have refrained from relying on those cases such as *Osborne* v. *Amalgamated Society of Railway Servants* (8) ([1911] 1 Ch. 540) and F *Yorkshire Miners' Assocn.* v. *Howden* (7) ([1905] A.C. 256), in which a member of a trade union has been held entitled to sue his union for wrongful expulsion, in order to avoid the suggestion that that decision depended on the fact that the act was ultra vires the society, but, although those cases and *Amalgamated Society of Carpenters, Cabinet Makers & Joiners* v. *Braithwaite* (9) ([1922] 2 A.C. 440) may be said to have been determined on the ground that the union sued G were acting ultra vires in the steps which they had taken, yet they establish the right of a member to sue his own union.

I would allow the appeal.

LORD MACDERMOTT: My Lords, the nature and bearing of the difficult and important issues raised by this appeal will appear more plainly if a brief H reference is first made to the history of the litigation. In 1952 Mr. Harry Bonsor sued the Musicians' Union, a registered trade union which I shall speak of as "the union", complaining that it had wrongfully expelled him from membership. He sought a declaration as to his rights and, after obtaining an amendment of his claim, an injunction and damages as well. The union defended the action, contending (inter alia) that Mr. Bonsor had been expelled in accordance with I its rules, and that his statement of claim disclosed no right to damages. In the Chancery Division, UPJOHN, J., held (a) that the expulsion occurred when the secretary of the union's Brighton branch, purporting to act under a particular rule dealing with members whose subscriptions were in arrear, erased Mr. Bonsor's name from the register of membership on July 2, 1949, and (b) that the branch secretary was not empowered to act in this manner and had done so in breach of the rules. He, accordingly, declared the expulsion to be null and void and granted an injunction restraining the union from acting on it. But, although it is clear from his careful judgment that the direct effect of this expulsion was to cause Mr. Bonsor grave difficulty in earning his living as a musician, the A union being what is known as "a closed shop", the learned judge was constrained to dismiss the claim for damages on the authority of *Kelly* v. *National Society of Operative Printers' Assistants* (1) (1915) (84 L.J.K.B. 2236), a case in which the Court of Appeal held that a member who had been wrongfully expelled by his trade union could not recover damages against it. Both parties appealed from the decision of Upjohn, J., the union still contending that the expulsion B was in conformity with its rules, and Mr. Bonsor still maintaining his claim for damages. The Court of Appeal unanimously dismissed the union's appeal, affirming Upjohn, J., in his conclusion that the expulsion was contrary to the rules and wrongful. And by a majority (Sir Raymond Evershed, M.R., and Jenkins, L.J.) it also dismissed Mr. Bonsor's cross-appeal, holding that *Kelly's* case (1) was binding on it and could not be distinguished. My Lords, I shall C refer to the reasoning of *Kelly's* case (1) later, but, for the purposes of this narrative, it will suffice to say that it was based on the view that a registered trade union is only an association of individuals, and that a member who sues it is suing the individuals who are his fellow members. That view was challenged before the Court of Appeal on behalf of Mr. Bonsor in a submission to the effect that a registered trade union was a juridical person in itself, a complete entity, D a body with a legal personality separate from that of its members and as competent to contract with them as they were to contract with each other. Such being the position, the argument proceeded, the difficulties in the way of a member suing the other members of his union for damages, which influenced the Court of Appeal in *Kelly's* case (1), did not arise; the rules of the union constituted the terms of the contract between it, as one person, and the members, including Mr. Bonsor, E as distinct persons; and, there having been a breach of that contract on the part of the union, it, as an entity, was liable in damages irrespective of the relationship of the individual members one to another. In the Court of Appeal, the Master of the Rolls and Jenkins, L.J., were not prepared to accept this argument; but Denning, L.J., expressed himself in favour of it, and was of opinion that *Kelly's* case (1) had been wrongly decided on this as well as other grounds. F

The union has not appealed from the decision of the Court of Appeal. Mr. Bonsor, unfortunately, died before it pronounced judgment dismissing his cross-appeal, but his widow and administratrix now appeals by leave from that dismissal. In these circumstances, the only question for your Lordships' determination concerns the only form of relief which can now have any practical value or effect. It is whether Mr. Bonsor was in law entitled to recover damages G against the union for his wrongful expulsion. Though not so stated in the pleadings, this claim has been treated throughout as a claim for damages for breach of contract, and it is common ground that the terms of the relevant agreement are to be found in the rules of the union. But who the contracting parties were involves the question of the union's status and is, therefore, in H dispute. The rules themselves seem to me to stand neutral on that question. If the union is not a juridical person, there is no difficulty in construing them as the terms of agreement between the members; but if, on the contrary, the union is a juridical person, they appear equally capable of being read as the terms of agreement between the union on the one hand and its members on the other.

Such being the course of the case on its way to this House, it will be convenient I to deal first of all with the issue respecting the legal nature of a registered union. Not only was this issue placed by counsel for the appellant in the forefront of his argument but, if he is right in his submissions on it, and the union is to be regarded as a juridical person, distinct from its membership, and as having contracted with its members in the terms of its rules, then, as I see the matter, the foundation of the decision in *Kelly's* case (1) will disappear, and the right to an award of damages will, in the circumstances, be established. If, however, the

A union is not a juridical person distinct from its membership, the basis of *Kelly's* case (1) will remain and the reasoning founded on it will have to be examined.

My Lords, if a registered trade union is a juridical person—and to avoid confusion I should say that I propose to use that expression as connoting the characteristics and attributes of the complete legal entity for which counsel contended—it must be in consequence of the Trade Union Act, 1871, which B provided for the voluntary registration of trade unions and conferred certain privileges on unions taking advantage of that provision. There can be no question that a trade union which is not registered under that Act is not a juridical person. It is a voluntary association of persons, a combination for the purposes mentioned in the definition of "trade union" in s. 23 of the Act of 1871, as modified by s. 16 of the Trade Union Amendment Act, 1876, and s. 2 of the Trade C Union Act, 1913. The first step, therefore, in ascertaining the effect of registration on the nature of a trade union, must be to consider such of the provisions of the Act of 1871 as appear to have a bearing on the point.

Section 2 and s. 3 throw no direct light on the question, but they were enacted to deal with a situation which has to be kept in mind in construing the Act. The objects of many trade unions included purposes which had been held to be D in restraint of trade, with the result that the agreements between their members were unlawful, and the members themselves within reach of the criminal law. Section 2 removed the danger of prosecution, and s. 3 provided that the purposes of a trade union

> "shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust."

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It was not, however, the policy of the legislature to make the whole range of trade union agreements enforceable at law. Section 4, accordingly, provides that nothing in the Act shall enable any court to entertain legal proceedings instituted with the object of directly enforcing or recovering damages for the breach of certain enumerated classes of agreement, the first of which reads as follows:

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> "1. Any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ, or be employed:"

Now it is clear that s. 4, like s. 2 and s. 3, is not confined in its application to G unions which are registered under the subsequent provisions of the Act. It applies to trade unions within the definition to which I have already referred, and, therefore, to unions which are not registered and not juridical persons as well as to unions which are registered; and this, it may be added, holds good for all the classes of agreement which s. 4 specifies, for there is nothing in the text to restrict any of these classes to a particular type of union. On H this account, s. 4 can hardly be expected to furnish a positive answer to the question under discussion; nevertheless I think its description of class 1, though by no means conclusive, affords some indication of the intention of the legislature. That class of agreement is described in a manner which indicates that it was the policy of Parliament to keep the contracts of union members respecting the main purposes of their combination outside the jurisdiction of the courts. The I description accords with what has long been the generally accepted view of the bond by which the members of a trade union are held in association, namely, the contract between members which is formed on admission by an acceptance of the union rules. But it does not refer to agreements between a union and its members. This omission seems natural if the only bond in contemplation was that just mentioned. But I do not think it is what one would expect, if the intention was to make a juridical person of any union choosing to register, as in that case, the registered union would, while the unregistered union would not, be free to circumvent this part of s. 4 by the simple expedient of doing what the union here is said to have done and framing its rules so that the members were bound contractually to it; and that would be contrary to the policy of s. 4, if I am right in the view already expressed that that section was meant to apply to trade unions generally and irrespective of registration.

The other provisions of s. 4 do not put the matter further and I need not detail them. But the section does prompt one general reflection which it will be appropriate to mention now. I would agree with DENNING, L.J., that a trade union may be regarded as an entity in fact. In common parlance, the term is habitually used to connote something that is in some way different from the individuals who form the combination; and I think it is right to say that the Act of 1871 (including s. 4) speaks after this fashion and recognises that a trade union and its membership may not always mean the same thing. But the same can be said of many groups which lay no claim to a legal personality, and, since s. 4 applies to both registered and unregistered unions, the Act's recognition of the factual entity can, in my opinion, offer no sound ground for making the registered union a legal entity as well.

Section 6 provides for registration, but neither in it nor in the fasciculus of sections, beginning with s. 13, which deals with the machinery of registration and various obligations flowing therefrom, nor elsewhere, is any provision for incorporation to be found; this omission is all the more striking in view of s. 5, which enacts that certain statutes, including the Companies Acts, 1862 and 1867,

> " shall not apply to any trade union, and the registration of any trade union under any of the said Acts shall be void . . . "

Then s. 7 says that it shall be lawful for a registered trade union to purchase or take on lease in the names of its trustees any land not exceeding one acre and to sell, exchange, mortgage or let the same. And s. 8 enacts that all the real and personal estate belonging to a registered trade union shall be vested in its trustee for the time being

> " . . . for the use and benefit of such trade union and the members thereof . . . "

At first glance, the enabling form of s. 7 suggests that the legislature regarded a registered trade union as an entity apart from its members which, like certain incorporated bodies, required special authority to hold land. But against this must be set the provision made in both s. 7 and s. 8 for the holding of union property by the union trustees which was relied on by the union as a clear indication that Parliament did not intend to make the registered trade union a juridical person, and, as such, capable of holding its own assets in its own name. Section 9 was said to point in the same direction. It provides that the trustees of a registered trade union, or any other officer who may be authorised by the rules to do so, shall be empowered

> " to bring or defend, or cause to be brought or defended, any action, suit, prosecution, or complaint in any court of law or equity, touching or concerning the property, right, or claim to property of the trade union . . . "

If, as the appellant claims, this Act made the registered union a juridical person, in the sense in which I am using the expression, there seems no very convincing reason why it should not have been left to sue and be sued respecting its property without conferring these special powers on its officers and trustees. Section 11 makes it obligatory for the treasurer and other officers of a trade union to account and hand over balances and books in their hands when required; and, in the event of any failure to comply with these obligations, the trustees are empowered to sue for the balance due, etc., and

> " . . . to recover their full costs of suit, to be taxed as between attorney and client."

This, of course, is not in any way conclusive, but, again, it is scarcely what one would expect if the intention was to create a body which could take these steps for itself. Section 13 deals with applications for registration, and s. 14 provides, inter alia, for the union having a name which can be registered. Section 15 requires a registered trade union to have a registered office, and s. 16 requires it to make annual returns. Each of these last two sections further provides that a trade union which fails to comply with its requirements shall be liable to a penalty. This was said to point to a registered trade union having a distinct personality as, at common law, an offender must be either a natural or an artificial person and must be named or otherwise identified as a person in the charge.

Reference may also be made in this connection to s. 6 and s. 8 of the Act of 1876. Section 6 requires a registered trade union to be registered in that part of the kingdom where its registered office is, and provides that, if it carries on business in another part of the kingdom, it is not to enjoy there " any of the privileges " of the Acts of 1871 and 1876 until the rules have been recorded by the registrar of that other part. Thus, if the act of registration creates a juristic person, it could happen, to take an example, that a union active throughout Great Britain, with one membership and one set of rules, might find itself at the same time an association of individuals in Scotland and an artificial person, a distinct legal entity, in England —or, vice versa, according to the location of the registered office. The power of Parliament to do even more than that cannot be questioned, but one would expect to find the intention to produce such an anomalous situation expressed in clear terms. Section 8 evokes a similar reflection. It makes provision whereby, inter alia, a registered trade union may have its certificate of registration withdrawn or cancelled at its request, and enacts that when this is done the union shall

> " . . . absolutely cease to enjoy as such the privileges of a registered trade union, but without prejudice to any liability actually incurred by such trade union, which may be enforced against the same as if such withdrawal or cancelling has not taken place."

I find it difficult to believe that the legislature ever intended that a trade union should be able to accomplish a fundamental change in its legal character by this simple procedure; yet such would be the result if the appellant's contention were well founded. It would be idle to say that these sections, considered in the context in which they must be placed, make an end of the matter; but their operation is relevant, and their language suggests a further way of stating the issue. Did Parliament intend registration to create a new sort of trade union with a legal personality of its own, or merely to confer the privileges for which the Acts provide on the unions as they were ?

My Lords, if I have referred to the statutory position at some length it is because the problem under examination is essentially one of the meaning and effect of the relevant enactments, and of the intention they manifest. Though this problem has produced numerous expressions of judicial opinion, these are in conflict and the state of the authorities is such that your Lordships are, I think, free to form a conclusion from the text on every material aspect of the matter save one. I do not, therefore, propose to embark on an exhaustive review of the cases cited in the course of the debate. I must, of course, refer to the decision of this House in *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants* (*1900*) (3) ([1901] A.C. 426), for it raises the exception which I have just mentioned; but after that it will be enough to direct attention to such of the pronouncements on the subject as suffice to define the issue and reveal the opposing views.

In the *Taff Vale* case (3), this House, affirming the decision of FARWELL, J., and reversing that of the Court of Appeal, held unanimously that a registered trade union may be sued in its registered name. That conclusion was reached as a matter of inference from the nature of trade unions and the terms of the Acts of 1871 and 1876, and, though its practical importance has been much reduced by the Trade Disputes Act, 1906, the principle it established stands and must be respected in considering the effect of the material statutes. Not only may a registered union, as provided by s. 9 of the Act of 1871, sue and be sued concerning its property in the names of its trustees or authorised officers, it can be sued also in its registered name and in respect of claims which lie outside the scope of that section. Counsel for the appellant relied strongly on this decision, and there can be little doubt that it has the effect of endowing the registered union with one of the more important attributes of a juristic person, and that it detracts appreciably from the force of the argument advanced on behalf of the union, which was based on the express powers of litigating conferred by the Act of 1871 on the trustees and authorised officers. But, if this is so, it is, in my opinion, equally clear that the decision was not founded on the proposition that a registered union is a juristic person. At first instance, FARWELL, J., had based his conclusion on the ground that it was competent for the legislature ([1901] A.C. at p. 429)

> "to give to an association of individuals which is neither a corporation nor a partnership nor an individual a capacity for owning property and acting by agents, and such capacity in the absence of express enactment to the contrary involves the necessary correlative of liability to the extent of such property for the acts and defaults of such agents."

And the learned judge then added (ibid.):

> "It is beside the mark to say of such an association that it is unknown to the common law. The legislature has legalised it, and it must be dealt with by the courts according to the intention of the legislature."

I do not take this to mean that, in the opinion of FARWELL, J., a registered trade union is a juristic person. He does not say that, and, if he meant it, I am at a loss to understand why, as is undoubtedly the case, he took the view that the Acts had not incorporated the registered union. The absence of express provision to that end certainly furnishes no explanation of this, as it has long been held that an intent to incorporate may be implied. See *Tone River Conservators* v. *Ash* (12) (1829) (10 B. & C. 349). It seems to me that, far from attributing a separate personality to such a union, the reasoning of the learned judge recognises the absence of such a personality and amounts in its substance to this—that, although Parliament has not gone far enough to make the registered union other than an association of individuals, it has legalised its purposes and endowed it with powers and qualities to such an extent that an intention to fix it with corresponding responsibilities, enforceable by proceedings brought against it in its registered name, ought to be implied.

In this House, the EARL OF HALSBURY, L.C., expressed his concurrence with the judgment of FARWELL, J., and added ([1901] A.C. at p. 436):

> "If the legislature has created a thing which can own property, which can employ servants, and which can inflict injury, it must be taken, I think, to have impliedly given the power to make it suable in a court of law for injuries purposely done by its authority and procurement."

LORD MACNAGHTEN, having also agreed with the reasoning of FARWELL, J., then spoke in terms which leave no doubt as to his mind on the present issue. He said (ibid., at p. 439):

> "The further question remains: May a registered trade union be sued in and by its registered name? For my part, I cannot see any difficulty in the way of such a suit. It is quite true that a registered trade union is not a corporation, but it has a registered name and a registered office. The registered name is nothing more than a collective name for all the members. The registered office is the place where it carries on business. A partnership

A firm which is not a corporation, nor, I suppose, a legal entity, may now be sued in the firm's name. And when I find that the Act of Parliament actually provides for a registered trade union being sued in certain cases for penalties by its registered name, as a trade union, and does not say that the cases specified are the only cases in which it may be so sued, I can see nothing contrary to principle, or contrary to the provisions of the B Trade Union Acts, in holding that a trade union may be sued by its registered name."

LORD SHAND also adopted the reasoning of FARWELL, J., and, in a brief opinion, stated his conclusion that ([1901] A.C. at p. 441)

> ". . . the power of suing and liability to be sued in the society's name is C clearly and necessarily implied by the provisions of the statutes."

LORD LINDLEY plainly based his concurrence on the ground, not of a new status, but of the effect of the statutory provisions. He said (ibid., at p. 445):

> "The Act appears to me to indicate with sufficient clearness that the registered name is one which may be used to denote the union as an unincorporated society in legal proceedings as well as for business and other D purposes. The use of the name in legal proceedings imposes no duties and alters no rights: it is only a more convenient mode of proceeding than that which would have to be adopted if the name could not be used. I do not say that the use of the name is compulsory, but it is at least permissive."

LORD BRAMPTON alone took the view now contended for by the appellant, his E opinion on the point being thus expressed (ibid., at p. 442):

> "I think that a legal entity was created under the Trade Union Act, 1871, by the registration of the society in its present name in the manner prescribed, and that the legal entity so created, though not perhaps in the strict sense a corporation, is nevertheless a newly created corporate body created by statute, distinct from the unincorporated trade union, consisting F of many thousands of separate individuals, which no longer exists under any other name."

In *Yorkshire Miners' Assocn.* v. *Howden* (7) ([1905] A.C. 256), a decision on the scope of s. 4 of the Act of 1871, LORD LINDLEY affirmed the view he had previously expressed in the *Taff Vale* case (3) in a passage ([1905] A.C. at p. 279) G which reads as follows:

> "One thing, however, the Act of 1871 did not do. It did not incorporate trade unions even when registered under the Act with a name. A trade union holds property by trustees; but not being incorporated there is no one legal person or entity in whom the beneficial interest in the property of a trade union is vested. The beneficiaries are its members collectively and severally. H This is plain from s. 8, which vests the property of every registered trade union in trustees for the use and benefit of such trade union and the members thereof. A trade union is, and its name is only a convenient designation for, an unincorporated society of individuals, and this observation must not be lost sight of on the present occasion."

In *Amalgamated Society of Railway Servants* v. *Osborne* (8) ([1910] A.C. 87), the I EARL OF HALSBURY referred to a registered trade union (ibid., at p. 93) as

> "a legalised combination having power to act as a person and to enforce its rules within the limits of the statute, whatever those limits are;"

and in the same case, LORD ATKINSON (ibid., at p. 102) expressed the view that trade unions are

> "when registered, quasi-corporations, resembling much more closely railway companies incorporated by statute than voluntary associations of

> individuals merely bound together by contract or agreement, express or implied."

These observations of Lord Halsbury and Lord Atkinson were canvassed in support of the appellant's contention, as was also the dictum of Farwell, L.J., in *Osborne* v. *Amalgamated Society of Railway Servants* (8) ([1909] 1 Ch. at p. 191), that

> "A registered trade union is thus a statutory legal entity, anomalous in that, although consisting of a fluctuating body of individuals and not being incorporated, it can own property and act by agents."

But, in my opinion, these dicta fall short of imputing a full juridical personality to the registered union. They recognise, what must be recognised on any view of the matter, that the legislature has conferred on such unions some of the characteristics of a juridical person, but they do not go the length of saying, and were not, in my opinion, intended to say, that the effect of the relevant legislation has been to give those unions a new status amounting to a legal personality distinct from their membership.

I come next to what was said in the Court of Appeal in *National Union of General & Municipal Workers* v. *Gillian* (11) ([1945] 2 All E.R. 593). That case decided that a registered trade union could possess a character capable of being defamed and could maintain an action for damages for defamation in its registered name. The defendants having pleaded that the action was not maintainable at the suit of the plaintiff union, Birkett, J., had held, on a pleading issue, that the suit was maintainable and had expressed the opinion that the Act of 1871 had (ibid., at p. 602) "designedly created a new entity in law, a new persona" in the registered union. As at present advised, I do not think that Birkett, J., needed to take this view in order to reach the conclusion he did. That, however, is by the way. The present relevance of the case lies in the support which this view obtained in the Court of Appeal. Scott, L.J. (ibid., at p. 603), expressed himself thus:

> "A trade union has many activities; it has some existence: and it is something. The omission of Parliament to christen it with some new generic name is immaterial; for Parliament has absolute sovereignty and can make new legal creatures if it likes. It is able, for instance, to create a persona juridica not previously known to law if it so chooses; or to clothe an existing association of natural persons with what I may call co-operative personality, so as to give it the status of a persona juridica. In my view, that is just what it did in 1871. It expressly assumed the possession by every trade union, when duly registered, of so many of the main attributes of judicial personality that I find any other inference of the intention of Parliament impossible."

And, again (ibid., at p. 604):

> "In my view, the true interpretation of the Acts is that a trade union is given all powers of a persona juridica except (a) those solely characteristic of a natural person and (b) those which are expressly excepted by the creating or enabling statute."

MacKinnon, L.J., concurred, and Uthwatt, J., dealt with the matter (ibid.), in these terms:

> "The point decided in *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants (1900)* (3) was that a registered trade union might properly be named as a defendant to an action. That decision involves to my mind that a registered trade union is recognised by the law as a body distinct from the individuals who from time to time compose it. It is not a corporation: but it is very like one. The association is not merely the aggregate of the persons who compose it and the presence of the corporate fiction is not necessary to

secure its individuality. In an age of neologism it might be called a 'near-corporation'."

As I have already indicated, these expressions of opinion do not seem to me necessarily to involve the decision in *Gillian's* case (11); but in the present suit, Denning, L.J., accepted them as well founded and they, no less than those I have quoted to the contrary effect, invite the most careful consideration.

My Lords, having endeavoured to give effect to what has been said on the subject, both in the cases and at the Bar, I have come to the conclusion that the correct view is the view favoured by Lord Macnaghten and Lord Lindley, and by the Master of the Rolls and Jenkins, L.J., in the Court of Appeal. I base this opinion primarily on the statutes. The more closely they are examined the clearer it seems to be that the legislature, though minded to bestow on registered unions some of the gifts and attributes of legal personality, had no intention of doing more and was, indeed, averse to the idea of going the whole length and making those unions new creatures, distinct in law from their membership, and fundamentally different from the "combination" of persons which the definition requires all trade unions to be. I need not go over the various provisions of the Acts again. If they point in more than one direction, on balance they seem to me to lead away from the appellant's contention; and, taken together, it would, I think, be right to say of them that they make of registration and its results something of far less consequence than might fairly be expected had that process been meant to bring into being a new juridical person. The comparative ease with which the garb of registration may be donned and doffed hardly accords with the view that each change means the taking up or the laying down of a legal personality; there is, however, nothing so casual or anomalous about the position if all that happens is that the union concerned gains or loses, as the case may be, certain advantages or "privileges" with their attendant responsibilities. But perhaps the most weighty consideration of all lies in the fact that Parliament has made no effort to incorporate the registered trade union. In the latter half of the last century, incorporation was the recognised and usual way of conferring on an association of persons the status of a distinct legal entity, and it is clear that the draftsman of the Act of 1871 had the Companies Act of 1862 before him. Yet there is not a word about the members becoming, on registration, a body corporate, and the only reference to a seal is in relation to the work of the registry. Parliament is not, of course, restricted in its choice of possible methods for producing a given result. But when, as here, it studiously avoids a familiar and appropriate method without purporting to adopt another in its stead, its intention to reach that result may well be open to doubt. For these reasons, I am of opinion that a registered trade union is not a juridical person.

Having come to this conclusion it is, I think, desirable to add some observations respecting the procedural consequences of the *Taff Vale* decision (3). How a voluntary association of persons, such as a trade union, can be sued is hardly less important than its responsibility under the law. The numbers and the changing character of its membership may be such as to make it impracticable to sue the right persons individually, and difficult to obtain an order appointing representative defendants. These difficulties are, perhaps, at their height in the case of trade unions of workmen where the membership often runs into many thousands and is subject to a constant fluctuation. Anyone—be he a member or an outsider—who seeks a remedy in the courts against an unregistered union of this nature may well be confronted at the outset with a formidable problem in determining how to constitute his suit. The *Taff Vale* decision (3) removed this obstacle to the process of adjudication in the case of the registered union by holding that Parliament had allowed it to be sued in its registered name. Where this is done the party suing, if he is to succeed, has still, of course, to show that the union concerned is, as an organised combination, responsible for the act of which he complains; but he does not need to marshall the membership on any basis of individual liability as, for example, by excluding those who are infants, or who have joined since his cause of action arose or who, as a minority, have voted in his favour; nor (if a member) has he, in my opinion, even to make it clear on the face of the record that he excludes himself. The peculiarity of this procedure, like that under the rules of court in England and Northern Ireland whereby a partnership may be sued in its firm name, lies in the fact that it sanctions proceedings at law in a name which is not that of a juridical person, either natural or artificial. But that, as FARWELL, J., pointed out, and as this House held in the *Taff Vale* case (3), is the result of what Parliament has enacted and, anomalous though it may be, there can be little doubt that, as a procedure, it is a convenient and valuable aid to the administration of justice. It has, however, one consequence which ought not to be overlooked. If a union is sued to judgment in its registered name, execution in respect of any sum it may be ordered to pay cannot, in my opinion, be levied on the assets of members and must be confined to the property of the union. That, as I read the judgment of FARWELL, J., was his view and it was also the view of LORD LINDLEY who said at the end of his speech ([1901] A.C. at p. 445):

> " . . . I will add that if a judgment or order in that form [that is, against a trade union in its registered name] is for the payment of money it can, in my opinion, only be enforced against the property of the trade union . . ."

LORD LINDLEY did not state his reasons for this conclusion. Subsequently, in delivering the judgment of the Judicial Committee in *Wise* v. *Perpetual Trustee Co.* (13) ([1903] A.C. 139), he said, speaking of unincorporated members' clubs (ibid., at p. 149):

> " They are societies the members of which are perpetually changing. They are not partnerships; they are not associations for gain; and the feature which distinguishes them from other societies is that no member as such becomes liable to pay to the funds of the society or to any one else any money beyond the subscriptions required by the rules of the club to be paid so long as he remains a member."

It may be, taking the view he did of the legal nature of a registered union, that LORD LINDLEY considered its members to be, in this respect, in a position similar to the members of a club. But I feel no certainty about that, or whether the passage I have quoted was meant to apply to unliquidated claims. I have not, therefore, based my opinion on any analogy of this sort. I prefer to found it on what appears to me a simpler and less debatable ground. If the statutory right to sue a registered union in its registered name is exercised and a money judgment is obtained, there is no procedure available whereby execution may be levied on foot of such a judgment against the individual members. I find it hard to regard this omission as accidental but, however that may be, the fact is that Parliament has not provided any machinery for extending what I may call a registered name judgment so as to make it enforceable against members as such. The situation where the members are sued by name, or by duly appointed representatives, raises different and, as it seems to me, more difficult considerations, but as that situation does not arise here I express no opinion on it.

My Lords, as counsel for the union conceded—very rightly as I think—that s. 4 of the Act of 1871 did not apply to these proceedings, and as the competence of the courts to embrace a claim of this kind is not otherwise open to question, it only remains to inquire whether *Kelly's* case (1) was properly decided. The foundation of that decision, the view that a registered trade union is not a juridical person but an association of individuals, having been accepted, this question turns on the soundness of the reasoning, based on that foundation, which led to the conclusion that a member could not recover damages against his union for being expelled in breach of the contract contained in the rules.

My Lords, the salient facts in *Kelly's* case (1) are so similar to those of the present appeal that I need not refer to them at length. In each case the party seeking redress had been actually expelled from his union; in each the expulsion was wrongful and in breach of the rules forming the contract between the members; and in each the union stood behind the expulsion and sought to justify it as warranted by the rules until it had to admit defeat on that issue before the Court of Appeal. In *Kelly's* case (1), it is true, the expulsion was the act of a committee, while here it was the act of an official; but, in my opinion, this difference is not important and may be disregarded. What is important is to ascertain the ratio decidendi of *Kelly's* case (1). As to that, it will be convenient to refer first of all to two points which appear not to form part of the ratio though this, of course, does not necessarily impair their relevance. The first arises from the words of PHILLIMORE, L.J., concerning the plaintiff (84 L.J.K.B. at p. 2238):

> " . . . if he sues the trade union for what it has done, he is suing himself among others."

This point is not mentioned in the other judgments, and it may be that it was only made by way of emphasising what I regard as the true ground of the decision. But if, as also seems possible, it is a procedural point and was meant to suggest that a member who sues his union in its registered name cannot succeed because he is also suing himself, I think it must be wrong. The right of a member so to sue for a declaration and injunction regarding his expulsion is now well settled, and I do not see how a claim for damages can be distinguished in this respect. The second matter arises on that part of the judgment of BANKES, L.J., in which he says (ibid., at p. 2239):

> " Further than this, the very ground on which the plaintiff succeeds in obtaining an injunction is fatal to his claim for damages. He succeeds in that claim because he has established that the London committee of the executive committee in expelling him from the society acted without authority and in defiance of the rules. Having established that fact, it is not possible to contend that they were at the same time the authorised agents of his fellow members to do the acts which he complains of as constituting breaches of his contract."

I have no doubt that this point, which is not taken by the other members of the court, is outside the ratio of its decision; but I have considerable difficulty in seeing how it can be applied to the facts of *Kelly's* case (1) if I have gathered them aright. Had the union there disavowed the action of the committee, the reasoning of this passage would be plainer, but, instead of doing that, the union appears from the reports to have approved the views of the committee and to have adopted what it had done. Here, the relevant facts preclude the point, if anything more clearly. There is little more the Musicians' Union could have done to identify itself with the expulsion of Mr. Bonsor. It has made the act of the branch secretary its act, and cannot now say that, because the expulsion was unauthorised by the rules, it has no responsibility for it.

With these points out of the way, the ratio of *Kelly's* case (1) is, I think, clear. It is, in my opinion, accurately described in that part of the headnote in the Law Journal report which says (ibid., at p. 2236):

> " A member of a trade union who has been illegally expelled by the committee . . . cannot recover damages for breach of the contract contained in the rules, since the committee who were responsible for breaking the contract were acting as agents for the plaintiff equally with his fellow members."

As I read the judgments of the Court of Appeal, this was regarded by all the learned judges as the outstanding reason why the claim for damages failed.

BANKES, L.J., stated it more fully than the other members in saying (84 L.J.K.B. at p. 2239):

> "The plaintiff's case is that this contract has been broken not by all the other members personally, but by the London committee of the executive committee acting as the agents of those other members. It is here that the plaintiff fails. It is true that both these bodies were appointed by the general body of members, and as such they are the agents of the members; but they are just as much the agents of the plaintiff as the agents of his fellow members whom he seeks to make liable under their collective name."

My Lords, as I follow it, this reasoning is not based on any concept peculiar to the law of trade unions. It appears to be founded on a general proposition to the effect that a member of a voluntary association who is injured by some wrongful act done by an agent of the association on behalf of its members, including himself, cannot recover against his fellow members whose responsibility, in the circumstances, will be no greater than his own. For the purposes of this appeal I am prepared to accept that proposition without inquiry as to what, if any, are the limits to be put on it. But one of its essential ingredients is that the act complained of should be done by the agent on behalf of the injured member. Was the Court of Appeal right in holding that the committee which expelled Mr. Kelly was, in so doing, acting as his agent ? In the present case, DENNING, L.J., answered that question thus ([1954] 1 All E.R. at p. 839):

> "I cannot understand this line of reasoning. I cannot understand how it can be said that the committee, when they were excluding the plaintiff, Mr. Kelly, were acting as agents on his behalf. They were acting against him, not for him."

My Lords, I think this criticism is well founded, and I agree with it. Expulsion from membership of a trade union stands, as a breach of contract, in a special category. It may be that a union committee or official, while investigating a complaint against a member, can be said to be acting on his behalf. I do not need to decide that, or to say where the line is to be drawn. We are now concerned with a later stage, with the act of expulsion, when what is being done is to thrust a party to the contract out of the combination on the ground that he is no longer entitled to any of the rights or privileges of membership. To say that that is done on behalf of the person expelled seems to me an unwarranted extension of the agency and quite out of keeping with reality.

For this reason I think *Kelly's* case (1) was wrongly decided, and, as I see nothing else to stand in the way of an award of damages, I would, therefore, allow the appeal and remit the case for the purpose of assessing the amount to be recovered.

LORD KEITH OF AVONHOLM: My Lords, much of the discussion on this appeal has been directed to the question of the status of a registered trade union. On the one side it is said that such a trade union is a legal entity capable of being sued by a member for breach of his contract of membership. On the other side it is said that such a union is only a voluntary unincorporated association of individuals incapable of being sued by a member, qua member, for breach of contract. My Lords, I think that the decisions of this House show that, in a sense, a registered trade union is a legal entity, but not that it is a legal entity distinguishable at any moment of time from the members of which it is at that time composed. It remains a voluntary association of individuals but it is capable of suing and being sued in its registered name; it holds property, through trustees, against which a creditor holding a decree against it could levy execution; it acts by agents; and it has other rights and is subject to other liabilities set out in the Trade Union Acts. It differs from an unincorporated association in that it is unnecessary to consider who were the members at any particular time. For instance, it is immaterial who were the members at the time that any cause of action arose, or what members have joined the union since the cause of action arose. The registered trade union may be said to assume a collective responsibility for all members past, present and future, in respect of any cause of action for which it may be made liable, irrespective of the date of the cause of action. On the other hand, the judgment creditor can look only to the funds of such a trade union to satisfy his debt and, to the extent to which these may be augmented from time to time by contributions of members, whether new or old, they will still be available for the unsatisfied judgment creditor. These are important attributes, or characteristics, of a registered trade union which, in my opinion, differentiate it from other voluntary associations and may entitle it to be called a legal entity, while at the same time remaining an unincorporated association of individuals. As an association, its membership is constantly changing, but as a registered trade union, it has a permanent identity and represents its members at any moment of time. It would not, I think, be wrong to call it a legal entity.

The view which I have endeavoured to formulate is, I think, entirely consistent with the decisions and dicta in earlier trade union cases which have come before this House. In *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants* (*1900*) (3) ([1901] A.C. 426), Farwell, J., whose judgment was upheld by this House, does not describe a registered trade union as a legal entity, though he does so in another case to which I refer later. He uses language, however, from which, I think, the conception of such a union as a legal entity arose. For instance, he says (ibid., at p. 429):

> "Now, although a corporation and an individual or individuals may be the only entity known to the common law who can sue or be sued, it is competent to the legislature to give to an association of individuals which is neither a corporation nor a partnership nor an individual a capacity for owning property and acting by agents, and such capacity in the absence of express enactment to the contrary involves the necessary correlative of liability to the extent of such property for the acts and defaults of such agents. It is beside the mark to say of such an association that it is unknown to the common law. The legislature has legalised it, and it must be dealt with by the courts according to the intention of the legislature."

In other places he refers to it as a creature of statute. In this House, the Earl of Halsbury, L.C., expressly adopted the judgment of Farwell, J., and, in a short sentence, referred to such a trade union as a thing created by the legislature. Lord Macnaghten, Lord Shand and Lord Brampton also accepted the judgment of Farwell, J. With the exception of Lord Brampton, however, none of their Lordships, in my opinion, uses language which necessarily leads to the view that he regards a registered trade union as having a legal persona separate from that of the members of which it is composed. Lord Macnaghten and Lord Lindley clearly regarded a registered trade union as a voluntary association of individuals. Lord Macnaghten says ([1901 A.C. at p. 439):

> "The registered name is nothing more than a collective name for all the members."

Lord Lindley says (ibid., at p. 445):

> "The Act appears to me to indicate with sufficient clearness that the registered name is one which may be used to denote the union as an unincorporated society in legal proceedings as well as for business and other purposes. The use of the name in legal proceedings imposes no duties and alters no rights: it is only a more convenient mode of proceeding than that which would have to be adopted if the name could not be used."

He points out, however, that the liability of a registered trade union is limited to the union funds. The decision of this House was to uphold an injunction granted by FARWELL, J., against a trade union in its registered name, but that injunction was grounded on tort, and it is clearly implicit in the judgment of this House that such a trade union could be made liable in damages for tortious acts against a non-member. In fact, a very large award of damages was made against the particular trade union in that case.

In *Yorkshire Miners' Assocn.* v. *Howden* (7) ([1905] A.C. 256), LORD LINDLEY said (ibid., at p. 280):

> " A trade union is, and its name is only a convenient designation for, an unincorporated society of individuals ",

and, referring to the *Taff Vale* case (3), he said (ibid.):

> " But care was taken in that case to point out that a trade union is not an incorporated society, although it may be sued in its registered name."

In *Amalgamated Society of Railway Servants* v. *Osborne* (8) ([1910] A.C. 87), the powers of a registered trade union were assimilated to the powers of a limited company or a corporation, but that was only on the question whether its rules were ultra vires of the statute. In that case, LORD HALSBURY referred to a registered trade union as being (ibid., at p. 93)

> " . . . a legalised combination having power to act as a person . . . "

In *Russell* v. *Amalgamated Society of Carpenters & Joiners* (2) ([1912] A.C. 421), LORD MACNAGHTEN again took occasion to re-affirm (ibid., at p. 429) that

> " a trade union is merely an unincorporated society of individuals."

Lastly, I should refer to what FARWELL, L.J., said in *Osborne* v. *Amalgamated Society of Railway Servants* (8) ([1909] 1 Ch. at p. 191):

> " A registered trade union is thus a statutory legal entity, anomalous in that, although consisting of a fluctuating body of individuals and not being incorporated, it can own property and act by agents."

These words, in my opinion, indicate that FARWELL, L.J., in calling a registered trade union a statutory legal entity, recognises that it is at the same time an unincorporated association of individuals and not something standing separate and apart from the individuals of which it is composed.

This view is, in my opinion, supported by a consideration of the terms of s. 4 of the Act of 1871, which prevents any court from entertaining any legal proceedings instituted with the object of directly enforcing or recovering damages for the breach of, inter alia,

> " Any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ, or be employed."

This provision is applicable alike to registered and unregistered trade unions, and is only consistent with the view that, in the matters covered by this head of s. 4, the rules are agreements between the members. The definitions also of a trade union in the Acts of 1871, 1876 and 1913 apply equally to registered and unregistered trade unions. This may not be conclusive, but it shows that the essential quality, or inherent structure, of the two bodies remains the same.

Reference was made in the course of the argument, and by DENNING, L.J., in the Court of Appeal, to passages in the judgments of BIRKETT, J., SCOTT, L.J., and UTHWATT, J., in *National Union of General & Municipal Workers* v. *Gillian* (11) ([1945] 2 All E.R. 593) on the legal status of registered trade unions. In my opinion, these passages go further than is warranted by previous authority and cannot be supported.

In the result, then, my view is that Mr. Bonsor's contract of membership was a contract between himself and the other members of the union. On the view I have endeavoured to express, it may be regarded also as a contract with

A the trade union, for the trade union, in its registered capacity, is representative of all the members. So long as this is kept in view, it is convenient to talk of a member's contract of membership as a contract with his trade union. Had, then, Mr. Bonsor a right to sue the trade union for breach of contract?

The Court of Appeal has held itself bound by the decision in *Kelly* v. *National Society of Operative Printers' Assistants* (1) (1915) (84 L.J.K.B. 2236), and the B question is whether *Kelly's* case (1) was rightly decided. That case was decided in the Court of Appeal by a strong court. On its facts, it is indistinguishable from the present case. Mr. Kelly sought against a registered trade union a declaration, an injunction and damages in respect of illegal expulsion from the union. He was held entitled to a declaration and injunction, but his claim for damages was refused. I find it unnecessary to analyse the judgments in detail. C The ratio of all the judgments appears to me to be that, in complaining of the action of the officers of the union in expelling him, the plaintiff was complaining of the conduct of agents of all the members of the union, including himself, and that, in suing the trade union, he was suing himself among others. In my opinion, this reasoning suffers from an underlying fallacy. A simple example will illustrate the point. Take the case of a member who has been illegally D expelled by a majority of members at a general meeting which is sufficient to bind the union. No question of agency arises here. The member may be entitled to sue the individuals of the majority for damages in some form of action. I do not find it necessary, however, to decide this point. He could not, it is clear, sue the individuals of the minority. But I see no reason why, if the union is bound by the voice of the majority, the member should not be able to sue the E union, as here, for a declaration and injunction, and the question would then arise, clear of any question of agency, whether he could sue it for damages and recover against the union funds. If the expulsion takes place on the initiative of the union officials, it appears to me that it reduces the position to an absurdity to say that the officials were acting as the expelled member's agents in the matter of the expulsion. They are no more his agents in the matter complained of than F would be a majority who expelled him in a general meeting. There may be cases where a trade union disclaims the action of an official or officials, and in which, accordingly, the conduct complained of cannot be said to be the act of that trade union. But, in such a case, the member would be speedily restored to his status as a union member and would, presumably, in the matter of any claim of damages, have to proceed against the individual or individuals concerned. But that can G hardly apply in this case, where Mr. Bonsor was excluded from his union for over four years, and where the trade union has maintained up to the Court of Appeal the validity of his expulsion.

This leaves the way clear for consideration whether there is any other reason why a registered trade union cannot be sued by a member in damages for breach of his contract of membership. The decision of this House in the *Taff Vale* H case (3) leads inevitably to the conclusion that, prior to 1906, a trade union could be sued, as such, in its registered name, for damages for tort committed against a third party. Liability for tort was subsequently abolished by statute, but liability in contract remained and, in principle, there is no reason why a member of such a trade union should not have the right to sue for damages for an act committed by the trade union in breach of his contract of membership I under the rules. As I have said, such a union assumes a collective responsibility for all its members. It provides the element of continuing responsibility, no matter how its membership changes. In no other way, in my opinion, is it possible to support the result implicit in the judgment in the *Taff Vale* case (3) that a trade union, as constituted at the date of the action, or at the date of the judgment decree, or at the date of enforcement of the decree, is responsible for its tortious acts whenever committed, and however much its membership has changed since the date of the tort.

In my opinion, the case of *Kelly* (1) was wrongly decided. A member of a registered trade union who has been damnified by breach of his contract of membership is entitled, in my opinion, to sue his union for damages, provided his claim is not struck at by any of the provisions of s. 4 of the Act of 1871. Counsel for the respondent union declined, no doubt wisely, to argue that this action was so excluded, although his attention was drawn to the Scottish case of *Berry* v. *Transport & General Workers' Union* (14) (1933 S.N. 110). That case is very shortly reported both on the facts and on the grounds of judgment, and there may be facts undisclosed in the report that would explain the judgment. But, considering the matter independently, I agree that an action of damages by a member of a trade union for breach of contract of membership is not necessarily excluded by the statute. Much may depend on how the claim is formulated. The basis and quantification of the claim in this case has still to be considered.

I would allow the appeal.

LORD SOMERVELL OF HARROW: My Lords, this appeal raises two questions. First, has a member of a registered trade union who is wrongfully expelled a right to claim special damage if he can prove that he has suffered any ? If the answer is " Yes ", then can judgment be obtained in proceedings against the union under its registered name ?

The position in law of trade unions under the various Acts of Parliament is a special one. To import into the subject such general phrases as " legal personality ", " legal entity ", " quasi-corporation ", whatever " quasi " may mean, may well serve to obscure that which is not, in any case, particularly easy to discern. I will, therefore, endeavour to summarise the effect of the decisions as I understand them so far as is relevant to this appeal.

It was decided in the *Taff Vale* case (3) ([1901] A.C. 426) that an action lay against a trade union in its registered name for torts committed by its agents. Section 4 of the Trade Disputes Act, 1906, removed this liability but the procedural importance of the decision remains. Lord Lindley said (ibid., at p. 445):

> " The Act appears to me to indicate with sufficient clearness that the registered name is one which may be used to denote the union as an unincorporated society in legal proceedings as well as for business and other purposes . . . it is only a more convenient mode of proceeding than that which would have to be adopted if the name could not be used."

Lord Lindley added that, in his opinion, a judgment against the union, eo nomine, could only be enforced against the property of the union. The " suability ", coupled with this limitation, avoided, apparently, any question of limiting the liability to the members, or the funds the property of the members, at the date of the tort. Although Lord Brampton used the words " newly created corporate body ", it is clear from the speeches of Lord Macnaghten, Lord Lindley and, I think, Lord Shand, that the association or " combination " of members remained an unincorporated association or combination. The nature of the association was unaffected by registration. Lord Halsbury, L.C., adopted the judgment of Farwell, J. Lord Macnaghten agreed with that judgment, and clearly thought that Farwell, J., had proceeded on the basis that a trade union remained a voluntary association of members, though he had not expressly so stated.

In *Osborne* v. *Amalgamated Society of Railway Servants* (8) ([1911] 1 Ch. 540), usually referred to as the second Osborne case, the plaintiff brought proceedings against the union in its registered name in respect of its alleged wrongful expulsion. He claimed declarations and an injunction. The case, as reported, was heard on two preliminary points. First, were the rules of the union in restraint of trade ? If not, then its legality did not depend on the Trade Union Act, 1871, and s. 4 of that Act did not apply. If the rules were in restraint of trade, then it was submitted that the plaintiff's claim was a proceeding instituted with the object of directly enforcing an agreement for the application of the funds of the trade union to provide benefits to members, a proceeding which was prohibited by s. 4 of the Act. The Court of Appeal considered both points, although success on either would have entitled the plaintiff to proceed to trial. It held that a wrongful expulsion action was not prohibited by s. 4 of the Act of 1871. It was never suggested that proceedings in respect of the alleged wrongful expulsion were not properly brought against the union under its registered name.

The question whether s. 4 of the Act of 1871 was a bar to a wrongful expulsion claim came before your Lordships' House in *Amalgamated Society of Carpenters, Cabinet Makers & Joiners* v. *Braithwaite* (9) ([1922] 2 A.C. 440). It was held that the section was not a bar, approving the decision of the Court of Appeal in the second *Osborne* case (8). The action was one to restrain a threatened expulsion, so no question of damages could arise. It was again accepted that the trade union, in its registered name, was the proper defendant in wrongful expulsion proceedings. In the meantime, the Court of Appeal had decided, in *Kelly* v. *National Society of Operative Printers' Assistants* (1) (1915) (84 L.J.K.B. 2236), that a member of the defendant society wrongfully expelled was entitled to a declaration and injunction but not to damages.

Your Lordships were invited by the appellant to distinguish the *Kelly* case (1) on the ground that the rules of the respondent union in the present case amounted to an agreement between the members and the union and not, or not solely, to an agreement of the members inter se. I do not accept this suggestion, for reasons which I will state briefly later. I propose to consider the *Kelly* case (1) on the basis that the rules contain a contract between the members. If that contract is broken by a wrongful expulsion, prima facie, as it seems to me, the party aggrieved can claim nominal damages and special damages if he could prove any. The main defence in the *Kelly* case (1) was based on the construction of the rules, and does not assist in the present appeal. The expulsion was held to have been wrongful and damages had been awarded by the county court decision. The point with which your Lordships are concerned was taken, apparently, by the court in the Court of Appeal. The reasons given by the lords justices have already been set out and, with respect, I am unable to accept them. If, under a contract to which there are a number of parties, the many by themselves, or through the agents of the association, purport to deprive the one of his contractual rights, the one, subject to possible procedural difficulties, must be entitled to the rights, including that to special damage, which our law confers in respect of breach of contract. It cannot, as it seems to me, be right to identify the plaintiff in such a case with those of whose acts, or of whose agent's acts, he complains so as to deprive him of his ordinary remedies. So far as procedure is concerned, if the union in its registered name is the proper defendant for a declaration and injunction, it would seem to me to be the proper defendant also in a claim for damages, though it would, I think, be right that the trustees should be added as parties. The damages, if any, will be recoverable only from the funds.

I turn to the appellant's primary submission that the contract of each member was in the present case with the union as a contracting party. It raises two issues. First, do the rules, on their true construction, purport to effect such a contract? Second, has the union power under the statutes to be such a contracting party? Even if the answer to the second question were "Yes", it would still, of course, be open to the members so to draft the rules as to constitute a contract inter se only, and not a contract with the union. In considering the rules, it may be helpful to consider the general form that rules of any voluntary association, such as a members' club, would take. In such a case, the name of the association plainly does not, and cannot, denote a contracting party, but it would be difficult not to use words which would be apt if the "name" could be a contracting party.

I do not think the present rules, in their reference to the union, go beyond this. A
I would not, myself, construe them as having any other basis than a contractual one as between members. On the second question whether a union would have power so to contract, I agree with the reasoning and conclusions of my noble and learned friend, LORD MACDERMOTT, on that point and on the general position.

I, therefore, would allow the appeal, and the matter should be remitted for the appellant to prove, if she can, special damage in law from the wrongful expulsion. B

Appeal allowed.

Solicitors: *Cecil Altman* (for the appellant); *Hall, Brydon, Egerton & Nicholas* (for the respondent union).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

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STANTON IRONWORKS CO., LTD. *v.* SKIPPER.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Ormerod and Barry, JJ.), October 27, 1955.] E

Factory—Locomotive—Safety regulations—Contravention—Regulation for safety of persons employed—Fatal accident to servant of independent contractor in consequence of breach of regulation by occupier of factory—Liability of occupier to penalty—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6 *c.* 67), *s.* 133 *—Regulations for Use of Locomotives and Wagons on Lines and Sidings* F
in or used in connection with premises under the Factory and Workshop Act, 1901 (*S.R. & O.* 1906 *No.* 679), *reg.* 14.

The appellants were the occupiers of a factory which was subject to the Regulations for Use of Locomotives and Wagons on Lines and Sidings in or used in connection with premises under the Factory and Workshop Act, 1901. Under an arrangement between the appellants and an independent contractor, a lorry driver was employed by the contractor to collect G
a load of slag from the factory premises. To reach the slag, the lorry driver had to cross a railway track on which wagons were being pushed by a locomotive. There was a collision between the lorry and the wagons, and the lorry driver was killed. At the time of the accident, although the locomotive was pushing more than one wagon and risk of injury might thereby be H
caused to persons employed, a man had not accompanied or preceded the front wagon and no other efficient means had been taken to obviate the risk, as required by reg. 14 of the Regulations of 1906*. The appellants were prosecuted under s. 133 of the Factories Act, 1937†, on the ground that a

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* The terms of the regulation are set out at p. 546, letter H, post. The regulations take effect under s. 60 (1) of the Factories Act, 1937 (see footnote p. 547, I
post). That section, as amended by the Factories Act, 1948, s. 12 (1) and Sch. 1, reads: " Where the Secretary of State is satisfied that any manufacture, machinery, plant, equipment, appliance, process, or description of manual labour, used in factories is of such a nature as to cause risk of bodily injury to the persons employed, or any class of those persons, he may, subject to the provisions of this Act, make such special regulations as appear to him to be reasonably practicable and to meet the necessity of the case ". The Act of 1948 substituted the words " the persons employed " for " persons employed in connection therewith ".

† The terms of the section are set out at p. 547, letter A, post.

A person was killed in consequence of the appellants having contravened a provision of a regulation made under the Act.

Held: the occupier of a factory was liable to a penalty under s. 133 of the Factories Act, 1937, if any person, whether employed by him or not, was killed or injured in consequence of the occupier having contravened any provision of a regulation made under the Act; the appellants had B contravened reg. 14 of the Regulations of 1906, although no one employed by them was injured, and, since the lorry driver was killed in consequence of that contravention of the regulation, the appellants were liable to a penalty under s. 133, whether or not they owed under the regulation any duty to the lorry driver for breach of which an action could be maintained against them.

C Appeal dismissed.

[For the Factories Act, 1937, s. 60 (1) and s. 133, see 9 HALSBURY'S STATUTES (2nd Edn.) 1046, 1105.

For the Regulations for Use of Locomotives and Wagons on Lines and Sidings in or used in connection with premises under the Factory and Workshop D Act, 1901 (S.R. & O. 1906 No. 679), reg. 14, see 8 HALSBURY'S STATUTORY INSTRUMENTS 77.]

Case referred to:

(1) *Hartley* v. *Mayoh & Co.*, [1954] 1 All E.R. 375; [1954] 1 Q.B. 383; 118 J.P. 178; 3rd Digest Supp.

E **Case Stated.**

This was a Case Stated by justices for the county of Leicester in respect of their adjudication as a magistrates' court sitting at Melton Mowbray.

The appellants, Stanton Ironworks Co., Ltd., were the occupiers of a factory at Asfordby Hill which was subject to the Regulations for Use of Locomotives and Wagons on Lines and Sidings in or used in connection with premises under F the Factory and Workshop Act, 1901 (S.R. & O. 1906 No. 679). On Mar. 22, 1955, the respondent, James Theodore Skipper, a factory inspector, preferred an information against the appellants charging that on Feb. 4, 1955, they contravened the provisions of reg. 14 of the Regulations of 1906 in that, where a locomotive pushed more than one wagon and risk of injury was thereby caused to persons employed, a man did not accompany or precede the front wagon or G other efficient means were not taken to obviate such risk, in consequence of which one Alfred Israel Clarence Smith was killed, whereby the appellants were liable to a fine not exceeding £100 under s. 133 of the Factories Act, 1937. The following facts were found by the justices. On Feb. 4, 1955, a locomotive was in use on the factory premises and was pushing more than one wagon, whereby risk of injury might be caused to persons employed on the premises. H A man did not accompany or precede the front wagon and it was not reasonably practicable for him to do so. Other efficient means were not taken to obviate risk of injury to persons employed. The deceased was on the factory premises and was employed carrying out work which was part of the work commonly carried out on the factory premises, namely, the removal of slag from the factory. There was no contract of employment between the appellants and the deceased. I The appellants in the course of their business sold slag to merchants for removal from the factory by the merchants, and the deceased was acting in the employment of one of such merchants. The deceased, who was employed as a lorry driver, was collecting a load of slag, and for this purpose had to drive his lorry across various railway tracks, including that on which slag was being shunted up to a slag crusher. Having driven across this track he had to reverse his lorry backwards in order to bring it to the navvy where it would be loaded with slag. Near the point where the road crossed the tracks were notice boards with the legend: " Danger. Beware of wagons ". There was an engine shunting wagons up to the slag crusher. The engine driver did not see the deceased or his lorry, but, having whistled, proceeded to shunt up the track. The wagons which the engine was pushing collided with the lorry, and the deceased fell out of the lorry in front of the wagons and was killed. The wagons were travelling faster than a man could run. Just before the accident the lorry was seen by an electrician in the employment of the appellants. He gave a shout of warning which the lorry driver did not hear, as there was a good deal of noise going on. There was no one in control at the crossing. The engine driver was assisted by a shunter, but the shunter, owing to the other jobs which he had to do, could not always be watching the engine, and the engine driver could not see anything directly in front of him. The appellants contended, among other things (a) that it was not reasonably practicable for a man to accompany or precede the front wagon and that other effective means were taken to obviate risk of injury to persons employed, namely, the blowing of the locomotive whistle and the stationing of a man on higher ground near the destination of the locomotive and wagons where other persons employed by the appellants were working; (b) that there was no contract of employment between the appellants and the deceased; (c) that there was no risk of injury to any persons employed by the appellants; and (d) that the deceased was not a person for whose benefit the regulations were made. The respondent contended, among other things (i) that " other efficient means " were not taken to obviate the risk of injury by persons employed; and (ii) that the work on which the deceased was employed was of a nature which normally would be carried on in the factory, and that persons carrying out such work would be in the class of persons who would be in the contemplation of the Minister making the Regulations of 1906. The justices were of the opinion, first, that the work on which the deceased was employed was of a nature which normally would be carried on in the factory, and that persons carrying out that work would be in the contemplation of the Minister making the Regulations of 1906; second, that, as it was proved that the movement of the locomotive pushing two wagons might and did, in the absence of efficient means to obviate risk, create a risk to persons employed, there was a breach by the appellants of reg. 14 of the Regulations of 1906; third, that the deceased was killed in consequence of that breach and was a person within the meaning of s. 133 of the Factories Act, 1937; and fourth, that the appellants were liable to conviction under that section.

M. V. Argyle for the appellants.
S. B. R. Cooke for the respondent.

LORD GODDARD, C.J., stated the facts and said: Regulation 14[*] provides:

> " Where a locomotive pushes more than one waggon, and risk of injury may thereby be caused to persons employed, a man shall, wherever it is safe and reasonably practicable, accompany or precede the front waggon or other efficient means shall be taken to obviate such risk."

No doubt, that regulation was passed for the benefit of the servants of the occupiers of a factory, and, in accordance with *Hartley* v. *Mayoh & Co.* (1) ([1954] 1 All E.R. 375), I am assuming that the appellants do not owe a duty under that regulation towards a person who is not employed by them. The regulation is broken, however, if the appellants have not taken efficient means to guard against danger to their employees, although no employee is injured. If an engine is pushing, and not pulling, a wagon, and efficient means have not been taken to guard against the danger which must exist in those circumstances,

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[*] I.e., of the Regulations for Use of Locomotives and Wagons on Lines and Sidings in or used in connection with premises under the Factory and Workshop Act, 1901 (S.R. & O. 1906 No. 679).

A there is a breach of reg. 14. Section 133 of the Factories Act, 1937, provides:

> "If any person is killed, or dies, or suffers any bodily injury, in consequence of the occupier or owner of a factory having contravened any provision of this Act or of any regulation or order made thereunder* . . ."

the occupier of the factory is liable to a penalty, namely, a fine not exceeding B £100.

The justices found that the lorry driver was killed because reg. 14 was contravened. That regulation, as I have already pointed out, is contravened although nobody may be injured. Once the regulation is contravened and somebody is injured, the occupier is liable to a fine not exceeding £100. It may follow from the decision in *Hartley* v. *Mayoh & Co.* (1), that the deceased's C widow would not have an action for breach of the statutory duty, but it does not follow from that decision that an offence is not committed against s. 133 of the Factories Act, 1937, because the section says that, if any person is killed through breach of a regulation, then the occupier is liable. The justices came to a perfectly right decision in this case, and the appeal fails.

D **ORMEROD, J.**: I agree. The appeal has been urged very largely on the ground that the lorry driver who was killed was not a "person employed" within the meaning of that term as used in reg. 14 of the Regulations of 1906. Indeed, the justices, in coming to their decision, appear to have taken the view that the lorry driver did come within the scope of those regulations because they were of the opinion that

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> "the work upon which the deceased was employed was of a nature which normally would be carried on in the factory, and that persons carrying out such work would be in the class of persons who would be in the contemplation of the Minister making the regulations . . ."

I think it is quite clear from *Hartley* v. *Mayoh & Co.* (1), which was the case of a F fireman who was electrocuted when he went on factory premises to put out a fire, that the only persons whose protection is within the contemplation of the regulations* are the persons who are actually employed by the occupier of a factory. Therefore, the first question which had to be decided by the justices in the present case was whether, under the particular conditions, there was a risk of injury to persons employed by the appellants, and whether, if there was a G risk, such efficient means had been taken for their safety as would obviate the risk. Quite independently of the question whether the lorry driver who was killed came within the words of reg. 14 of the Regulations of 1906, the justices found that there was a risk of injury to persons employed and that efficient means had not been taken to obviate that risk. In those circumstances, there is clearly a breach of reg. 14, because there was an obvious risk of injury to a person or to persons H employed by the appellants. In fact, the injury which occurred was not an injury which was caused to a person employed by the appellants, but an injury caused to a person employed by an outside contractor. That does not render the appellants any less liable for a breach of the regulation bringing into play s. 133 of the Factories Act, 1937, which is a section governing the penalties which may be inflicted if any person is killed or suffers bodily injury by reason of a breach I of the regulation. In those circumstances, I agree that the justices came to a proper decision in this case, and the appeal should be dismissed.

BARRY, J.: I also agree, for the reasons given by my Lords. For my part, I am not entirely satisfied that the regulation in respect of which this information was laid necessarily falls within the decision of *Hartley* v. *Mayoh & Co.* (1) or is necessarily to be considered in a similar way to the regulations* which were in question in *Hartley's* case (1). However, as my brethren pointed out, that point is purely immaterial in the present case, and I am satisfied that the justices rightly convicted and that the appeal should be dismissed.

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* The Regulations of 1906 were made under s. 79 of the Factory and Workshop Act, 1901, which is repealed. They are continued in force by s. 159 (1) of the Factories Act, 1937, and are deemed to be made under s. 60 (1) of the latter Act.

Appeal dismissed.

Solicitors: *Carpenters*, agents for *G. Keogh & Co.*, Nottingham (for the appellants); *Solicitor, Ministry of Labour and National Service* (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

WISEBURGH *v.* DOMVILLE (INSPECTOR OF TAXES).

[CHANCERY DIVISION (Harman, J.), October 25, 26, 1955.]

Income Tax—Income—Damages—Loss of capital asset or profit—Agency agreement—Wrongful determination—Settlement of action—Claim for arrears of commission abandoned—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5 *c.* 40), *Sch. D.*

The taxpayer, a manufacturers' agent, was agent for twenty firms altogether for varying periods between 1939 and 1951. In 1948 one of his two main agency agreements was determined by his principals without due notice, and he brought an action for damages for breach of contract and for commission due up to the date of the breach. The principals claimed that they were entitled to dismiss him without notice and said that no commission was owing. In a settlement of the action, the taxpayer recovered £4,000, which was expressed in an agreed order, of Apr. 20, 1950, to be damages for breach of agreement and costs, the claim for commission being abandoned. He was assessed to income tax on the £4,000 for 1949-50 (on the basis that it related to arrears of commission) and alternatively for 1951-52. The General Commissioners of Income Tax found that the sum took the place of commission which he would have earned if the employment had continued until properly determined by notice at the time of the breach and that it was taxable profits in his hands. On appeal,

Held: (i) the £4,000 was not received in compensation for the premature termination of the agency, and was taxable as representing the profit which the taxpayer would have earned between the date of termination of the agency and the due ending date of the agency, and (ii), as it was a normal incident of an agency that it should end and the agency was not the taxpayer's entire source of livelihood, the loss of the agency was not the loss of a capital asset.

Van den Berghs, Ltd. v. *Clark* ([1935] A.C. 431), and *Barr, Crombie & Co.* v. *Inland Revenue* (1945) (26 Tax Cas. 406) distinguished.

Kelsall Parsons & Co. v. *Inland Revenue* (1938) (21 Tax Cas. 608) applied.

Per CURIAM: if the taxpayer had carried on no business other than his agency for the principals, it might well be that its loss would have been the loss of a capital asset (see p. 551, letter E, post).

Appeal dismissed.

[As to whether damages constitute trade receipts for income tax purposes, see 17 HALSBURY'S LAWS (2nd Edn.) 125, para. 235; and for cases on the subject, see DIGEST Supp.]

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* I.e., Regulations for Generation, Transformation, Distribution and Use of Electrical Energy in Premises under the Factory and Workshop Acts, 1901 to 1907 (S.R. & O. 1908 No. 1312); 8 HALSBURY'S STATUTORY INSTRUMENTS 86.

Cases referred to:

(1) *Van den Berghs, Ltd.* v. *Clark,* [1935] A.C. 431; 104 L.J.K.B. 345; 153 L.T. 171; 19 Tax Cas. 390; Digest Supp.

(2) *Barr, Crombie & Co.* v. *Inland Revenue,* 1945 S.C. 271; 26 Tax Cas. 406; Digest Supp.

(3) *Kelsall Parsons & Co.* v. *Inland Revenue,* 1938 S.C. 238; 21 Tax Cas. 608; Digest Supp.

Case Stated.

The taxpayer appealed to the General Commissioners of Income Tax for Manchester against assessments to income tax made on him in the sums of £12,000 for 1949-50 and £10,000 for 1951-52 under Sch. D to the Income Tax Act, 1918, in respect of his profits as an agent. The sums were estimated amounts to protect the interests of the Inland Revenue and they were alternative assessments. The questions for determination were whether £4,000 received by the taxpayer in respect of the ending of an agreement with his principals, Gordon Mills, Ltd., was wholly or partly taxable and, if so, for which year of assessment.

The taxpayer was appointed sole agent of the principals under an agreement made on Apr. 2, 1942. It established one of the two principal agencies out of twenty agencies which he held for varying periods between 1939 and 1951. Following determination of the agreement in alleged breach of its terms by the principals on July 1, 1948 (it could have been lawfully determined by due notice given on that date expiring on Oct. 20, 1949), the taxpayer instituted proceedings claiming damages for breach of contract, the taking of an account of the commission and expenses due to him under the agreement prior to the breach, and payment of the amount found due on the taking of the account. The principals filed a defence to the claim in which they said, inter alia, that the taxpayer was not entitled to any commission or expenses nor to damages, but they paid £4,000 into court. After negotiations the action was settled, without an account being taken, on agreed terms embodied in an order of the Manchester district registrar dated Apr. 20, 1950. Under the order the taxpayer was to be at liberty to enter judgment against the principals for £4,000 as damages for breach of agreement and costs but was to recover nothing in respect of his claim for commission and expenses. The £4,000 paid into court was to be paid out in satisfaction of this sum. The taxpayer acted on the advice of leading counsel that the claim to commission would have to be abandoned.

The taxpayer submitted that the agreement was the principal source of his earnings, was one of the only two sources he had at the time of the dispute and was one of the three permanent agencies he had possessed. He contended that the £4,000 constituted damages for breach of contract in respect of damage to his business structure, that it could not be related to any fiscal year or years and that it was a capital receipt of his business and so not taxable. He submitted further that, if it was paid in respect of commission, it was to the extent of £3,935 a receipt of his business for the accounting period ended Mar. 31, 1949, and the remaining £65 was not a revenue receipt at all. The Crown contended that the taxpayer received the £4,000, not in respect of the loss of an enduring asset, since the agency was not fundamental to the taxpayer's business organisation, but as damages for loss of commission which would have been earned by Oct. 20, 1949, which loss was a normal incident of the business carried on by the taxpayer, and the £4,000 was a receipt on revenue account for the year ended Mar. 31, 1951 (the basis year for 1951-52). Alternatively the Crown submitted that the £4,000 was in respect of commission of £3,935, plus expenses, due in respect of the period up to July 1, 1948, and should be assessed as having been earned in the year ending Mar. 31, 1949. The commissioners held that the terms of the agreed judgment had no bearing on whether the amount awarded was capital or income, that the amount awarded took the place of commission which the taxpayer would have earned if the employment had continued to Oct. 20, 1949, and that the £4,000 was, therefore, taxable profits for the year in which it was received (1950-51).

N. E. Mustoe, Q.C., and *G. B. Graham* for the taxpayer.
Sir Lynn Ungoed-Thomas, Q.C., and *Sir Reginald Hills* for the Crown.

HARMAN, J.: The taxpayer appeals against an assessment of £4,000 in respect of the receipt by him of that sum on the termination of an agency agreement which he had with Gordon Mills, Ltd., his principals. He was by calling a manufacturers' agent. From time to time between the beginning of the war and the end of 1951, he had been agent for twenty firms altogether, some of them for a short time and some of them for longer, but his two main clients were Messrs. Green Hearn & Co. over a period of twelve years, and Gordon Mills, Ltd., the principals, for six years. A considerable agency had gone on for seven years up to 1945, but it ended then.

The taxpayer says that the loss of this particular agency was the loss of one of his capital assets, and that the £4,000 represents that asset and is not taxable as such. The Crown says, and the commissioners agreed, that this was a compensation for the loss of profit-making capacity of the agreement and compensation for loss of profits and, therefore, on ordinary principles, it is as much taxable as the profits which it represents would themselves have been if he had made them.

Many cases have been cited on one side and the other, and my task is to find out whether the commissioners came down on the right side. It is said that they have decided the question as a question of fact. I do not think that, baldly so stated, that is right. Their finding must largely have been a matter of inference. The agreement began in 1942 and was for two years certain and thereafter it was continued from year to year. It was not, therefore, a permanent kind of arrangement.

The parties quarrelled in July, 1948, and the taxpayer started an action for damages in the King's Bench Division, claiming that he had been wrongfully dismissed and was entitled to damages accordingly; in addition he claimed that the defendants had not paid him the right amount even up to the date of the breach, which was stated to be July 1, 1948. The defendants justified, saying that they were entitled to dismiss him without notice owing to various matters and they put in issue whether any sum was owing for the period up to the breach. There were long negotiations, and the action was eventually settled on terms which were embodied in an order made by consent by the district registrar.

In point of form the order leaves much to be desired, but in point of substance it is not very obscure. It was agreed between the parties that the taxpayer should abandon his claim for arrears of commission up to July, 1948. It was also agreed that he should receive £4,000 as damages for breach of agreement. What was the breach of agreement alleged? It was the dismissal in July, 1948, when under the terms of the agreement the principals could not legally dismiss him except by a year's notice ending in October, 1949: in other words, that he had been prematurely dismissed by fourteen months or so, and, therefore, had been deprived of the opportunity of earning the commissions which would, or might, have accrued to him during that time. The parties assessed that at £4,000.

At one time it was said that the £4,000 really represented the pre-breach arrears which had been estimated at nearly that figure, and that in view of that coincidence I ought to look at it as such, but I do not see any reason why I should or how I can do that. Parties are at liberty to make their own bargain. It is open to the taxpayer to say: "I abandon my claim for the pre-breach period and rely entirely on wrongful dismissal". And it may be that the defendants said: "If you do abandon your first claim we may be more ready to meet you". It did not matter to the defendants for what they paid the agreed sum; it might matter to the taxpayer, from the tax point of view, and he was quite justified in taking it in any way which he thought more beneficial from that aspect.

I accept that the defendants paid purely for the wrongful dismissal—the wrongful, premature ending of the agreement—but what does that represent? It represents the profit which would, or might, have been made out of the agreement between the breach and the due ending date. The commissioners have so found in para. 8 (4) of the Case which says:

> "The amount awarded, in fact, took the place of the commission which he would have been earning if the engagement had been continued to Oct. 20, 1949."

I think that is the proper inference to draw from the order. The commissioners were wrong in saying that the order was irrelevant—it is a highly relevant document—but it seems to me that they arrived at the right conclusion.

If this was merely a compensation for the loss of trading profit by an agent, and if the contract would have resulted in a taxable profit to the taxpayer if it had been allowed to run its proper course, and what he has got is merely a quid pro quo for that, I do not see why he should not pay tax just as much on the compensation he got as he would have done on a profit had he earned it. It seems to me, therefore, that what he got is income, just as much as what he would have got had the agreement been allowed to run. Consequently, the commissioners came to the right conclusion.

That is enough to end the case, but in view of the elaborate arguments addressed to me I will look at the authorities. If the taxpayer had carried on no business other than his agency for the defendants and they provided his sole work, it might well be that its loss would have been the loss of a capital asset. I do not think it can depend on the volume of his work—whether one-eighth, or one-quarter or one-third—but if it is his entire livelihood one might say that that is the man's capital asset. That is much easier to say in the case of a limited company than in the case of a private individual, as two cases illustrate. In *Van den Berghs, Ltd.* v. *Clark* (1) (1935) (19 Tax Cas. 390), an English company received a large sum of money from a Dutch company and in return agreed to give up one side of its business. In *Barr, Crombie & Co.* v. *Inland Revenue* (2) (1945) (26 Tax Cas. 406), a Scottish case, LORD NORMAND (the Lord President) pointed out (ibid., at p. 412) that in the *Van den Berghs* case (1)—and indeed in the case before him—the ending of the agreement radically affected the whole structure of the company and the character of its business.

I do not think that observations about business structure apply here. The taxpayer was a manufacturers' agent. He had other agencies from time to time and carried on business as an agent, and one of the incidents of such business is that one agency may be stopped and another begun. The fact that an agency was a key agency, and was therefore important to him and represented half of his income, seems to me to be irrelevant. He must have expected as part of the normal course of such a business that one agency would end and another start. It is said that he had only two agencies at this time, and found it very difficult to get any more after this one ended. It may be that that was his own fault, because he was also representing his wife—nominally his wife, but I think himself—in a similar, competing business, and it would be difficult for him to act as agent for others in competition with his own interest as a principal for himself. However that may be, it was a normal incident in this kind of business that an agency should come to an end, and it seems to me that the compensation paid is quite clearly income.

That side of the line is best illustrated by *Kelsall Parsons & Co.* v. *Inland Revenue* (3) (1938) (21 Tax Cas. 608), again a Scottish case and a fairly plain one and perhaps simpler than this one. LORD NORMAND again gave the leading opinion. There also the business was to be stopped at twelve months' notice. The Lord President pointed out that one of the factors in the setting up of an agency company was that it had agreements which might end and that that was a normal incident in the course of its business. The present case is, perhaps, not quite so clear as that, but it seems to me it is a tolerably clear case. There is nothing to be said against the finding of the commissioners that this was a mere compensation for a loss of profits over the next fourteen or fifteen months. As such, it is taxable in the way that the Crown claims and in my judgment the appeal should be dismissed.

Appeal dismissed. Case remitted to the commissioners to adjust the assessment.

Solicitors: *Garland-Wells, Riches & Co.* (for the taxpayer); *Solicitor of Inland Revenue.*

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

SUN LIFE ASSURANCE SOCIETY *v.* DAVIDSON (INSPECTOR OF TAXES).
PHOENIX ASSURANCE CO., LTD. *v.* LOGAN (INSPECTOR OF TAXES).

[Chancery Division (Harman, J.), October 11, 12, November 2, 1955.]

Income Tax—Repayment—Management expenses—Life assurance companies—Expenses of changing investments—Brokerage and stamp duty—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5 *c.* 40), *s.* 33 (1).

Two life assurance companies, an essential part of whose daily business was investing their premium income and changing the investments of their life fund as occasion demanded, were taxed on their investment income, not on their profits. They claimed relief under s. 33 (1) of the Income Tax Act, 1918, in respect of sums expended for brokerage and stamp duty in buying and selling investments on the ground that these sums were " sums disbursed as expenses of management (including commissions) " within that section.

Held: sums paid in brokerage and stamp duty by a life assurance company in buying and selling investments in the ordinary course of its life assurance business were not sums disbursed as " expenses of management (including commissions) " within s. 33 (1) of the Act of 1918, and accordingly the companies were not entitled to relief in respect of those sums.

Capital & National Trust, Ltd. v. *Golder* ([1949] 2 All E.R. 956) followed.

Appeals dismissed.

[As to the Crown's right of election to assess an assurance company on its investment income, see 17 Halsbury's Laws (2nd Edn.) 132, para. 255; and as to relief for expenses of management of a life assurance company, see 17 Halsbury's Laws (2nd Edn.) 135, 136, paras. 267, 268; pp. 335-337, paras. 676-678. For a case on the subject, see 28 Digest 55, *283*.

For the Income Tax Act, 1918, s. 33 (1), see 12 Halsbury's Statutes (2nd Edn.) 27; and for the replacing provision in s. 425 (1) of the Income Tax Act, 1952, see 31 Halsbury's Statutes (2nd Edn.) 406, 407.]

Cases referred to:

(1) *Simpson* v. *Grange Trust, Ltd.*, [1935] A.C. 422; 104 L.J.K.B. 276; 152 L.T. 517; 19 Tax Cas. 231; Digest Supp.

(2) *Capital & National Trust, Ltd.* v. *Golder*, [1949] 2 All E.R. 132; *affd.* C.A., [1949] 2 All E.R. 956; 31 Tax Cas. 265; 2nd Digest Supp.

(3) *North British & Mercantile Insurance Co.* v. *Easson*, (1919), 7 Tax Cas. 463; 28 Digest 55, *r*.

(4) *Bennet* v. *Underground Electric Rys. Co.*, [1923] 2 K.B. 535; 92 L.J.K.B. 909; 129 L.T. 701; 8 Tax Cas. 475; 28 Digest 55, *283*.

(5) *Southern* v. *Aldwych Property Trust, Ltd.*, [1940] 2 K.B. 266; 109 L.J.K.B. 719; 163 L.T. 364; 23 Tax Cas. 707; 2nd Digest Supp.

(6) *London County Freehold & Leasehold Properties, Ltd.* v. *Sweet*, [1942] 2 All E.R. 212; 167 L.T. 175; 24 Tax Cas. 412; 2nd Digest Supp.

(7) *Liverpool & London & Globe Insurance Co.* v. *Bennett*, [1913] A.C. 610; 82 L.J.K.B. 1221; 109 L.T. 483; 6 Tax Cas. 327; 28 Digest 60, *304*.

Cases Stated.

The appellant assurance companies claimed under s. 33 (1) of the Income Tax Act, 1918, repayment of so much of the income tax paid by them for the year of assessment 1949-50 as was equal to the amount of tax on the sums disbursed as expenses of management for the year ended Dec. 31, 1949. The claims were objected to by the Crown to the extent and on the ground that the expenses claimed included sums disbursed by the companies by way of brokerage and stamp duties, and the question therefore fell to be decided by the Special Commissioners of Income Tax whether such sums were expenses of management reclaimable under s. 33. The sums were, in the case of the Sun Life Assurance Society, £40,773, and in the case of the Phoenix Assurance Co., Ltd., £62,806 less consequential reduction of foreign life fund restriction £3,623, leaving £59,183 net. The Sun Life Assurance Society contended that the purchases and sales of stocks and shares giving rise to the payment of the commissions and stamp duties were a part of the ordinary day-to-day trading activities of the society and the stocks and shares as purchased and sold were part of its ordinary trading assets. It submitted that these facts, and the Phoenix Assurance Co., Ltd., submitted that the fact that the investments representing its life funds constituted circulating capital of the company's trade, distinguished the cases from *Capital & National Trust, Ltd.* v. *Golder* (2), (which the Phoenix Assurance Co., Ltd., said alternatively was wrongly decided), where the stocks and shares purchased and sold were part of the capital assets of the company; and that the expenses were therefore properly treated as part of the " sums disbursed as expenses of management (including commissions) " within the meaning of s. 33 and were so reclaimable. The Crown contended that, because (in the Phoenix Assurance Co., Ltd.'s case) they were directly referable to each several purchase and sale of a holding of investments and were to be treated as part of the cost, or as a reduction from the receipts of sale, the sums were not expenses of management allowable under s. 33 on the authority of *Capital & National Trust, Ltd.* v. *Golder* (2). The commissioners found, in the case of each of the assurance companies, that in the carrying on of the business of the company it was necessary for the company to purchase investments out of its premium income and from time to time to sell or change investments, as part of its ordinary day-to-day business activities. But they held that the expenses were so specifically referable to the transactions involved that they constituted part of the expenses of purchase or sale and were not expenses of management, and they therefore disallowed the claims. The companies appealed.

Sir James Millard Tucker, Q.C., *L. C. Graham-Dixon, Q.C.*, and *J. L. Creese* for the Sun Life Assurance Society.

F. Heyworth Talbot, Q.C., and *S. M. Young* for the Phoenix Assurance Co., Ltd.

The Attorney-General (*Sir Reginald Manningham-Buller, Q.C.*), *R. Borneman, Q.C.*, and *Sir Reginald Hills* for the Crown.

Cur. adv. vult.

Nov. 2. **HARMAN, J.**, read the following judgment: These two appeals raise the same point, which is one of some importance in that it affects to a considerable degree the income tax liabilities of all the life assurance societies carrying on business in this country. As is well known, the Crown has long had the option of charging a life assurance society to tax either under Sch. D or by taxing the income of the society's investments without regard to its annual profits. In fact such profits are not easily ascertainable year by year, and the

Crown invariably takes advantage of its right to tax these companies on their investment income. The same principle has been applied in the case of what are known as investment companies, and their position is described by ROMER, L.J., in his judgment in *Simpson* v. *Grange Trust, Ltd.* (1) (1934) (19 Tax Cas. 231). As ROMER, L.J., observed (ibid., at p. 246), it was appreciated in 1915 that this method of taxation deprived the company of the right, which it would otherwise have, of deducting its expenses before suffering tax, and accordingly, by the Finance Act, 1915, s. 14 (1), some relief was given. This section was reproduced by s. 33 (1) of the Income Tax Act, 1918, which is the section to be considered here, the relevant words being " sums disbursed as expenses of management (including commissions) for that year ". The provisos to sub-s. (1) are not here relevant.

From 1915 until 1949 companies coming within the section had always treated as expenses of management deductible under it the sums paid to brokers and the stamp duties on transfers of investments made in the course of business. In the year 1949-50, with which these appeals are concerned, these two items amounted in the case of the Sun Life Assurance Society to over £40,000 and in that of the Phoenix Assurance Co., Ltd., to nearly £60,000. Up to that year the Crown had always admitted these claims in the case of life assurance societies. The Crown had followed the same course in connection with investment companies until the previous year, when it had obtained, in *Capital & National Trust, Ltd.* v. *Golder* (2) ([1949] 2 All E.R. 956), a decision from the Court of Appeal that in the case of those companies these particular expenses, namely, brokerage and stamp duty on changes of investment, did not fall to be deducted as being expenses of management. Not unnaturally the Crown seeks to extend this decision to the case of life assurance societies and the question before me is whether it is entitled so to do.

What then are sums " disbursed as expenses of management (including commissions) " ? The taxpayer suggests that the origin of these words is to be found in the Assurance Companies Act, 1909, where in Sch. 1 to the Act, prescribing statutory forms of account which assurance companies have to lay before the Board of Trade in each year, two of the headings under which deductions fall to be made on the revenue account are (i) commission and (ii) expenses of management. It may very well be that this suggestion is correct, though it is to be remembered that s. 33 (1) applies to companies other than assurance companies. If, however, I accept it, I do not see that I am further on the road to ascertaining what the words mean when they reappear in s. 33 (1). The large majority of assurance societies when making their returns under the Act of 1909 do not include brokerage and commission on purchases and sales under expenses of management or commission. A minority, including the Sun Life Assurance Society, however, do show both brokerage and stamps under the former head. The way in which the companies keep their books seems to me immaterial. The Crown, on the other hand, argued that these words were meant to give somewhat less relief than if the company were being assessed under r. 3 of Cases I and II of Sch. D. I do not find this at all helpful. Rule 3 is not a relieving section but the contrary. It merely says what may not be deducted. Section 33 is a relieving section and says what may be claimed by way of repayment.

The words are not a term of art and must, as it seems to me, bear their ordinary meaning. Looking at them first apart from all authority, I should suppose them to mean the expenses to which the company acting by its board of directors is put, or the commission for which it becomes liable, in managing the business of the company. This does not, of course, mean that the cost of the article in which the company trades can be charged, but that the expense of buying or selling it may be. As I read the commissioners' decision, they conclude that both brokerage and stamp duty ought to be treated as part of the cost of purchase and sale, and not expenses of management, either because they were necessarily incurred and paid in the course of the transaction of purchase or sale, or because they are not general expenses but expenses specifically referable to these purchases and these sales. I confess I cannot follow this reasoning at all. As to the first, brokerage is no necessary part of the cost of purchasing or selling shares, operations which may be performed, and often are performed in the case of new issues, outside the Stock Exchange. As to the second, many other items of expense are specifically so referable: e.g., stamps on the policies, and legal costs of investigating titles on mortgage transactions.

Again the commissioners seek to distinguish between the management of the company's business and the carrying on of its business and this is a distinction I cannot see. In order to carry on the business you must manage it: the two functions are inseparable. If a man carrying on a draper's trade purchases a roll of cloth, he will pay its cost to the wholesaler and probably a commission to the buyer. Neither of these is an expense of management (though the second is a commission) but everything else which the draper pays in connection with the roll of cloth, viz., its transport to his shop and the various operations necessary to bring about its sale, are, as it seems to me, expenses of management, though they are also doubtless expenses of the conduct of the business.

The course of life assurance business is described in the Case Stated and is not in issue. The purchase and sale of shares is a day-to-day activity essential to a life assurance company and vital to the carrying out of its objects, which are to maintain the life assurance fund, to provide the assured with his covenanted money, and to produce profits wherewith to pay bonuses to policy-holders and dividends to shareholders. This day-to-day activity in practice involves the services of brokers. It also involves the services of solicitors where real estate or mortgage transactions are in question. I cannot see that the charge for the services of the brokers is any different from the charge for the services of the solicitors or the wages of the clerk who enters the transaction in the books or the salary of the skilled member of the staff who advises on the purchase or sale.

I do not feel the same confidence about stamp duties. These are disbursements no doubt in a sense, but they are imposed by the state by way of taxation and may truly be said to be part of the cost of each transaction to the company and be treated as such. If there were no authority I would, therefore, allow the appeal at any rate as regards brokers' fees, holding them to be expenses of management. I may say that neither side argued that the words in brackets " including commissions " applied to these fees.

In Revenue matters, however, the court is rarely free from the shackles, or perhaps I should say deprived of the help, of authority. I turn then to examine the authorities said to cover these matters. The earliest case cited to me was *North British & Mercantile Insurance Co.* v. *Easson* (3) (1919) (7 Tax Cas. 463). This was a Scottish case decided in 1919 on the Finance Act, 1915. The appellant company there had agreed to accept a certain class of insurance business at a discount and sought to deduct the discount as a management expense. The Lord President pointed out (ibid., at p. 471) that this sum was not a disbursement at all—it was a discount and constituted a saving which the assurance company made in respect of a certain class of lives assured. LORD MACKENZIE said (ibid., at p. 472):

> " I think, upon the evidence led before them, the Special Commissioners were entitled to take the view that the £42,000 odd was not an expense of management (including commission), and that the sum in question is not disbursed by the company. The £42,000 odd represent fifteen per cent. on the premiums paid by policy holders under this special scheme of insurance. It was of the nature of a saving—an exceptionally favourable rate—granted to these policy holders in consequence of their coming in en bloc, and so saving to the company expenses which otherwise it would have been put to

> had it dealt with these policy holders singly. The character of the payment must be gathered from the terms of the contract and I am unable to find any support for the view advanced by the insurance company either on the construction of art. 28, art. 29 or of art. 33 to which our attention was specially directed by counsel for the taxpayer. The short view sufficient for the disposal of the case is that it is impossible to treat as expenses of management expenses which have not in fact been paid out . . ."

This case throws no light on the present problem.

Next I was referred to *Bennet* v. *Underground Electric Rys. Co.* (4) (1923) (8 Tax Cas. 475). In that case, in order to meet the interest on bearer bonds payable in New York, a company was put to a considerable expense in purchasing dollars at an unfavourable rate of exchange. Rowlatt, J., said ([1923] 2 K.B. at p. 537):

> "The object of s. 33 of the Income Tax Act, 1918, is to enable a holding company which, unlike a trading company, is not assessed and has no account into which its expenses of management can be brought, to obtain relief in respect of those expenses. I have therefore to consider whether the loss on exchange suffered by this company, which is a holding company, is an 'expense of management' within s. 33. The reason why the company suffered the loss in question was because, in order to carry on its business, it had to provide itself with money in New York and Amsterdam, and as it did not have money lying there it had to buy it at a high rate. If the company had been able to obtain the needed currency on favourable terms, its management would not have cost less, and on the other hand if, as happened, it could only obtain the necessary money on unfavourable terms, its management cannot be said to have cost more. In either case the cost of management is the same."

This was a clear enough case where the cost of complying with the company's obligations was greater than anticipated but, as the learned judge pointed out, this had nothing to do with management.

The next case was *Southern* v. *Aldwych Property Trust, Ltd.* (5) (1940) (23 Tax Cas. 707). The argument here turned on whether the relief was obtainable under Sch. A, in which case it could not be demanded again under s. 33. This is irrelevant for my purpose. More pertinent, perhaps, is *London County Freehold & Leasehold Properties, Ltd.* v. *Sweet* (6) ([1942] 2 All E.R. 212), where an investment company incurred expense in reorganising its various classes of loan capital and this was held not to be an expense of management. Macnaghten, J., said (ibid., at p. 213):

> "I think that expenses incurred in the re-arrangement of the loan capital of a company stand on the same footing as expenses incurred in raising loan capital, and that neither expenses incurred in raising loan capital nor expenses incurred in re-arranging loan capital can, in my opinion, be regarded as expenses of the management of the business of the appellant company."

So far the cases merely illustrate certain things as not being expenses of management. They do not tell me what such expenses are, nor are they really pertinent to the present case.

I turn now to the case on which the Crown relied and which was no doubt the source of the present demand. I have already alluded to it as *Golder's* case (2). There the investment company was held not to be entitled to charge brokerage and stamp duties on changes of its investments as expenses of management within the Act of 1918. That was a decision of Croom-Johnson, J., upheld in the Court of Appeal, and, unless there is some distinction to be found in the nature of the businesses, it is clearly decisive of the matter in this court.

A The commissioners there found that changes of investments made by an investment company were incidental to its business, that business being the purchase and retention of investments and the distribution of income therefrom. The company charged the cost of brokerage and stamp duty to capital and the case might have been decided on the ground that these were capital transactions, and, indeed, CROOM-JOHNSON, J., was tempted so to decide it, but in the end B refrained. The commissioners decided it on the ground that brokerage and stamp duty were an integral part of the purchase price, thus increasing the price to be paid. This view was not observed on by CROOM-JOHNSON, J., and TUCKER, L.J., described it in the Court of Appeal as not quite accurate. CROOM-JOHNSON, J., made the following observations after saying he did not find it necessary to express an opinion on the point about capital ([1949] 2 All E.R. C at p. 133):

> " . . . it seems to me that it is impossible for the company here to say, on the facts as proved, not only that as a matter of law these payments are expenses of management, but that the commissioners ought to have been satisfied that they were. I do not think they are expenses of management, although, no doubt, it was judicious for the company to do what D was done. If they are not expenses of management, then the sub-section is not satisfied and the company is not entitled to relief under it. I cannot see how, giving the expression 'management' its ordinary everyday meaning, it can possibly be said, with regard to an investment company, that the cost of stamps on transfers and contract notes and brokers' remuneration E can be said to be expenses of the management of the company. It is, no doubt, incidental to the business of an investment company, but I do not think it is within the expression which is used, giving it, as I must give it, its ordinary meaning."

The learned judge does not say why he does not think it was an expense of management. In the Court of Appeal there was only one judgment. This F consisted almost entirely of quotations from the evidence incorporated in the Case and from the judge below. TUCKER, L.J., after reading the findings, said ([1949] 2 All E.R. at p. 957);

> " Some criticism may be directed towards the reasoning which appears in those findings and in the statement that the sums paid in respect of G brokerage and stamp duty constitute an integral part of the purchase price. That may, perhaps, not be quite accurate, but they are certainly sums necessarily paid in the course of the transaction of purchase. The gist of the decision lies in the view expressed that the expenses of management in this case are mainly concerned with matters up to the time of the actual purchase or sale of an investment. I think that is the foundation of the commissioners' finding."

H

I do not find that in the commissioners' finding: that is what the learned judge said. He appears, therefore, here to express the view that management ends where executive action begins. He adds these words (ibid., at p. 958):

> " I would only add that the argument of counsel for the company, as it seems to me, is really that these expenses were 'expenses of management', I because they were expenses incurred by the management in carrying out the business of the company. That seems to me a totally different thing. What we are concerned with here is the expenses *of* management, not expenses incurred *by* the management in carrying out the proper business of the company."

With every respect, this is to use the word " management " in two totally different meanings in one sentence. In the second instance " the management " means the directors, and if those words are supplied I do not derive any help from the observation which is really only, I think, a repetition of the lord justice's former view that executive action is the conduct of the business and not its management. However that may be, here is a finding that brokerage and stamp duty paid by an investment company are not allowable under the section. There is no actual decision that this applies to an assurance company and CROOM-JOHNSON, J., is careful to limit his judgment to investment companies, but, unless a distinction, as was argued before me, can be based on the difference between the businesses of the two companies, the decision must cover both. The commissioners pointed out that there is what they style a "fundamental difference" between the nature of the businesses of the two companies. I quote from the foot of p. 7 of the Stated Case in the Sun Life Assurance Society's case: A B

> "There is a fundamental difference in the nature of the businesses carried on by the two companies as well as in the quality of the acts of purchase and sale of investments. In the case of the *Capital & National Trust, Ltd.* (2), the purchase and sale of investments were, in the words of CROOM-JOHNSON, J. ([1949] 2 All E.R. at p. 133) 'no doubt, incidental to the business of an investment company' whereas in the case of the society the purchase and sale of investments are an inherent part of their ordinary day-to-day business activities." C D

I agree that this is a difference. In one case the investments are the fixed capital of the company and in the other circulating capital. One company buys investments in order to hold them and the other in order to trade with them. Assurance companies are carrying on a trade but investment companies are not—see *Liverpool & London & Globe Insurance Co.* v. *Bennett* (7) (1911) (6 Tax Cas. 327), and compare *Simpson* v. *Grange Trust, Ltd.* (1). It was submitted to me that, if the carrying out of a particular transaction is an integral part of the company's day-to-day business, then the expense so incurred is an expense of management. I should be inclined to agree, but the transaction of buying and selling investments is part of the day-to-day business of both these classes of company, though with different ends in view, and I am unable to see how, if not an expense of management in one case, it can be such an expense in the other. E F

I do not conceal the fact that I should not have reached this conclusion unaided, but the authority standing where it does binds me and is to my mind indistinguishable and I must follow it. I therefore dismiss the appeals. G

Appeals dismissed.

Solicitors: *Hair & Co.* (for the Sun Life Assurance Society); *Slaughter & May* (for the Phoenix Assurance Co., Ltd.); *Solicitor of Inland Revenue.*

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

Re TRUMAN, HANBURY, BUXTON & CO., LTD.'S APPLICATION.

[Court of Appeal (Sir Raymond Evershed, M.R., Birkett and Romer, L.JJ.), October 27, 28, 1955.]

Real Property—Restrictive covenant—Discharge—Building estate—Covenants imposed in 1898 *with object of preserving estate as residential area—Covenant prohibiting trade of innkeeper to be carried on on the land—Some change in character of part of estate—Serious injury to persons entitled to benefit of covenant, if covenant discharged—Whether covenant " obsolete "—Law of Property Act,* 1925 (15 *&* 16 *Geo.* 5 *c.* 20), *s.* 84 (1) (*a*).

In 1898 a large estate was laid out in plots for building purposes. The plots were sold subject to restrictive covenants which included a covenant that " the trade of a hotel-keeper, innkeeper, victualler of wines, spirits or beer was not to be carried on ". General development did not take place until 1925, and, when it took place, a number of shops were erected; and in addition some houses were at various times converted into shops. The applicants, who owned two plots fronting a road, which carried much traffic in the summer between London and Southend, wished to build a public house on their property and applied to the Lands Tribunal under s. 84 (1) of the Law of Property Act, 1925,* to discharge the restrictive covenant. The application was based on the ground, among other grounds, that the covenant was obsolete within s. 84 (1) (a). The application was opposed by, among others, four objectors who were admittedly entitled to the benefit of the restrictive covenant and the gardens of whose premises adjoined the two plots. The tribunal found that there had been a change in character of some part of the area, but also was satisfied that the discharge or modification of the covenant so as to permit the erection of on-licensed premises on the plots would seriously injure persons entitled to the benefit of the covenant, and rejected the application. On the question whether the covenant was obsolete within s. 84 (1) (a) of the Act of 1925,

Held: a restrictive covenant as to user of land became obsolete, within the meaning of s. 84 (1) (a) of the Act of 1925, when its original purpose could no longer be achieved; and, in view of the tribunal's finding that the erection of on-licensed premises on the plots would seriously injure persons admitted to be entitled to the benefit of the covenant, the covenant was not obsolete.

Appeal dismissed.

[As to the discharge of restrictive covenants under the Law of Property Act, 1925, s. 84, see 29 Halsbury's Laws (2nd Edn.) 452, para. 660.

For the Law of Property Act, 1925, s. 84 (1), see 20 Halsbury's Statutes (2nd Edn.) 605.]

Cases referred to:

(1) *Chatsworth Estates Co.* v. *Fewell*, [1931] 1 Ch. 224; 100 L.J.Ch. 52; 144 L.T. 302; Digest Supp.

(2) *Re Henderson's Conveyance*, [1940] 4 All E.R. 1; [1940] Ch. 835; 109 L.J.Ch. 332; 2nd Digest Supp.

Case Stated.

This was a Case Stated by the Lands Tribunal (Erskine Simes, Esq., Q.C.) pursuant to s. 3 (4) of the Lands Tribunal Act, 1949, for the decision of the Court of Appeal.

The applicants, Truman, Hanbury, Buxton & Co., Ltd., applied to the tribunal under s. 84 (1) of the Law of Property Act, 1925, for an order discharging wholly a restrictive covenant affecting two plots of land fronting the London Road,

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* The terms of the sub-section are printed at pp. 561, 562, post.

Leigh-on-Sea, imposed by a conveyance dated Aug. 18, 1898, and made between Alexander Underwood Higgins and William Harvey. The restrictive covenant provided that " the trade of a hotel-keeper, innkeeper, victualler of wines, spirits or beer is not to be carried on upon the said land ". The applicants were the owners in fee simple of the two plots of land. The grounds of the application were that the application fell within paras. (a), (b) and (c) of s. 84 (1) of the Law of Property Act, 1925. Nine objectors appeared or were represented at the hearing. The tribunal viewed the land which was the subject of the application and the surrounding property. The following facts were proved or admitted.

The land which was the subject of the application formed part of a large area of land known as the Leigh Park Building Estate which was laid out in plots as a building estate in or about 1898. The covenants as framed, applying to the plots, indicate that it was intended that the whole estate should be residential. Development did not take place generally on the estate until 1925. When it did take place a number of shops were erected fronting a portion of the London Road, and some houses which had previously been erected fronting thereto have been converted into shops. On Apr. 1, 1925, the restrictive covenant against the use of certain premises at the corner of Park Road and London Road for licensed premises was released, so far as it could legally be so released, by the successors in title of the original vendor so as to permit their use for off-licensed premises and the premises were then so used. The gardens of four objectors who owned dwelling-houses in Gordon Road (who were admitted to be entitled to the benefit of the restrictive covenant) adjoined the land which was the subject of the application. The houses in Gordon Road were erected after the erection of shops fronting London Road and after Apr. 1, 1925. The London Road was, until the construction of a new arterial road, the main approach to Southend from London. It still carried a heavy load of traffic and was used particularly during the summer months and especially at week-ends by visitors to Southend. The user of on-licensed premises on the land which was the subject of this application by such casual visitors travelling by coach or motor car to or from Southend would have a detrimental effect on the value of dwelling-houses in Gordon Road and would seriously interfere with those residents therein whose gardens adjoined the land which was the subject of the application. Permission for use of the land for on-licensed premises was given by the Southend County Borough Council under the Town and Country Planning Act, 1947, on Feb. 3, 1953. A justice's full on-licence was granted on Apr. 12, 1954. The applicants hoped to attract to the proposed licensed premises casual visitors travelling by coach or motor car to and from Southend.

The tribunal's findings were stated as follows. The tribunal was satisfied that there was no doubt a change so far as London Road was concerned, but was not satisfied, applying the principles laid down by Farwell, J., in *Chatsworth Estates Co.* v. *Fewell* (1) ([1931] 1 Ch. at p. 229), that that change would justify the tribunal in saying that the restrictive covenant in relation to licensed premises had been rendered obsolete. The tribunal did not consider that a failure to object to the erection of shops or conversion of premises into shops on the London Road or the release of the restriction on the premises at the corner of Park Road could be regarded as matters satisfying the tribunal that s. 84 (1) (b) of the Act of 1925 was satisfied in relation to the application. The tribunal was satisfied that the objectors in Gordon Road, who were admitted to be entitled to the benefit of the restriction, would be injured if the discharge or modification of the covenant sought was granted. The tribunal, therefore, dismissed the application.

The tribunal found it unnecessary, therefore, to deal with the position which would have arisen had the applicants satisfied the tribunal that either of the grounds set out in paras. (a) or (b) of s. 84 (1) was satisfied in relation to the application. The tribunal construed s. 84 (1) as giving to the tribunal discretion whether or not to modify or discharge a restrictive covenant if it were satisfied that any one of the grounds set out in paras. (a), (b) or (c) of that subsection had been proved by an applicant. In the present case, being satisfied, as the tribunal was, that the discharge or modification of the covenant so as to permit the erection of on-licensed premises on the land would seriously injure persons admitted to be entitled to the benefit of the covenant, the tribunal stated that, in the exercise of the discretion to which reference has been made, it would have refused the application.

The applicants appealed.

G. D. Squibb for the applicants.

W. B. Harris for the respondents, G. A. Smith & Sons, Ltd.

A. G. F. Rippon for the respondent, Mr. R. C. Percy-Smith, and other respondents.

SIR RAYMOND EVERSHED, M.R.: I will ask ROMER, L.J., to deliver the first judgment.

ROMER, L.J.: This is an appeal by the applicants, Truman, Hanbury, Buxton & Co., Ltd., against an order of the Lands Tribunal, dismissing an application by the applicants, under s. 84 (1) of the Law of Property Act, 1925, to have a certain restrictive covenant affecting their property at Leigh-on-Sea in Essex discharged. The application was opposed by people living in the district, and some of them are represented before us on this appeal.

The land in question consists of two plots fronting to a road called London Road, which was, prior to the making of the arterial road which now exists, the principal road between Leigh-on-Sea and London. Those plots form part of quite a considerable estate called the Leigh Park Building Estate. That estate was laid out for building purposes in 1898 and covers a considerable area. Large numbers of houses were built on this property, and there are a number of roads on the property in addition to London Road itself; in particular, there is a road called Gordon Road, which runs into London Road and in which some of the opponents to the application live. The covenants which were imposed on these properties when they were sold were all in much the same form and were directed to preserving the estate as a residential area. The particular covenant which the applicants are seeking to have discharged, because they want to build a public-house or inn, is one which provides that " the trade of a hotel-keeper, innkeeper, victualler of wines, spirits or beer is not to be carried on upon the said land ". That covenant, unless modified or discharged, would obviously place a fatal bar between the applicants and the object which they desire to achieve.

Section 84 (1) of the Law of Property Act, 1925, is in the following terms:

> " The authority hereinafter defined [which is now the Lands Tribunal*] shall (without prejudice to any concurrent jurisdiction of the court) have power from time to time, on the application of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction (subject or not to the payment by the applicant of compensation to any person suffering loss in consequence of the order) on being satisfied—(a) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the authority may deem material, the restriction ought to be deemed obsolete, or that the continued existence thereof would impede the reasonable user of the land for public or private purposes without

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* See s. 1 (4) (a) of the Lands Tribunal Act, 1949; 28 HALSBURY'S STATUTES (2nd Edn.) 319.

> securing practical benefits to other persons, or, as the case may be, would unless modified so impede such user; or (b) that the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction, whether in respect of estates in fee simple or any lesser estates or interests in the property to which the benefit of the restriction is annexed, have agreed, either expressly or by implication, by their acts or omissions, to the same being discharged or modified; or (c) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction."

There is a proviso as to compensation, which I need not read.

[HIS LORDSHIP stated the facts found by or admitted before the Lands Tribunal (these have been set out at p. 560, letters B et seq., ante), and reviewed the findings of the tribunal (which have been set out at p. 560, letter G to p. 561, letter B, ante) and continued:] The particular ground on which the application was made and on which the applicants still seek to support it is that the covenant in question ought to be deemed obsolete within the meaning of s. 84 (1) (a) of the Law of Property Act, 1925, having regard to the changes which have taken place in the character of the property or the neighbourhood since 1898. The main attack which counsel for the applicants levelled on the tribunal's decision was founded on the tribunal's reference to the principles laid down by FARWELL, J., in *Chatsworth Estates Co.* v. *Fewell* (1) ([1931] 1 Ch. 224), which was the case that the tribunal was applying. Counsel for the applicants rightly said that this case was not a case under s. 84 at all, and counsel submitted that the principles which were there laid down by FARWELL, J., were not applicable to cases under s. 84.

In that case, which was brought by the trustees of the well-known Chatsworth Estates at Eastbourne, the plaintiffs were seeking to enforce certain restrictive covenants which were being infringed by the defendant. It appears from the report that the defendant had suggested that the covenants could be modified under s. 84 of the Law of Property Act, 1925, and the plaintiffs gave him an opportunity of making an application under that section, but, as he did not take it and went on breaking the covenants, or so they alleged, they sued him for an injunction. One of the defences which the defendant raised was that he was no longer bound by the covenants, because there had been a general change in the character of the neighbourhood. FARWELL, J., dealt with that point in this way. After saying that the estate as a whole, taking it broadly, still retained its character of being a residential area, he said ([1931] 1 Ch. at p. 229):

> "The defendant's first ground of defence is that there has been such a complete change in the character of the neighbourhood, apart from the plaintiffs' acts or omissions, that the covenants are now unenforceable. But to succeed on that ground the defendant must show that there has been so complete a change in the character of the neighbourhood that there is no longer any value left in the covenants at all. A man who has covenants for the protection of his property cannot be deprived of his rights thereunder merely by the acts or omissions of other persons unless those acts or omissions bring about such a state of affairs as to render the covenants valueless, so that an action to enforce them would be unmeritorious, not bona fide at all, and merely brought for some ulterior purposes. It is quite impossible here to say that there has been so complete a change in the character of this neighbourhood as to render the covenants valueless to the plaintiffs. Whether right or wrong the plaintiffs are bringing this action bona fide to protect their property, and it is hopeless to say that the change in the character of the neighbourhood is so complete that it would be useless for me to give them any relief."

As a supplement, as it were, to that case one might refer to *Re Henderson's Conveyance* (2) ([1940] 4 All E.R. 1), another decision of FARWELL, J., to which the tribunal was referred. That, in fact, was an appeal from an arbitrator's award under s. 84. The learned judge said (ibid., at p. 7):

> " Speaking for myself, I do not view this section of the Act as a section designed to enable a person to expropriate the private rights of another. I am not saying that there may not be cases where it would be right to remove or modify a restriction against the will of the person who has the benefit of that restriction, either with or without compensation, in a case where it seems necessary to release the restriction because it does prevent in some way the proper development of the neighbouring property, or for some such reason of that kind. In my judgment, however, this section of the Act was not designed—at any rate, prima facie—to enable one owner to get a benefit by being free of the restrictions imposed upon his property in favour of a neighbouring owner, merely because, in the view of the person who desires the restriction to go, it will make his property more enjoyable or more convenient for his own private purposes. If a case is to be made out under this section, there must be some proper evidence that the restriction is no longer necessary for any reasonable purpose of the purchaser who is enjoying the benefit of it. There may be some variation of the restriction by reason of a change in the character of the property or the neighbourhood, such as that the existence of that restriction is one which ought to go because the requirements of the neighbourhood make it proper that there should no longer be any such restriction in existence."

Counsel for the applicants said that the tribunal in the present case was applying to s. 84 the principle which FARWELL, J., had applied in *Chatsworth Estates Co.* v. *Fewell* (1) and that that principle, in effect, was that " obsolete " meant " valueless ". Counsel contended that the tribunal, accordingly, applied the wrong test of what was obsolete, namely, whether the covenant had become wholly valueless. He said that that test was relevant to an application brought under s. 84 (1) (c), but not in relation to deeming a covenant to be obsolete within s. 84 (1) (a); that the tribunal, accordingly, may well have made the wrong approach to the relevant evidence, and, indeed, that there might have been further evidence on certain matters, if there had not been that approach to the circumstances of the case; and that the case should be remitted to the tribunal with a proper direction what " obsolete " in s. 84 (1) (a) really meant. Indeed, this case really turns on the meaning of the word " obsolete " as used in s. 84 (1) (a).

Counsel for the applicants referred us to the SHORTER OXFORD ENGLISH DICTIONARY, and, out of the many meanings of " obsolete " which are to be found there, he selected as being appropriate to this case such definitions as " fallen into disuse ", or " out of date ", and submitted that that was the proper interpretation to apply to " obsolete " in s. 84 (1) (a). Counsel submitted that such an interpretation was quite distinct from the interpretation which, he said, the tribunal inferentially put on the word, namely, " valueless ".

The meaning of the term " obsolete " may well vary according to the subject-matter to which the term is applied. Many things have some value, even though they are out of date in kind or in form—for example, motor cars or bicycles. Here, however, we are concerned with the application of the term to restrictive covenants as to user, and these covenants are imposed when a building estate is laid out, as was the case with this estate which was laid out in 1898, for the purpose of preserving the character of the estate as a residential area for the mutual benefit of all those who build houses on the estate or subsequently buy them. If, as sometimes happens, the character of an estate as a whole, or of a particular part of it, gradually changes, a time will come when the purpose to which I have referred can no longer be achieved, for what

was intended at first to be a residential area has become, either through express A
or tacit waiver of the covenants, substantially a commercial area. When that
time comes, it may be said that the covenants have become obsolete, because
their original purpose can no longer be served and, in my opinion, it is in that
sense that the word " obsolete " is used in s. 84 (1) (a). If the tribunal did,
in fact, apply the test whether the covenant had become absolutely valueless,
it may be that the tribunal was applying rather too strict a test, but I doubt B
whether this criticism which was made is not in reality directed rather to the
form of the matter than to the substance, for, if the original object of the covenant
can no longer be achieved, it is difficult to see how the covenant can be of
value to anyone. Be that as it may, I am quite satisfied that nothing would
be gained by remitting the case to the tribunal. The tribunal saw the property,
and, after hearing the objectors and the evidence which was laid before the C
tribunal on the matter as a whole, the tribunal came to the conclusion, to which
I have already referred, that the discharge or modification of the covenant
so as to permit the erection of on-licensed premises on the land would seriously
injure persons admitted to be entitled to the benefits of the covenant; not
one or two people, be it noted, but persons in general.

If this serious injury would result to the objectors and others if the covenant D
were discharged (and having regard to the proposed user for the benefit of motor
coach travellers between Southend and London, it is very easy to imagine the
kind of result that would happen), I cannot see how, on any view, the covenant
can be described as obsolete, because the object of the covenant is still capable
of fulfilment, and the covenant still affords a real protection to those who are
entitled to enforce it. I think that the finding that the discharge for which the E
applicants asked would seriously injure these persons renders it almost impossible
to say that the covenant has become obsolete, in the light of the interpretation
which I have given to the word " obsolete ", and which I believe to be the right
one having regard to its context. Accordingly, for my part, I cannot accept
the submission which counsel for the applicants made on that issue, which was
the main issue in the appeal. F

For the reasons which I have given, I would dismiss the appeal.

BIRKETT, L.J.: I am entirely of the same opinion and have nothing to add to the judgment which has just been delivered.

SIR RAYMOND EVERSHED, M.R.: I also agree.

Appeal dismissed. G

Solicitors: *Gibson & Weldon*, agents for *H. Maxwell Lewis*, Southend-on-Sea (for the applicants); *J. P. Nolan & Janes*, Southend-on-Sea, and *Bates, Son & Braby*, Southend-on-Sea (for the respondents).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

NOTE.

TURNER & SON, LTD. *v.* OWEN.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Ormerod and Barry, JJ.), October 24, 1955.]

Costs—Case Stated by magistrates' court—Successful appeal to Divisional Court—Order as to costs in the court below.

[As to the costs of appeals from magistrates' courts, see 21 HALSBURY'S LAWS (2nd Edn.) 730, para. 1262; and for cases on the subject, see 33 DIGEST 420, 421, *1309-1323, 1329-1331.*]

Cases referred to:

(1) *J. Miller, Ltd.* v. *Battersea Borough Council,* ante, p. 279.

(2) *Mills & Rockleys, Ltd.* v. *Leicester Corpn.*, [1946] 1 All E.R. 424; [1946] K.B. 315; 115 L.J.K.B. 373; 174 L.T. 307; 110 J.P. 136; 2nd Digest Supp.

Case Stated.

This was a Case Stated by magistrates for the City of Nottingham in respect of their adjudication as a magistrates' court sitting at the Guildhall, Nottingham, on May 13, 1955.

On Apr. 27, 1955, an information was preferred by the respondent, the town clerk of the City of Nottingham acting on behalf of the said city, against the appellants alleging in terms that the appellants sold on Mar. 4, 1955, a loaf intended for but unfit for human consumption contrary to s. 9 of the Food and Drugs Act, 1938. The information was heard on May 13, 1955, and the following facts were found. On Mar. 4, 1955, a small loaf was purchased at a teashop in Nottingham: the loaf had been purchased by the teashop from the appellants by whom it had been baked. The purchaser found that she could not cut through the loaf because of a piece of string therein. When questioned by a sanitary inspector of the Nottingham Corporation the appellants explained that the string had probably been used to attach a label to the sack of flour of which the loaf was made and that it had inadvertently dropped into the flour during the bread-making process. Apart from the string the bread appeared to be in good condition. No evidence was called for the appellants but it was contended on their behalf that the evidence did not support a conviction under s. 9 of the Food and Drugs Act, 1938, because apart from the string the loaf in itself was not unfit for human consumption, and that if an offence had been committed it was an offence against s. 3 of the Act. The magistrates convicted the appellants of an offence against s. 9, imposed a fine and ordered the appellants to pay £1 costs.

During the hearing of the appeal to the Divisional Court counsel for the appellants stated that when the summons was served on the appellants they applied, by their solicitor, for an adjournment and that the respondent consented to this adjournment. The reason for this application was that it was known that an appeal was then contemplated to the Divisional Court in a similar case; that application had been made for a Case to be stated and that a Case had been stated but that it had not actually been set down in the list. This latter case was eventually heard by the Divisional Court on Oct. 14, 1955 [*J. Miller, Ltd.* v. *Battersea Borough Council* (1) (ante, p. 279)] and the appeal was allowed. A second adjournment was applied for by the appellants' solicitor but was refused because little was then known as to the progress of the appeal in the case mentioned. The Divisional Court, following *J. Miller, Ltd.* v. *Battersea Borough Council* (1) (ante, p. 279), found that the loaf was not unfit for

human consumption and allowed the appeal with costs. The case is reported A
for the decision of the court on the award of costs before the magistrates.*

J. M. G. Griffith-Jones for the appellants.

Elson Rees for the respondents.

LORD GODDARD, C.J.: Counsel for the appellants has asked us to make an order for the costs in the court below. It seems that the court must have
power to deal with the costs in cases in which it thinks fit. If a conviction is B
quashed, it results in any costs which the successful appellant had been ordered to pay in the court below being returned to him. The question is whether this court in quashing the conviction can order that the costs which the appellants have incurred in the magistrates' court should be allowed to them. The matter is not clear, but at any rate an order of that nature has been made in at least
two cases.† The last case (*Mills & Rockleys, Ltd.* v. *Leicester Corpn.* (2)‡) was C
on Jan. 29, 1946, when, in setting aside a notice under the Town and Country Planning (Interim Development) Act, 1943, s. 5 (1), the appellants, who were unsuccessful in the court below, were given twenty-five guineas costs by this court as their costs in the court below. It does not follow by any means that in every case in which this court sets aside the conviction we should give the successful appellant the
costs, but there are two reasons why we think that we can give costs in this case. D
One is that we do think that these prosecutions ought to be launched with much greater care. People ought not to be charged with a very serious offence of this nature when there is another section dealing with what I may call the far less serious offence under which the information ought to be preferred. The other point is that when this case was coming on before the magistrates, it was
known that there was a similar case under appeal to this court although it had E
not actually been set down in the list. In this instance, though perhaps not in all, as magistrates might think that it was very desirable to get certain cases on quickly, it would have been a very good thing if some further adjournment had been granted in order to find out what was the state of affairs with regard to the other case (i.e., *J. Miller, Ltd.* v. *Battersea Borough Council* (1), ante, p. 279)
which came before this court on Oct. 14 and which provides the reason why we F
are quashing the conviction in the present case.

In this case, therefore, the appellants ought to have something for costs. Now comes the difficulty, which is this: when magistrates make an order for costs under the powers given by the Magistrates' Courts Act, 1952, s. 55, the magistrates have to fix a sum. There is no provision in the Act for taxing the
costs, and the magistrates, if they are giving costs, must consider whether they G
are ordering costs to be paid by a prosecutor or whether they are ordering costs to be paid by the defendant, and what is a fair sum taking into account where the witnesses have to come from, and whether there are expert witnesses. In this case we are told that no witnesses were called. Every fact was agreed and, therefore, the only costs which the appellants have had to pay is the
attendance of a solicitor before the magistrates to argue the case. It is true H
that they were only ordered to pay £1 costs. We have come to the conclusion that as there was a solicitor who had to appear and get an adjournment in the first instance and ask for a second adjournment, a fair sum to allow will be £7 7s. We shall set this order aside, quash the conviction with costs here and order also that the appellants will recover against the prosecutor the sum
of £7 7s. costs in the court below. In certain cases we might send the case I
back to the magistrates to consider the matter because there have been many cases in which we should not have enough information to enable us to assess

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* The decision may be compared with the cases of *Cook* v. *Montague* (1873) (28 L.T. 494) and *Slaughter* v. *Sunderland Corpn.* (1891) (55 J.P. 519), both of which were decided on s. 6 of the Summary Jurisdiction Act, 1857, since amended by the Magistrates' Courts Act, 1952, s. 131, Sch. 5; see 14 HALSBURY'S STATUTES (2nd Edn.) 820.

† See GRIFFITHS, GUIDE TO CROWN OFFICE PRACTICE, 69.

‡ See [1946] 1 All E.R. 428, letter G; otherwise unreported on the question of costs.

A a fair sum. In this case we have enough information and that is the order we make.

ORMEROD, J.: I agree.

BARRY, J.: I agree.

Appeal allowed, conviction quashed.

B Solicitors: *Sidney C. Elphick*, agent for *Clayton, Massey & Mason*, Nottingham (for the appellants); *Sharpe, Pritchard & Co.*, agents for *Town clerk*, Nottingham (for the respondent).

[*Reported by* A. P. PRINGLE, ESQ., *Barrister-at-Law.*]

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D

R. *v.* HARRIS-RIVETT.

[COURTS-MARTIAL APPEAL COURT (Lord Goddard, C.J., Pearce and Pearson, JJ.), November 7, 1955.]

Court-Martial—Jurisdiction—Offence abroad by officer stationed in England—Arrest in England—Investigation of charge by commanding officer abroad

E *—Validity—Army Act, s.* 45 (1), (5), *s.* 46.

Court-Martial—Evidence—Judges' Rules—Application to courts-martial.

After his arrest in England the appellant, an officer stationed in England, was convicted before a general court-martial in Germany of an offence of an indecent character with a civilian in Berlin. He appealed on two grounds: (i) that the court-martial had no jurisdiction because the investigation before

F his committal for trial required by the Army Act, s. 45 and s. 46, had been carried out by the commanding officer of a regiment to which he was attached in Berlin and not by his own commanding officer in England; and (ii) that the Judges' Rules had not been complied with because while in custody he had been ordered to attend an interview with an officer of the military police at which, although at that time no charge had been made, he was

G questioned.

Held: (i) sections 45 and 46 of the Army Act did not require that the appellant's commanding officer at the time of his arrest should be the officer to investigate the charge against the appellant or to take steps to bring him to trial; the commanding officer in Germany who investigated the charge was the appropriate commanding officer to take steps to bring the appellant to

H trial, and accordingly no question of the jurisdiction of the court-martial arose.

(ii) although the rules of evidence that apply in civil cases apply, generally speaking, in courts-martial, and although the judges by resolution have laid down for the guidance of police officers the rules known as the Judges' Rules with regard to taking statements from accused persons, it was a

I matter for the Army Council to decide whether those rules are to be applied to courts-martial because it did not follow that rules applying to civilians necessarily applied to serving members of the forces.

(iii) in any event there was no ground for interfering in this case because the court-martial were properly directed by the judge-advocate and the evidence was admissible.

Semble: if no commanding officer investigated the charges, that might affect the jurisdiction of a court-martial (see p. 569, letter I, post).

Appeal dismissed.

[**Editorial Note.** The Army Act, 1955 (3 & 4 Eliz. 2 c. 18), which has not yet come into force, will replace the existing Army Act. The provisions of the new Act corresponding to s. 45 and s. 46 of the existing Act are, so far as relevant, s. 75 (1), s. 76, s. 77 (1): see HALSBURY'S STATUTES (Interim Service) 182, 183, 185. Section 79 of the new Act governs the further proceedings on charges against officers.

For the Army Act, s. 45 and s. 46, see 22 HALSBURY'S STATUTES (2nd Edn.) 288-291.]

Appeal against conviction by general court-martial.

The appellant, Lieutenant-Colonel Adrian Andrew Brodie Harris-Rivett, D.S.O., the Bedfordshire and Hertfordshire Regiment, was convicted before a general court-martial in Berlin on Mar. 30, 1955, on a charge of an indecent character with a civilian in Berlin. He appealed on two grounds, namely, (i) that the court-martial had no jurisdiction to try him; and (ii) that questions were put to him after his arrest contrary to the Judges' Rules. The facts are fully set out in the judgment of the court delivered by LORD GODDARD, C.J.

B. R. Clapham for the appellant.
E. Garth Moore for the Crown.

LORD GODDARD, C.J.: The appellant in this case was convicted before a general court-martial sitting in Berlin of an offence of an indecent character with a civilian in Berlin. He took objection before the court-martial by way of a plea as to jurisdiction on the ground that certain requirements, partly of the Army Act and the Rules of Procedure under that Act, had not been complied with, which, he said, destroyed the jurisdiction of the court. The court overruled the objection and convicted him on one of the charges and sentenced him to be cashiered. With that sentence this court has nothing to do.

The only substantial ground of appeal which is put forward here is that a rule of procedure or a right of his under the Army Act as an army officer to have the matter investigated by his commanding officer before the court-martial sat was not afforded to the appellant. In the opinion of the court, this appeal entirely fails and the point, which is a highly technical point in any circumstances, certainly in this case, has no substance.

The facts were these: the appellant had been in Berlin, and it was while he was an officer in Berlin that the alleged offence of an indecent character with a civilian is said to have taken place. He returned to England, and, being an officer of the Bedfordshire and Hertfordshire Regiment, was sent to Warminster, where he was attached to a school of instruction for officers. While he was there, owing to statements which, I suppose, had been made to the provost authorities in Berlin, he was arrested. He was arrested by an officer of equal rank, Lieutenant-Colonel Elliott, on this charge of indecency. He demanded that the affair should be investigated by the commanding officer at Warminster, though it is perfectly obvious that it would be a most absurd thing if the commanding officer at Warminster was required to undertake the serious matter of the investigation of an offence committed in Germany against a German civilian. What sort of investigation could have taken place? It is perfectly clear that the sort of investigation that could have taken place in those circumstances in England would have been of a most jejune description. If the contention here were right, as I pointed out in the argument, if an offence was alleged to have been committed by a soldier against a civilian in Hong Kong or Malaya or some other far-distant possession of the Queen, he could demand that the matter should be investigated by his commanding officer when he returned to England, that is to say, by an officer who might never have seen him before or might have no opportunity of finding out anything that had taken place in the foreign place where the offence had been committed, except possibly by keeping the accused person under arrest till statements could have been obtained from abroad.

It would be a very grave prejudice to any officer or soldier if this court had to give any colour or support to such a contention.

We must now turn to the Army Act, which provides in s. 45:

> "The following regulations shall be enacted with respect to persons subject to military law when charged with offences punishable under this Act:—(1) Every person subject to military law when so charged may be taken into military custody."

The charge is made just in the same way as a charge is made with regard to a civilian by the policeman who takes him into custody. He is taken into custody. Then, by sub-s. (5):

> "The charge made against every person taken into military custody shall without unnecessary delay be investigated by the proper military authority, and, as soon as may be, either proceedings shall be taken for punishing the offence, or such persons shall be discharged from custody."

Then there is s. 46 (1):

> "The commanding officer, shall, upon an investigation being had of a charge made against a person subject to military law under his command of having committed an offence under this Act, dismiss the charge, if he in his discretion thinks that it ought not to be proceeded with, but where he thinks the charge ought to be proceeded with, he may take steps for bringing the offender to court-martial, or, in the case of an officer below the rank of lieutenant-colonel or of a warrant officer, may refer the case to be dealt with summarily under the provisions of this Act . . ."

No one suggests that an offence of this description should be dealt with summarily. It must be investigated by a court-martial; but the section does not say what commanding officer, and an officer may be serving under a variety of commanding officers up to the time he leaves the service. In this case, the appellant was taken into military custody, having before he left demanded an investigation by his commanding officer. The commanding officer in England could not and did not investigate this case. The appellant was then taken to Germany where he was attached to the 1st Battalion Manchester Regiment, which was then in Germany. He was attached there so that the commanding officer of a regiment in Germany where the court-martial would have to be held could investigate the charge. The commanding officer did investigate the charge, and decided that there was a case to be tried by court-martial. Thereupon, the major-general commanding that part of Germany, who was the proper person to act as convening officer, convened a court-martial, and the court-martial found before them the charge sheet, which said:

> "The accused, Substantive Major, Temporary Lieutenant-Colonel, Adrian Andrew Brodie Harris-Rivett, the Bedfordshire and Hertfordshire Regiment, attached to the 1st Battalion Manchester Regiment, an officer of the regular forces, is charged with the following offences";

and that was signed by the lieutenant-colonel commanding the 1st Battalion Manchester Regiment. Those charges having been sent to the general, the general ordered that he was to be tried by court-martial. It may be said, though we are not deciding the question one way or another, that if no commanding officer had investigated these charges, that might have affected the jurisdiction of the court-martial. In other cases where the facts are different, we might have to decide whether failure of a commanding officer to investigate invalidates the proceedings if a court-martial sits.

In this case it is quite clear that the commanding officer who investigated the case decided that there should be a court-martial, and s. 46 (1), which I have already read, provides:

> "The commanding officer, shall, upon an investigation being had of a

> charge made against a person subject to military law under his command . . . dismiss the charge [or] . . . he may take steps for bringing the offender to court-martial . . ."

It must be the commanding officer who holds the investigation. The investigation in this case was held by the taking of a summary of evidence. Then, having taken the summary of evidence, the investigating officer decided that there was a case to be tried by court-martial and, accordingly, to use a civilian expression, the appellant was committed for trial by court-martial. It is quite clear that the commanding officer who may be the commanding officer at the moment of arrest may not be the commanding officer to carry out the investigation. The question here is: who was the commanding officer who carried out the investigation ? The commanding officer was the officer of the regiment to which this officer had been temporarily attached and, in the opinion of the court, no question arises here as to jurisdiction, and this appeal is dismissed.

Perhaps I had better deal with one other point put forward by counsel for the appellant, which was that, as he said, the Judges' Rules in this case had not been complied with in that certain questions had been put to the appellant when he was in custody. The circumstances with regard to that were these: The appellant had been ordered to present himself at Lansdowne House, in London, there to be interviewed by an officer of the military police, Lieutenant-Colonel Elliott. He was not then in custody in the formal sense though, being an officer bound to obey an order, he was present at that interview in consequence of an order. The appellant having been given that order, it seems to me it is extremely likely that it would have been a breach of discipline if, when Colonel Elliott came in and began to ask questions, the appellant had taken himself out of the room. He was there, perhaps not formally in custody, in a way which the judge-advocate described as militarily in custody; at any rate he was there in pursuance of an order. He was asked to answer certain questions, and it is said that they amounted to cross-examination. I do not think that they did, but it is not necessary for the court to give a considered decision on that point. I do, however, want to say this, that although no doubt the rules of evidence that apply in civil cases apply, generally speaking, in courts-martial, the rule of law with regard to confessions or statements made by accused persons is that they are wholly admissible if they are made voluntarily. It is perfectly true that the judges did by resolution some years ago lay down for the guidance of police officers certain rules, which are now known as the Judges' Rules with regard to giving cautions. It is a matter for the Army Council to decide whether those rules are to be applied as rules to courts-martial because I do not think the rules the judges made to be observed in the trial of civilian prisoners can necessarily apply to serving officers and men.

No doubt courts-martial have to decide the question of law in the same way as it has to be decided in civil cases, that is to say, whether or not the statement is voluntary; and if it is a voluntary statement it can be admitted whether the Judges' Rules have been complied with or not. The most the courts have ever done is this, that if they come to a decision in a civil court that the Judges' Rules have not been complied with, the judge may in his discretion refuse to admit the evidence, notwithstanding the fact that it is a voluntary statement. That is the same point; it is a mere matter of discretion. If they think that a man has made a statement perfectly voluntarily and not in consequence of any threat or promise of reward or promise of benefit, nevertheless because no caution has been given after he has been taken into custody, the court may refuse to admit the statement. That is a matter of discretion. One difficulty of applying these matters to military personnel is that they are under discipline and at the time when an offence may be investigated they are still members of a disciplined force and obliged to obey orders of superior officers. In this particular case, the question arises at once because the appellant was ordered to attend the

A interview with Lieutenant-Colonel Elliott, and no such thing as that happens in civilian life.

It may therefore be that at some time the Judges' Rules will be applied by the Queen's Regulations either as they stand or with certain qualifications. I can quite well see that there may be occasions on which the Judges' Rules B could not well be applied without some qualification to offences or charges which have been made against members of disciplined forces who are obliged to obey orders. In any case, there is no ground for interfering with the result of the court-martial here because we do not think the evidence was wrongly admitted and, in any case, the court-martial were properly directed by the judge-advocate. They had to consider whether it was a voluntary statement, C and they came to the conclusion, having heard the evidence, that it was a voluntary statement; and on those grounds there is no reason to interfere. On both these grounds the appeal is dismissed.

Appeal dismissed.

Solicitors: *Eland, Hore, Pattisson, Nettleship & Butt* (for the appellant); D *Director, Army Legal Services* (for the Crown).

[*Reported by* T. J. KELLY, ESQ., *Barrister-at-Law.*]

E

SANDLAND *v.* NEALE.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Ormerod and Barry, JJ.), October 27, November 4, 1955.]

F

Street Traffic—Notice of intended prosecution—Notice sent to defendant's residence by registered post—Defendant known to be in hospital at time as result of accident—Defendant's wife living at defendant's residence—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5 *c.* 43), *s.* 21 (*c*)—*Interpretation Act,* 1889 (52 *&* 53 *Vict. c.* 63), *s.* 26.

G By the Road Traffic Act, 1930, s. 21, a person shall not be convicted of, amongst other offences, dangerous driving unless, inter alia, " (c) within . . . fourteen days [of the commission of the offence] a notice of the intended prosecution . . . was served on or sent by registered post to " the offender.

On Jan. 23, 1955, the defendant was involved in a motor accident and received serious spinal injuries. He was taken to a hospital where he H remained for two months. A police officer saw him at the hospital on the day of the accident and again on Feb. 2, but was unable to hold a conversation with him on either occasion. The police officer formed the view that the defendant was likely to be detained at the hospital for a considerable time. He made inquiries and ascertained the defendant's home address and that the defendant's wife was living there. On Feb. 2, after the officer had I visited the hospital, a notice of intended prosecution was sent by pre-paid registered post addressed to the defendant at his home address. The defendant was charged with dangerous driving contrary to s. 11 (1) of the Act of 1930, but contended that the notice had not been sent to him in accordance with s. 21 (c) of that Act.

Held (BARRY, J., dissenting): a notice of intended prosecution was properly sent within the meaning of s. 21 (c) of the Act if it was addressed to the place where it was most likely to come to the attention of the alleged

offender within the specified time (see p. 574, letter I, post); as the condition A
of the defendant was such that he was unable to appreciate the notice or act on it, it made no difference whether it was sent to the hospital or to his home where his family were living, and, therefore, the notice had been properly sent.

Stanley v. *Thomas* ([1939] 2 All E.R. 636) applied; *Holt* v. *Dyson* ([1950] B
2 All E.R. 840) distinguished.

Appeal allowed.

[As to notice of intended prosecution, see 31 HALSBURY'S LAWS (2nd Edn.) 680, para. 1008 note (g); and for cases on the subject, see Supplements to 42 DIGEST *245e*.

For the Road Traffic Act, 1930, s. 21 (c), see 24 HALSBURY'S STATUTES (2nd C
Edn.) 594.

For the Interpretation Act, 1889, s. 26, see ibid., 224.]

Cases referred to:

(1) *Holt* v. *Dyson*, [1950] 2 All E.R. 840; [1951] 1 K.B. 364; 114 J.P. 558; D
2nd Digest Supp.

(2) *Stanley* v. *Thomas*, [1939] 2 All E.R. 636; [1939] 2 K.B. 462; 160 L.T. 555; 103 J.P. 241; Digest Supp.

Case Stated.

This was a Case Stated by the justices for the County Borough of Wallasey E
in respect of their adjudication as a magistrates' court on May 11, 1955.

On Feb. 3, 1955, an information was preferred by Charles Thomas Sandland, a police officer, against Alexander Neale charging that he drove a motor vehicle on a road in a manner dangerous to the public contrary to s. 11 (1) of the Road Traffic Act, 1930. At the request of the parties the justices agreed to decide
as a preliminary point whether the notice of intended prosecution had been F
validly sent by registered post to the defendant in accordance with s. 21 (c) of the Act. The notice was sent in a postal packet by pre-paid registered post addressed to the defendant at his usual residence, 145 Leasome Road, Wallasey. At the time, viz., Feb. 2, 1955, the defendant was a patient in the Victoria Central Hospital, Wallasey, where he remained until Mar. 23, 1955. The
justices were of the opinion that the notice was not properly sent and dismissed G
the information. The facts appear from the judgment of LORD GODDARD, C.J.

F. D. Paterson for the police officer.
R. G. Clover for the defendant.

Cur. adv. vult.

Nov. 4. The following judgments were read. H

LORD GODDARD, C.J.: This Case Stated by the justices for the County Borough of Wallasey raises again the question as to the service of a notice of intended prosecution for a driving offence under s. 21 (c) of the Road Traffic Act, 1930. The facts are that the defendant was involved in a motor accident
about midnight on Jan. 23, 1955. He was very seriously injured, and could I
not be warned at the time that a prosecution would be considered. A police officer visited the hospital to which he had been removed on two occasions, first later on the day of the accident and again on Feb. 2. On neither occasion was he able to hold a conversation with the defendant because of the latter's condition. The officer thought that, owing to the state in which the defendant appeared to be on this second visit, it would have been improper and unwise to serve him with a notice, and that the defendant would not have understood it

A if he had done so. We must, I think, take it that the justices were satisfied that the police officer's opinion was justified, and as they also find that the defendant had no knowledge of the officer's visits or of any conversation with him, it is obvious that, had he served the notice on the defendant, it would have conveyed nothing to him. The notice would have to be sent by Feb. 6 at the latest, and the officer had obviously no reason to suppose that the defendant's condition B would be substantially improved between Feb. 2 and Feb. 6. He expected that the defendant would be detained in hospital for a considerable period, and he was in fact not discharged till Mar. 23. From inquiries made between the date of the accident and Feb. 2 the officer had ascertained that the usual residence of the defendant was at 145 Leasome Road, Wallasey, and that his wife was then living in the house. Accordingly, on Feb. 2 he sent a notice, which it is not C disputed complied with the Act, by registered post to that address where it was duly received on Feb. 3. The notice was not handed to the defendant till after the expiration of the fourteen days, but, though there is not an express finding on the subject, it is clear from the defendant's contentions below that it was eventually handed to him by his wife. Whether or not the defendant received the notice within fourteen days is immaterial; the section requires D the notice to be sent within that time; it says nothing about receipt for the obvious reason that the person to whom it is sent may be away from home when the letter is delivered. It is said that in the present case the police officer knew that the defendant was not only not living at home when the letter was sent, but was actually in hospital, which was the only place therefore to which the letter could be sent so as to comply with the section, and reliance is E placed on the decision of this court in *Holt* v. *Dyson* (1) ([1950] 2 All E.R. 840).

Before I deal with that case there are one or two pertinent observations that may be made. The object of the section is, of course, plain; it is to let the offender know promptly that he may be prosecuted so that he may be able to collect material for his defence while the matter is fresh in his memory and F that of potential witnesses; so the sooner the notice is given, the better. However, if a man is lying unconscious or even in a partially unconscious condition for the whole of the fourteen days, the service on him during that period is of no practical use to him unless someone can act on his behalf and will do so. For instance, an injured man might be taken to his home, but if the only occupant of his house is a housekeeper, it is unlikely that she would open his registered G letters nor would a doctor in attendance on him during the period when he could not attend to them be likely to do so. Compliance with the Act must, however, still be made. The Interpretation Act, 1889, s. 26, provides that service by post shall be deemed to be effected by properly addressing, pre-paying, and posting a letter containing the document to be served; but that does not H solve the question as to what is properly addressing. It is true that in *Stanley* v. *Thomas* (2) ([1939] 2 All E.R. 636) LORD HEWART, C.J., said (at p. 640), that he thought that all that is meant by properly addressing is confined to the accuracy and propriety of the address and not to any circumstances affecting the question whether the letter was being sent to the proper destination. I confess I have difficulty in understanding this, for it seems to me that the I propriety of the address and the proper destination are the same thing. I, therefore, turn at once to the two cases on this subject, *Stanley* v. *Thomas* (2) and *Holt* v. *Dyson* (1) where the former case was distinguished. In the former the driver was interviewed in hospital on Sept. 14 within the fourteen days which expired in that case on Sept. 22. A notice had been posted to him at his usual residence on Sept. 13, and was not returned to the police as undelivered till Sept. 23. It was held that, although he was well enough to be interviewed on Sept. 14, the notice sent to his home while he was still in hospital was duly sent. The court said that it was posted at a time when it might well have been expected to reach him " in the ordinary course of post " as stated in the Interpretation Act, 1889, s. 26. LORD HEWART, C.J., went on to say that other considerations no doubt would apply, if it appeared that the sender deliberately sent it to a place where he knew the intended recipient was not, or was not likely to be, and from this and a further passage in the judgment emphasis is being laid on the fact that there must be no deliberate attempt to defeat the intention of the statute. He also said that other considerations might apply where the circumstances were different. It was because the court considered that the circumstances in *Holt* v. *Dyson* (1) were different that they distinguished the two cases. In the latter the injured woman lived in Worthing; the accident took place in Hove and she was in hospital at the latter place. She was interviewed in hospital seven days after the accident and was well enough to be told orally that a prosecution would be considered. Then within fourteen days, namely, on Nov. 28, a notice was sent to her house at Worthing which was not returned as undelivered till Dec. 9 while she was still in hospital, and it was held that the notice was not properly sent. We distinguished that case from *Stanley* v. *Thomas* (2) because we thought that in the latter the court considered the police might reasonably think the man might be back home before the time expired. In *Holt* v. *Dyson* (1) not only did they know that the woman would not have returned home, but no inquiry was made whether letters would be received or if anyone was in charge at her home, and the notice was sent only three days before the time would expire.

In the present case the police had made inquiries, and had ascertained that the defendant's house, which was in the borough where the accident happened, was open and that his wife was living in it. She in fact took in the letter. In my opinion, it is much too technical to hold in these circumstances that the notice was not sent to him within the specified time. It is the sending and not the receipt that is decisive. In ordinary parlance a letter is sent to a person if it is sent to his ordinary residence. True, the police knew that he was in hospital but in a state unfit to receive or attend to a letter. What better or more reasonable thing could they do to implement the intention of the section, than to send it where it would be received by his wife who might well be supposed to be ready to deal with anything urgent while her husband lay unconscious. In such circumstances to put forward arguments whether or not a wife is her husband's agent to do this is to ignore reality; we are not dealing with a commercial or business matter. It was argued that there is nothing in the section which entitled the court to consider whether the police acted reasonably. I do not agree. The section requires the notice to be " sent by registered post to him ". It does not say where. It does not say to the last known address. Surely no one could contend that if it was sent to his ordinary address, the fact that he was away on a holiday would make the service bad; it is the sending, not the receipt, as I have already emphasised, that is material. It was because the court thought that the police had not acted altogether reasonably in *Holt's* case (1) that the service was held to be bad. In the present case, the police have taken the course which was most likely to effect that which the section aims at. The illustration which I gave in *Holt's* case (1) of a resident in Cornwall meeting with an accident while staying in Northumberland shows that reasonableness must be a consideration in a matter of this sort. In my opinion, the duty is performed if the notice is sent to the alleged offender wherever it is most likely to come to his attention within the specified time. If his condition is such that wherever it is sent he will be unable to appreciate or act on it, I do not think that it can make any difference whether it is sent to the hospital

A where he is lying unconscious or to his home where his family are living, though the latter is the more preferable as it is possible that they will take any action that may be open in his interest. I recognise that the two cases to which I have referred may cause difficulty for justices, and it is no reflection on them that we are taking a view differing from them. I hope this judgment may perhaps make it easier for them in the future. In my opinion, the appeal should be B allowed.

ORMEROD, J.: I agree with the judgment of LORD GODDARD, C.J., and wish to make only one short observation. The section provides that notice of an intended prosecution must be served on the defendant or sent to him by C registered post within fourteen days of the commission of the offence. In *Holt* v. *Dyson* (1) LORD GODDARD, C.J., said that the police must act reasonably in these matters. It may be that if the police had sent the notice to the hospital, where they knew the defendant was, the justices might properly have found that the police were complying with the section. That does not, in my view, mean that because the police did not adopt that course, but sent the notice D to his home after making proper inquiries, they were not acting in pursuance of the section. The two findings are not mutually exclusive, and to have taken either course in the present case would, in my opinion, have been a proper compliance with the section. I agree that the Case should be sent back.

BARRY, J.: In the present case I have the misfortune to differ from my E brethren as to the proper construction of s. 21 (c) of the Road Traffic Act, 1930. I agree that the police acted in a humane and reasonable manner, and that the course which they adopted in regard to the sending of the notice was at least as likely as any other to bring it to the attention of the defendant within fourteen days, if he had recovered sufficiently during that period to appreciate its contents. The reasonableness or otherwise of the conduct of the police is, no doubt, a F matter to be taken into account, but only in considering whether or not they have complied with the requirements of the Act. If the notice of intended prosecution has not been sent to the accused person in the manner prescribed by s. 21 (c) of the Act of 1930, there can be no conviction. No question arises in the present case as to the form or contents of the notice. It was properly sent by registered post and the only point at issue is whether or not it was sent G to the defendant. The justices have decided that it was *not*, and I am bound to say that I agree with their decision.

Before the decision of this court in *Holt* v. *Dyson* (1), it might reasonably have been suggested that, in the absence of bad faith on the part of the sender, a notice was sent to the accused as required by the statute if it was properly H addressed and posted to him at his normal place of residence. It is clear from *Holt* v. *Dyson* (1) that this is not the correct interpretation of the Act in cases where the police are well aware that the accused person is not living at his usual address, but at a known address, such as a hospital, elsewhere, and that there is no expectation of his returning to his normal residence during the statutory fourteen-day period within which the notice must be sent. In such circum- I stances it was decided by this court that the notice must be sent to the place where the accused was known to be. So far as I can ascertain the only feature which distinguishes the present case from *Holt* v. *Dyson* (1) is that in the present case the police made proper inquiries and satisfied themselves that the defendant's wife was living at his home. In *Holt* v. *Dyson* (1) no effort was made to discover whether anyone was living at Miss Dyson's home, and it was in fact unoccupied. I cannot accept the view that this one difference between the two cases has in law any real significance. A wife, as I see it, is not an agent authorised to receive communications of this kind on behalf of her husband, and, in any event, the Act requires the notice to be sent to the accused and not to his agent. If the presence of his wife in the defendant's home distinguishes the present case from *Holt* v. *Dyson* (1), what would be the position if the mother or sister of the accused person were known to live at his address? It might also be reasonable for the police to assume that such a person would be likely to give the notice to the accused as soon as he was fit to receive it. If, on the other hand, the occupant were a housekeeper or domestic servant, it might be even more reasonable to send the notice to the address of the mother or sister or even to that of his solicitor.

I fully appreciate that in the present case the point taken on the defendant's behalf is both technical and unmeritorious. None the less, with the greatest respect for the views expressed by my brethren, I fear that it may lead to confusion if the principle established by *Holt* v. *Dyson* (1) is qualified by the consideration of what may or may not be reasonable in any particular case. For myself, I would prefer to establish the simple rule that the notice must be sent to the accused person at the address at which he is actually living, and will in all probability continue to live, during the statutory fourteen-day period, if that address is actually known to the police. Unless the accused is in hospital or is known to be living at some address other than his own, the notice would normally be sent to his usual residence. Provided that the notice is properly sent the requirements of the Act have been observed, and the failure of the accused to receive it will not be a bar to prosecution.

Appeal allowed. Case remitted.

Solicitors: *Kinch & Richardson*, agents for *Percy Hughes & Roberts*, Birkenhead (for the police officer); *Carpenters*, agents for *Laces & Co.*, Liverpool (for the defendant).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

A. PROSSER & SON, LTD. *v.* LEVY AND OTHERS.

[COURT OF APPEAL (Singleton, Jenkins and Parker, L.JJ.), October 10, 11, 31, 1955.]

Negligence—Escape—Water—Escape of water from pipe with open end and without drain—No consent to condition of pipe by parties suffering damage—Immediate cause of escape unexplained.

The plaintiffs were lessees and occupiers of a shop on the ground floor of a building owned by trustees, the first defendants, who retained control of staircases and passages in the building. In a passage on the second floor under a washbasin there was a copper pipe about three and a half inches above floor level. Only a short piece of the pipe remained. It had a stop tap, of an ordinary type for a supply pipe, but the end of the copper pipe was open and there was no waste pipe or drain to carry away water that might flow from it. The stop tap required three or four turns to turn it full on, but water would come slowly from the pipe if the tap were only slightly opened. On a night in June, 1953, the plaintiffs' premises and goods therein were damaged by an escape of water from the copper pipe on the second floor; the flow of water being slow at the time when the escape was discovered and the stop tap being found turned on. How the tap came to be turned on was unexplained. In an action by the plaintiffs against the trustees for damage done by the escape of water,

Held: the trustees were guilty of negligence towards the plaintiffs in leaving the copper pipe in the condition in which it was, to which the plaintiffs were not to be regarded as having consented (*Kiddle* v. *City Business Properties, Ltd.*, [1942] 2 All E.R. 216 and *Peters* v. *Prince of Wales Theatre* (*Birmingham*), *Ltd.*, [1942] 2 All E.R. 533 considered), and the damage caused to the plaintiffs was of a kind which might naturally flow from the negligence and should be regarded as having resulted from it (dictum of GREER, L.J., in *Haynes* v. *Harwood*, [1935] 1 K.B. at p. 156 applied); therefore, as the trustees had failed to discharge the onus, which was on them if they were to avoid liability, of showing that the escape of water was due to the deliberate and mischievous act of some independent person (*Rickards* v. *Lothian*, [1913] A.C. 263, and *Dominion Natural Gas Co., Ltd.* v. *Collins & Perkins*, [1909] A.C. 640 applied), they were liable to the plaintiffs for the damage caused by the escape of water.

Appeal allowed.

[**Editorial Note.** The operation of an original cause may cease, and the chain of causation may be broken, by reason of the intervention of an independent new cause, e.g., by an act of independent human volition. Such an act may render the resulting damage too remote, and may thus provide a defence to a cause of action to which damage is essential. If, however, the intervening act is of a kind which might reasonably have been anticipated, this consequence does not follow; see, generally, 11 HALSBURY'S LAWS (3rd Edn.) 282, 283.

The decision in *Birchall* v. *J. Bibby and Sons, Ltd.* ([1953] 1 All E.R. 163) affords an example of a case where defendants discharged the onus of showing that an accident was due to a malicious act of some person unknown, and thus may be contrasted with the present case.

As to liability in negligence for the escape of water artificially introduced into houses, see 23 HALSBURY'S LAWS (2nd Edn.) 623, para. 873; and for cases on the subject, see 36 DIGEST (Repl.) 293, *393-396*, 295, 296, *409-414*.

As to the exceptions or excuses from the application of the rule in *Rylands* v. *Fletcher*, see 24 HALSBURY'S LAWS (2nd Edn.) 47, para. 83.]

Cases referred to:

(1) *Fletcher* v. *Rylands*, (1866), L.R. 1 Exch. 265; 35 L.J.Ex. 154; 14 L.T. 523; 30 J.P. 436; *affd.* H.L. sub nom. *Rylands* v. *Fletcher*, (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70; 36 Digest (Repl.) 282, *334*.

(2) *Kiddle* v. *City Business Properties, Ltd.*, [1942] 2 All E.R. 216; [1942] 1 K.B. 269; 111 L.J.K.B. 196; 166 L.T. 302; 2nd Digest Supp.

(3) *Carstairs* v. *Taylor*, (1871), L.R. 6 Exch. 217; 40 L.J.Ex. 129; 36 Digest (Repl.) 284, *337*.

(4) *Ross* v. *Fedden*, (1872), L.R. 7 Q.B. 661; 41 L.J.Q.B. 270; 26 L.T. 966; 36 J.P. 791; 36 Digest (Repl.) 293, *393*.

(5) *Cockburn* v. *Smith*, [1924] 2 K.B. 119; 93 L.J.K.B. 764; 131 L.T. 334; 31 Digest (Repl.) 104, *2484*.

(6) *Peters* v. *Prince of Wales Theatre (Birmingham), Ltd.*, [1942] 2 All E.R. 533; [1943] K.B. 73; 112 L.J.K.B. 433; 168 L.T. 241; 36 Digest (Repl.) 299, *434*.

(7) *Blake* v. *Woolf*, [1898] 2 Q.B. 426; 67 L.J.Q.B. 813; 79 L.T. 188; 62 J.P. 659; 36 Digest (Repl.) 296, *414*.

(8) *Rickards* v. *Lothian*, [1913] A.C. 263; 82 L.J.P.C. 42; 108 L.T. 225; 36 Digest (Repl.) 293, *396*.

(9) *Humphries* v. *Cousins*, (1877), 2 C.P.D. 239; 46 L.J.Q.B. 438; 36 L.T. 180; 41 J.P. 280; *on appeal*, 46 L.J.Q.B. 442; 36 Digest (Repl.) 288, *361*.

(10) *Blyth* v. *Birmingham Waterworks Co.*, (1856), 11 Exch. 781; 25 L.J.Ex. 212; 26 L.T.O.S. 261; 20 J.P. 247; 156 E.R. 1047; 36 Digest (Repl.) 5, *1*.

(11) *Haynes* v. *Harwood*, [1935] 1 K.B. 146; 104 L.J.K.B. 63; 152 L.T. 121; 36 Digest (Repl.) 151, *795*.

(12) *Dominion Natural Gas Co., Ltd.* v. *Collins & Perkins*, [1909] A.C. 640; 79 L.J.P.C. 13; 101 L.T. 359; 36 Digest (Repl.) 36, *176*.

(13) *Philco Radio & Television Corpn. of Great Britain, Ltd.* v. *J. Spurling, Ltd.*, [1949] 2 All E.R. 882; 36 Digest (Repl.) 81, *442*.

Appeal.

The plaintiffs appealed from an order of HAVERS, J., at Manchester Assizes, dated Mar. 21, 1955, whereby he held that neither the first nor second defendants had been guilty of negligence and dismissed the plaintiffs' claim. His decision is reported in 105 L. Jo. 569.

The facts appear in the judgment of the court.

G. J. Paull, Q.C., and *C. N. Glidewell* for the plaintiffs.

D. J. Brabin, Q.C., *J. D. Cantley, Q.C.*, and *A. K. Hollings* for the first defendants.

Cur. adv. vult.

Oct. 31. **SINGLETON, L.J.**, read the judgment of the court: The plaintiffs were the occupiers of a lock-up shop on the ground floor of No. 15 Market Street, Manchester, when on June 5, 1953, there was an escape of water from above and much damage was caused to the plaintiffs' goods and fittings. The owners of the premises are the first defendants, the trustees of the Levy Estate Trust, to whom we shall refer as "the trustees". They had purchased the freehold of the premises in 1951, at which time the plaintiffs were occupiers of the ground floor under the terms of a lease which was still running on June 5, 1953.

The position in regard to the upper parts of the building is clearly shown in the judgment of HAVERS, J., in this passage:

> "On July 2, 1951, the trustees granted a lease of certain parts of this property to the second defendants, Barder Morris Incorporated Ltd. The

lease provided that the lessors (the lessors being the trustees) demised to the second defendants: ‘ all those offices and warerooms situate on the first, second and third floors known as 15 Market Street in the City of Manchester together with the right (in common with all others to whom the lessors may give the like right) of ingress, egress and regress through or by means of the entrance doors staircases and passages serving the first, second and third floors of the said building ’ for a term of three years beginning on July 2, 1951, ‘ subject to but with the benefit of the existing tenancies in respect of the demised premises particulars whereof are set out in the attached schedule ’.

“ Now on the natural and ordinary interpretation of that document it seems clear that what was being demised by the trustees to the second defendants were these offices and warerooms on the first, second and third floors and they had the right solely of ingress, egress and regress through the entrance doors, stairways and passages which served these three floors. The view I take on a natural and ordinary interpretation of that document is that all the second defendants acquired under that was a limited right of ingress, egress and regress through the stairways and passages and that the trustees were reserving to themselves the ownership and control of those stairways and passages. There was no covenant by the trustees to maintain, repair or decorate the stairways or passages.

“ On Mar. 25, 1954, there was an agreement for a tenancy made between the second defendants and Mr. Leslie James Thorpe, who trades as A. Robinson & Sons. Under this agreement the second defendants let to A. Robinson & Sons the four offices situate on the second floor of the building together with a right of access thereto between the hours of 8.30 a.m. and 6 p.m. on weekdays and such other hours as may be mutually agreed upon by means of the common staircases and common passages and together with the use (in common with all persons having the like right) of the lavatories and conveniences on the second floor of the building. The agreement contained a covenant by Robinson & Sons: ‘ to keep in good and tenantable substantial and complete order repair and condition at their own expense the whole of the inside part of the said demised premises together with electric light and heating installations (except the main bearing timbers or main girders main walls and roofs) and the partitions floors ceilings glass in the windows and the locks and fastenings thereof and the painting and papering thereof ’. Clause 5 of the agreement contained a covenant by the landlord: ‘ to keep the outside main walls and roof passages and staircases intended for the use of the occupants at all times in complete repair and as to the conveniences in proper sanitary and clean condition and fit for comfortable use and enjoyment by the occupants ’. This agreement was signed by Robinson & Sons, but it never appears to have been signed by the second defendants. Robinson & Sons went into possession on the terms of this agreement.

“ Now an agreed plan was put in evidence before me, and it shows quite clearly what was the occupation of the second floor of this building. For convenience and identification the various offices have been lettered beginning from the left of the plan. On this floor the offices A, B, C and E were occupied by Robinson & Sons. Office D was occupied by the second defendants, who had left on it the name of the North Manchester Manufacturing Company. As you come up the stairs to this floor there is a fairly long passageway, and these three offices on the right-hand side open out into this passageway, as does the solo office E at the end of the passageway. On the left-hand side there are some stairs which go upward, and on one of the stairs there is a door opening from the ladies’ water closet to that stair. Going a little further on the same side of the passageway there was a washbasin. Once or twice a day Mr. Barder, a director of the second defendants, or one or other of his two employees, Mr. Driver or Miss Dobson, passed through this passage on the second floor to the one storeroom which they occupied on this floor, which was marked D on the plan. Mr. Barder and Mr. Driver, one of his employees, used the water closet on the third floor. Miss Dobson, the other employee, used the ladies' toilet on the third floor, the one I have already mentioned. Neither Mr. Barder, Mr. Driver nor Miss Dobson, ever used the washbasin on the second floor. They had an enclosed washbasin on the first floor which was almost opposite the washbasin on the second floor. Otherwise none of these persons ever had occasion to use the passageway on the second floor.

"Mr. Barder employed a cleaner to keep his own office clean. She used to do her cleaning from 8 o'clock to, by the latest, 12 noon. So far as the stairways and passageways were concerned, Mr. Barder and Robinson & Sons had an arrangement by which the work of cleaning was done under the supervision of Robinson & Sons, who employed somebody to do it. The passageways on the first, second and third floors and the stairs were cleaned, and the arrangement between the two was that Mr. Barder contributed 5s. a week towards the wages of the cleaner. This again was always done between 8 o'clock and either 11 or 11.30 at the latest, and Mr. Barder had never seen the cleaner, he told me, after lunch. Mr. Barder was not sure whether the cleaner had a key and he thought she had not, but he usually found her there when he arrived in the morning. So far as the decoration was concerned, some time about February, 1953, Mr. Barder and Robinson & Sons both came to the conclusion that the state of decoration was not very good and they thought that from a business point of view it was desirable to do something about it. They made an arrangement to share the costs of decorating the passageways, and in fact the passageways and walls were decorated. They divided the cost and the cost to each was in the neighbourhood of £10. The trustees were asked to consent to this and they gave consent.

"The position, therefore, with regard to the rest of the building was this. The first floor was occupied by Fitton & Sons. They occupied one office on the first floor under an agreement put in before me of Oct. 5, 1951, and they had a similar right to use, in common with all other persons having the like right, the lavatories and conveniences on the floor of the building. The whole of the remainder of the first floor other than the one office occupied by Fitton & Sons was occupied by the trustees. I have already said with regard to the second floor that Robinson & Sons occupied four of the offices, and that the second defendants occupied office D. The third floor was occupied by More O'Farrell Ltd., sub-tenants from them.

"Now the building had a front door opening into Market Street and the occupants used to leave in the normal course of events between 5 and 6 o'clock at night. There seems to have been rather a haphazard method of locking the door. The person who believed himself to be the last to leave the building locked the door. He would call out to see if there was anybody present, but of course as there were four floors it is possible that he was not always heard. In fact on occasions he might be the last person but did not believe he was, in which event it appears that the door might possibly be left open, so there might be an opportunity for a trespasser to come in from the street and go to the second floor and, if he were mischievously minded, interfere with this piece of pipe to which I shall have to refer in a moment."

Barder Morris Incorporated Ltd., were the second defendants in the action which was brought by the plaintiffs to recover damages. HAVERS, J., at Manchester Assizes on Mar. 21, 1955, held that the plaintiffs were not entitled to succeed against either of the defendants and gave judgment for the defendants with costs. The plaintiffs appeal against the judgment in so far as it is in favour of the trustees. No question is raised on the judgment in favour of the second defendants, Barder Morris Incorporated Ltd.

Now the escape of water took place from a pipe under the washbasin in the passageway on the second floor. There is little evidence as to the use of this basin. So far as the evidence shows it was not used by those employed by Barder Morris Incorporated Ltd., who occupied only one room on this floor. One assumes that it was used by the employees of Robinson & Sons who occupied four rooms on the floor, but no witness was called from that firm. The position of the rooms and of the washbasin is shown on the plan, which also shows the design of the washbasin and mirror above. The basin had a $1\frac{1}{4}$-inch lead waste pipe. The pipe which carried water to the basin was a $\frac{1}{2}$-inch lead water pipe. Some three and a half inches above floor level there was a $\frac{1}{2}$-inch copper pipe at right angles to the $\frac{1}{2}$-inch lead pipe; only a small portion of the copper pipe remained. Towards the end of it there was a stopcock, but the pipe had an open end. HAVERS, J., said of this copper pipe:

> "This section of pipe was completely redundant and served no useful purpose whatever. It had a thread end and the probability is that at one time it had been connected with another pipe which provided water for the office marked E on the plan. The stop tap which is near the end of this piece of pipe was not designed for the purpose of stopping water coming out from this small section of pipe; it had originally been used for stopping the flow of water if a leak had occurred in the pipe connected to it which supplied water to office E. The stop tap was a normal type of stop tap approved by the Manchester Corporation waterworks department and was a perfectly standard stop tap on a $\frac{1}{2}$-inch supply pipe. To open this stop tap fully you had to make three or four turns. If it was turned so as to be fully open and permit water to flow at maximum pressure, water would gush out and this would be obviously noticeable to anybody who turned it fully on. If the tap was opened slightly from its closed position some water would come through. The volume would increase as the tap was opened more and more until maximum pressure was reached when the tap was fully open. I had evidence from Mr. Gomersall, which I accept, that, owing to its position being so close to the ground—$3\frac{1}{2}$ inches above the ground—and being underneath the washbasin and slightly to the right, a cleaner sweeping the floor or anybody mopping the floor, or even catching a foot against it while washing, could knock it on. It could not accidentally be knocked on completely, but it could be knocked on sufficiently to cause water to start seeping out. By being knocked against unintentionally in this way or by a cleaner touching it, it could not be turned on more than half a turn. As soon as you start to turn water comes out, which would be noticeable; indeed, Mr. Gomersall said you would notice it long before as much as half a turn had taken place, and with a half-turn the flow of water would not be in excess of fifty per cent. of the maximum flow. This stop tap is vertical when closed and you move it to the left, anti-clockwise, to open it."

At 5.45 a.m. on June 5 a call was received at the London Road fire station and officers from the fire brigade and police officers went to 15 Market Street. They could see through the windows that the ground floor part seemed to be sodden, and that water in quantity was dripping from above. They went to the second floor and found that the escape was from the open end of the copper pipe. Mr. Harris, the assistant divisional officer of the fire brigade, was unable to say how far the tap was turned on. He described the flow of water in this way:

> "It was a very lazy flow: no pressure behind it: sort of bubbling out and gurgling";

and he said he would imagine that the stop tap was slightly turned on, unless the supply was at low pressure. P.c. Bowker said that the water was not coming out with fierce pressure; it was coming out in quantity, but not to spread all over the floor. He added that the tap was turned full on when he found it. He formed that impression from the feel of the tap: he did not check it by the number of turns required to turn on the tap to the full extent. The learned judge accepted the evidence of P.c. Bowker and said:

> " I find accordingly that somebody during the night of June 4/5 turned on this stop tap so that the water did flow out on to the floor. I find that the person who did it turned it fully on and that it was not accidental, but deliberately turned on."

We are not satisfied on the evidence that it was satisfactorily established that the stop tap was fully turned on, although it does seem that it was turned on to an extent that would have been unlikely to happen from an accidental kick or knock. It is not clear what is meant by the words " during the night ". It appears from the evidence that the outside door of the building was locked each evening when the last person left and, if the ordinary practice was followed, it is unlikely that anyone would enter the building afterwards. The basin was used by Robinsons. If someone turned on the tap and no water came, it is possible that he, or she, would try the copper pipe below and if no water came, it is equally possible that the person would omit to turn the stop tap to the off position. This might occur if the supply was cut off about the time the employees of Robinsons were leaving. And although the copper pipe was said to be of no use whatsoever, it is possible that one person might try to get water there while another was using the basin. There is no evidence to show whether the supply was cut off at any time during the evening of June 4 nor is there any evidence from anyone in the employ of Robinsons. We do not know how many were employed there, who was the last to leave, or who last used the basin. On the evidence, we should think it is more likely that the stop tap was turned on, and left turned on, by someone employed there than that someone entered after the place was closed and turned on the tap deliberately in order to cause damage. If perchance the stop tap was left turned on when the supply was off, trouble was bound to occur when the supply came on again. It is unfortunate that the judge was left without any information from Robinsons and without any information as to who was last in the building and as to who locked the outside door, if it was locked. There is no doubt on the evidence that the leaving of the copper pipe with the end open was wrong and constituted a source of potential danger, for there was no sink or means by which the water could be carried away without causing damage. Again, the evidence does not show when the alteration was done, or by whom.

Mr. Adams, a plumber of experience, who was called on behalf of the plaintiffs, said that the pipe ought not to have been left in the way it was: it should have been taken off the rising main altogether and the main then soldered up, or a brass cap specially made for such a purpose should have been fitted on to it. He said:

> " I should not think anybody in his right mind would have it like that ",

and, in reply to the judge, " Unless a lunatic ". Mr. Gomersall, an architect, gave evidence before an examiner as follows:

> " Q.—What is your opinion as to the manner in which that tap and pipe were at the time when you saw them ? How would you describe them ? A.—I would say that the plumber who had disconnected that branch service should have put a screwed stop or plug in the end of the pipe to stop any water coming out from the end of the pipe if the stop tap happened to be turned on, which is quite a normal procedure. Q. There is nothing difficult about it ? A.—Oh, no. Q.—What was the potential situation,

A that not having been done ? A.—A cleaner sweeping the floor or anybody mopping the floor, or even catching their foot against it whilst they were washing, could knock it on—not completely but sufficient to cause water to start seeping out. Q.—Left in that way, would you say it was a proper or safe system ? A.—Certainly not. Q.—How would you describe it ? A.—As a potential danger. Q.—Was it a danger which would or would not B have been obvious to anyone who had taken the slightest chance to look at it ? A.—I do not think a lay person would have noticed it perhaps, but certainly a plumber should notice it and not leave it like that."

Mr. Fieldhouse, an estate agent called on behalf of the first defendants, was asked questions on this when he was cross-examined by counsel for the second C defendants, and it is necessary to read some of the questions and answers. The witness was asked by counsel:

" Q.—It is essential if there is a pipe—as we know there is a pipe—that it should be sealed and have no open end ? A.—Yes, I presume so. Q.—That is elementary, is it not ? A.—Yes. Q.—How many years' experience have you had ? A.—Twenty-six years. Q.—Indeed, your firm is one D of the oldest in Manchester ? A.—Yes. Q.—Almost the oldest, I think ? A.—Possibly. Q.—If you had known there was an open end to that pipe, the immediate thing you would have done would be to stop it up, wouldn't you ? A.—No. I would have inquired what it was for, asked why they had this open end in the first place. Q.—You would have inquired ? A.—Yes. Q.—You have seen it since, have you not ? A.—No. Q.—You have seen E the plan ? A.—Yes. Q.—You can see, can you not, that it serves no purpose of any kind ? A.—Yes. (HAVERS, J.): I suppose your inquiries would have been likely to have revealed that ? A.—Yes. I would have consulted an expert on it, or a plumber. (Counsel): Have you any doubt in common sense, never mind an expert plumber, that the obvious thing to do would be to close it up ? A.—As it served no purpose, yes. Q.—You F would close it up because water might get through ? A.—Only if the tap were turned on it will. (Counsel): Exactly, yes. (HAVERS, J.): The obvious thing would be to take it away or close it up ? A.—Yes. (Counsel): And that is a thing which, if it had come to your notice, you would have done ? If you had seen there was an open end there, you would either, on your own motion, have had it closed up or sent for a plumber to ask G his advice ? A.—If it was considered dangerous. Q.—Would you not have considered it dangerous ? A.—It is not dangerous unless the tap is turned on. Q.—Whether turned on or not, would you not consider it a source of potential danger ? A.—A possible source."

The findings of HAVERS, J., on this are as follows:

H " Now the trustees [the first defendants] through Mr. Fieldhouse knew of the existence of this basin and of this pipe with a stop tap on it and the open end. They certainly had the means of knowing it had this stop tap on it and an open end. In my view, they ought to have realised it was a source of potential danger to persons occupying the lower floors if it was accidentally knocked on. I accept the evidence of Mr. Adams and Mr. I Gomersall. I think leaving the pipe in this condition $3\frac{1}{2}$ inches above the floor and close to the basin with a stopcock and open end was a very slipshod and inefficient piece of plumbing. There was no drain to take away water if it was left on, and if it was left on accidentally, as might well happen, in one of the ways indicated by Mr. Gomersall, the water would come out on to the floor, and if negligently left on it would in course of time seep through the floors to the ground floor and do damage. I am satisfied that there was a duty on the trustees to take reasonable care to prevent the escape of water and I think that they ought to have foreseen the possibility

> that this stop tap might be accidentally turned on in one of the ways Mr. Gomersall described, and that they were negligent in failing to take reasonable care in not adopting one or other of the methods of preventing water escaping which Mr. Adams and Mr. Gomersall described."

Thus the judge was satisfied that there was negligence on the part of the trustees, or of their agent, in regard to the water supply in the building. He said that if he was satisfied that the tap was accidentally or unintentionally turned on he would have been disposed to find that the plaintiffs had established a case against the trustees, but:

> "As it is, however, I am satisfied that this turning on of this tap must have been a deliberate and mischievous act . . . I have not had the advantage of having Messrs. Robinsons called before me or any of their servants or employees. I do not know whether or how often they used this basin on the second floor. I do not know at what time their employees left on the material date or what the condition of the property was when they did last leave. I am quite satisfied as regards the second defendants that neither Mr. Barder, Mr. Driver, nor Miss Dobson deliberately turned this stop tap on. It may have been caused by the mischievous act of one or other of the occupiers of the building or by a stranger who came in from outside, or possibly it may have been caused by somebody who came in when the door was left open. It is quite impossible for me on the evidence to say who it was that did in fact turn this stop tap on."

We cannot accept as accurate the finding that the turning on of the tap was a deliberate and mischievous act. It is, of course, possible that someone deliberately and mischievously turned on the tap, although we do not regard that as so likely to happen as that someone tried the tap, and, failing to get water, forgot to turn it off. One ought not to assume a deliberate act with the intention to do damage if there are other equally likely explanations. It seems to us on the evidence that there exists complete uncertainty how the escape came about. If the learned judge was entitled to draw the inference that the damage was caused by the deliberate and mischievous act of some person unconnected with the trustees, we would agree with him that the trustees are not liable in damages. As we take a different view on the facts, we must consider the law on the subject.

The general rule in regard to damage caused by the escape of water from one man's land on to that of another was stated in the judgment of the Court of Exchequer Chamber, delivered by BLACKBURN, J., in *Fletcher* v. *Rylands* (1) (1866) (L.R. 1 Exch. 265), in these terms (ibid., at p. 279):

> "We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape."

This statement of the law was expressly approved in the House of Lords (1868) (L.R. 3 H.L. 330), and cannot be challenged. There are, however, exceptions to the rule. If the plaintiff has consented to the source of danger and there has been no negligence on the part of the defendant, the defendant is not liable, and the same applies if the water is maintained for the common benefit of both the plaintiff and the defendant. It is not necessary to cite the older authorities: they are admirably summarised in two judgments of the present Lord Chief Justice. The first was given when he was sitting as a judge of first instance in *Kiddle* v. *City Business Properties Ltd.* (2) ([1942] 2 All E.R. 216). In that case the plaintiff was the occupier of a shop which formed part of a building belonging to the defendants who had demised the shop to him. The shop was situated in an arcade, the glass roof of which was the property and under

A the control of the defendants. Rain water from this roof ran into a gutter over the plaintiff's shop and was carried to the sewer by a piping which ran down the side of the shop. Owing to an accumulation of rubbish in the piping, rain water escaped from the gutter, found its way into the plaintiff's shop and damaged his stock. The defendants had made adequate arrangements for the inspection and cleansing of the gutter and piping, and there was no negligence B on their part. It was held that, in the absence of negligence, the defendants were not liable to the plaintiff in an action for nuisance for allowing the water to escape on his premises as (i) the plaintiff's shop formed part of a larger building belonging to the defendants and he must be held to have taken the shop as it was and could not complain that the building was not constructed differently; and (ii) the arrangement for the collection and carrying away of water from the C glass roof to the sewer was for the joint benefit of both the plaintiff and the defendants. The court was unable to find that there was any neglect of duty on the part of the defendants and, after referring to certain of the authorities, GODDARD, L.J., said ([1942] 2 All E.R. at p. 217):

> "All these cases, however, arose between adjoining owners, whose holdings were entirely independent the one of the other, and there is another D line of authority which has to be considered where the water has escaped from a place where it has been brought with the consent or for the common benefit of both parties. I need refer to no more of the cases than *Carstairs* v. *Taylor* (3) (1871) (L.R. 6 Exch. 217), *Ross* v. *Fedden* (4) (1872) (L.R. 7 Q.B. 661) and *Cockburn* v. *Smith* (5) ([1924] 2 K.B. 119). It is now settled law that where the plaintiff and the defendant occupy parts of the same E building, whether it be two floors of a warehouse, two sets of offices or two flats, and water which is laid on to the building escapes and does damage, the person from whose part the escape takes place is not liable in the absence of negligence. The reason for the escape is immaterial so long as the exercise of reasonable care would not have prevented it, and it seems to me that the true reason is most clearly stated in the judgment of MARTIN, B., F in *Carstairs* v. *Taylor* (3) where he says (L.R. 6 Exch. at p. 222): 'Now, I think that one who takes a floor in a house must be held to take the premises as they are, and cannot complain that the house was not constructed differently'. So here the plaintiff has taken part of the defendants' premises with a sloping roof outside, down which rain must run to the gutter provided to carry it off. It therefore follows that, if the flooding from the gutter G occurred without negligence on the part of the landlords, the landlords are not liable."

The second judgment is that in *Peters* v. *Prince of Wales Theatre* (*Birmingham*), *Ltd.* (6) ([1942] 2 All E.R. 533), where the plaintiff leased from the defendants shop premises forming part of the defendants' building which contained a theatre H and a rehearsal room, the defendants covenanting (inter alia) to keep the exterior of the demised premises in good and tenantable repair and condition. When the lease was granted the plaintiff knew that the rehearsal room was fitted with a system of sprinklers, which also extended to his shop, designed to discharge automatically large quantities of water in case of fire. Owing to an exceptionally severe frost, and not to any default on the part of the defendants, the sprinklers I burst and water percolated to the plaintiff's shop and damaged his goods. In an action by the plaintiff against the defendants for damages it was held (i) that the defendants had not broken their covenant to keep the exterior of the demised premises in repair since the covenant must be construed as referring to every exterior part of the demised premises, to the exclusion of what was not demised, and the sprinklers were no part of the demised premises; (ii) that the doctrine in *Fletcher* v. *Rylands* (1) did not apply as the plaintiff had impliedly consented to the presence of the sprinklers. The plaintiff's claim, therefore, failed. The judgment of the Court of Appeal was given by GODDARD, L.J., who reviewed the authorities from *Carstairs* v. *Taylor* (3) onwards, and said ([1942] 2 All E.R. at p. 538):

> " A case almost identical on its facts with the last is *Blake* v. *Woolf* (7) ([1898] 2 Q.B. 426), where the judgment of the Divisional Court was delivered by that most learned and accurate lawyer, R. S. WRIGHT, J. He said (ibid., at p. 428): ". . . the plaintiff, by taking these premises with water laid on to them and accepting his supply of water from the defendant's cistern, must be taken to have assented to water being kept on the premises by the defendant '. He then cited the cases to which we have referred and held that as there was no negligence proved the defendant was not liable. The same result followed in *Rickards* v. *Lothian* (8) ([1913] A.C. 263), though in that case the emphasis was laid on the supply of water for water closets and lavatories being a necessity and indeed a landlord's duty in modern life. So there is unbroken authority from 1871 to 1913 that where the plaintiff and defendant occupy different floors of one building and water laid on to the building escapes, the party from whose rooms the water escapes is not liable in the absence of negligence.
>
> " The latest case on the subject is *Kiddle* v. *City Business Properties, Ltd.* (2), where it was decided that this matter was now settled law, the reason for which was most clearly stated in the passage from the judgment of MARTIN, B., in *Carstairs* v. *Taylor* (3) . . . In truth, it appears to depend on consent, and it seems to us that the fact that in most of the cases at any rate the benefit of the water or the gutters was common to both is really an element, though no doubt an important element, in showing that there was consent. The contractual relationship between landlord and tenant, or the willingness of the plaintiff to take a lease of part of a house so constructed that at the time when he takes his lease other occupiers are being supplied with water removes the case from the sphere of the common law doctrine laid down in *Rylands* v. *Fletcher* (1). This explains why the plaintiff failed in *Carstairs* v. *Taylor* (3) and succeeded in *Humphries* v. *Cousins* (9) (1877) (2 C.P.D. 239)."

From these judgments it appears that there are two important elements for consideration, namely, negligence and consent. In the case of an ordinary water supply in a block of premises, each tenant can normally be regarded as consenting to the presence of water on the premises if the supply is of the usual character. It cannot be said that he consents to it if it is of quite an unusual kind, or is defective or dangerous, unless he knows of that. HAVERS, J., said:

> " I do not think, therefore, that in the light of that evidence it can be taken that the plaintiffs gave any implied consent to the existence of that particular section of pipe. They must, as I say, have been taken to have impliedly consented to the installation of a water supply."

It appears to us that they cannot be said to have consented to the set-up or installation as it existed at the time the damage was caused. Over and above this, negligence on the part of the defendants which causes or contributes to the damage takes the case out of the exception to the rule in *Fletcher* v. *Rylands* (1). It cannot be disputed that the leaving of the pipe in the condition in which it was constituted negligence, as the judge said.

The trustees owed a duty to the plaintiffs. To determine whether there was a breach of that duty it is not necessary to look further than to the words of ALDERSON, B., in *Blyth* v. *Birmingham Waterworks Co.* (10) (1856) (11 Exch. at p. 784):

> " Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."

A The leaving of the copper pipe in the position, and in the condition, in which it was was something which no reasonable person would do, and the damage to the plaintiffs' goods was damage of a kind which might naturally follow from it. In *Haynes* v. *Harwood* (11), GREER, L.J., said ([1935] 1 K.B., at p. 156):

> "There can be no doubt in this case that the damage was the result of the wrongful act in the sense of being one of the natural and probable B consequences of the wrongful act. It is not necessary to show that this particular accident and this particular damage were probable: it is sufficient if the accident is of a class that might well be anticipated as one of the reasonable and probable results of the wrongful act."

In order to excuse themselves, the trustees must show that the escape of water C was due to the act of a subsequent conscious volition. It is clear from the decision of the Privy Council in *Dominion Natural Gas Co., Ltd.* v. *Collins & Perkins* (12) ([1909] A.C. 640) that the onus of showing this is on them. If they can show that the proximate cause of the damage is the malicious act of a third party against which no precautions would have been of use they are not liable in damages; see *Rickards* v. *Lothian* (8). It appears to us that D they have not approached this stage. The position is one of complete uncertainty. It does not excuse the trustees if the stop tap was negligently left on by a third party; see the judgments in *Philco Radio & Television Corpn. of Great Britain, Ltd.* v. *J. Spurling, Ltd.* (13) ([1949] 2 All E.R. 882). Unless it can be established that the act was at the least "a deliberate and mischievous act", to use the words of HAVERS, J., the trustees are not absolved. As we have E said, we do not consider that that finding of the learned judge was warranted on the evidence which was given.

Counsel on behalf of the plaintiffs put the case in another way. He submitted that it was clear that the trustees had not taken all reasonable precautions to prevent an escape of water and that such reasonable precautions would have prevented the damage suffered by the plaintiffs. Consequently, he claimed, F the plaintiffs were entitled to succeed on their claim. We prefer to look on the case in the way already stated. The trustees were the owners of the building and the occupiers of the part on which the basin and copper pipe were. They were found to be negligent in relation to the pipe from which the escape occurred. The immediate cause of the escape remains wholly unexplained. The position might have been made much clearer if further evidence had been G called. Having regard to the way in which the case was left, we consider that the plaintiffs are entitled to succeed. Their appeal should be allowed and judgment should be entered for them for the amount of damages agreed, with costs in this court and in the court of first instance.

Appeal allowed.

Solicitors: *Manches & Co.*, agents for *David Blank, Alexander & Co.*, Manchester (for the plaintiffs); *Gardiner & Co.*, agents for *A. W. Mawer & Co.*, Manchester (for the first defendants).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

DAVIES *v.* DAVIES.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), June 17, November 9, 1955.]

Divorce—Decree nisi—Substitution of decree of judicial separation—Motive to safeguard wife's occupancy of matrimonial home—Application unopposed—Discretion of court.

On Apr. 30, 1954, the wife obtained a decree nisi of divorce on the ground of the husband's adultery. Thereafter, the wife, the three children of the marriage and the husband continued to live in the flat which had been the matrimonial home, and the wife acted as housekeeper for the husband. The flat was owned by the husband. The wife was afraid that if the decree were made absolute the husband would soon compel her and the children to leave the flat. Accordingly she now applied that the decree nisi be rescinded and that she be granted in its place a decree of judicial separation. The husband did not oppose the application.

Held: the court had a complete discretion and, as in the present case there was no reason why the court should not exercise its discretion in the wife's favour, the application would be granted.

Observations of PEARCE, J., in *Jeffrey* v. *Jeffrey* (*No. 1*) ([1950] 2 All E.R. at p. 450) applied.

[As to the changing of relief prayed for in a petition in a matrimonial cause, see 12 HALSBURY'S LAWS (3rd Edn.) 322, para. 650, and as to the effect of the use of delay in making absolute a decree nisi in order to obtain advantage, see ibid., p. 407, para. 905.

For the Matrimonial Causes Act, 1950, s. 12 (3), which replaces s. 183 (3) of the Supreme Court of Judicature (Consolidation) Act, 1925, see 29 HALSBURY'S STATUTES (2nd Edn.) 400.]

Case referred to:

(1) *Jeffrey* v. *Jeffrey* (*No. 1*), [1950] 2 All E.R. 449; [1951] P. 32; 27 Digest (Repl.) 687, *6566*.

Summons.

The parties were married in 1937 and there were three children of the marriage. The wife petitioned for divorce on the ground of the husband's adultery. The petition was undefended and on Apr. 30, 1954, His Honour JUDGE MACMILLAN, sitting as a special commissioner, granted the wife a decree nisi and ordered that she should have the custody of the two younger children (who were still under the age of sixteen). The wife did not apply to have the decree made absolute but on May 19, 1955, she issued a summons for the hearing of an application by her for an order that the decree nisi should be rescinded and that she should be granted a decree of judicial separation. In her affidavit in support of the application the wife stated that since the decree nisi was pronounced she had continued to live with the three children of the marriage in the former matrimonial home at 53, Dagmar Avenue; that the husband had also continued to live at the same address and she had, in fact, acted as a housekeeper to him, but that there had been no sexual relations between them; that the property at 53, Dagmar Avenue belonged to the husband and consisted of two flats, of which the ground floor flat was let by the husband and the upper flat was the former matrimonial home; and that if the decree were made absolute the husband would within a short time if not at once require her to leave the premises and that she would be unable, in view of the present housing difficulties, to find suitable

A accommodation elsewhere for the children and herself, though she might find accommodation for herself alone; and that it was for this reason that she had remained in the same house as the husband. The application was heard by KARMINSKI, J., on June 17, 1955, and adjourned for argument by the Queen's Proctor. The husband did not appear but supplied a statement to the Queen's Proctor in which he said that he did not oppose the application. B

K. B. Campbell for the wife.
J. P. Comyn for the Queen's Proctor.

KARMINSKI, J.: The decree nisi was granted on the ground of adultery. After it was pronounced the wife, her three children by the marriage and the C husband continued to live in the matrimonial home, which was a flat. The wife says in her affidavit that, since the decree nisi was pronounced, she has in fact acted as the husband's housekeeper, but no more, and there have been no sexual relations of any kind between them. The flat in which they live is owned by the husband.

D The wife says she fears that if the decree nisi is made absolute the husband will quite quickly, if not at once, turn her out; and that thereafter she would inevitably have some difficulty in obtaining suitable accommodation for herself and the children of the marriage. She desires, therefore, to be in a position where she, with the children, cannot be compelled to leave her present home, and she says that is why she has stayed on in this rather unusual position, acting as the E husband's housekeeper. The husband has not appeared, but has written a letter to the Queen's Proctor. He has taken up a wholly negative attitude and merely desires some sort of final decision to be taken. Apparently he spends a good deal of time away from home on business. He says that he is doing all that he can by paying all the expenses, and he emphasises that there never has been and never will be any suggestion of the wife being asked to leave the flat, F so far as he is concerned. He makes no opposition to this application.

There can be no doubt in law that if the decree is made absolute, the wife—who then will be the former wife—will have no right to continue to reside in the flat and will be, to that extent at least, at the mercy of the husband. When the case came before me I felt that it might be a matter of some difficulty. I G therefore asked that the Queen's Proctor should be represented to argue on any question of law. On a further examination of the law I think that the present case is not perhaps of such difficulty as it appeared to be. The wife says, quite frankly, "I do not much care whether I am divorced or not. What I really want is to be safeguarded so far as the occupancy of this flat (which is my home) is concerned." I ventured to suggest in argument that she could possibly have H sought relief from the justices under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, though counsel for the wife reminded me that that would not have been effective if she had continued to live in the same house. I do not think that there would have been any difficulty if originally she had applied for maintenance under s. 23 of the Matrimonial Causes Act, 1950 However, she asked for divorce and has, indeed, obtained a decree nisi of divorce I and now regrets her choice. There is no doubt that if she had originally petitioned for a decree of judicial separation on the ground of the husband's adultery she would have obtained such a decree. Indeed I can see no reason, on the facts so far as I know them, why the court could have refused a decree of judicial separation; but in fact she chose the other course and now seeks to have that altered for the reasons I have indicated.

Counsel for the Queen's Proctor made it clear that the Queen's Proctor, having made the usual inquiries, was satisfied with the grounds advanced for the petition for divorce, and he suggested that the real test in matters of this kind is really this: Is there any reason why the court should not, having regard to all the circumstances of the particular case, alter the decree granted to the wife in April, 1954 ? Counsel said that, in the view of the Queen's Proctor, there were no grounds in the present case on which the court could refuse. I think that the court has a discretion in an application of this kind to grant or refuse the application, though, of course, the discretion must be judicially exercised. My attention was called, originally by counsel for the wife and subsequently by counsel for the Queen's Proctor, to a decision of PEARCE, J., in *Jeffrey* v. *Jeffrey* (*No. 1*) (1) ([1950] 2 All E.R. 449). That was a case where a wife had obtained a decree of divorce and, as in the present case, made application subsequently for a decree of judicial separation in lieu of the decree nisi of divorce. At the same time, the husband made an application under what was then s. 183 (3) of the Supreme Court of Judicature (Consolidation) Act, 1925, a sub-section added by s. 9 of the Matrimonial Causes Act, 1937, that the decree nisi should be made absolute. PEARCE, J., had both applications before him, the one to rescind the decree nisi and to substitute a decree of judicial separation, and the other to make the decree nisi absolute. It was clear that PEARCE, J., regarded some of the reasons advanced by the wife in that case, especially those dealing with conscience, as lacking in substance, and he made it clear that the wife's underlying motive in making the application before him was that she was disappointed with the husband's financial state and thought it would pay her better to remain his wife, so that if she survived him she might have a chance of making a successful application under the Inheritance (Family Provision) Act, 1938, in the capacity or status of a widow.

In dealing with the principles of the matter, PEARCE, J., said ([1950] 2 All E.R. at p. 450):

> " It is obviously undesirable to allow a petitioner wife to use delay in applying for a decree nisi of divorce to be made absolute, or to accede to her application for an alteration in the form of decree, to enable her to put pressure on a respondent husband and to secure from him a financial advantage. There might be circumstances where justice is served by altering a decree nisi of dissolution to a decree of judicial separation. The judge has a complete discretion under the new sub-section. How that discretion should be exercised must depend entirely on the circumstances of the case."

I would add respectfully that I agree entirely with what PEARCE, J., said there. I have no doubt that the court has a complete discretion and that the manner in which that discretion should be exercised must depend in each case on its particular facts.

In the present case, I am satisfied that the wife has put her reasons fully and properly before the court. She says, in terms, " What I want is to secure the home for myself and the children." The present is not a case in which there is any suggestion (as there was in *Jeffrey* v. *Jeffrey* (1)) that the wife, by making such an application, was putting pressure of a financial kind on the husband. Any such suggestion is, happily, lacking in the present case. The husband in the present case, unlike the husband in *Jeffrey* v. *Jeffrey* (1), has made no cross-application for the decree to be made absolute. He appears to have adopted a wholly neutral attitude in this dispute.

In my view, the test suggested by counsel for the Queen's Proctor is right, and I ask myself this question: Is there really, after considering the facts, any reason why the court should not exercise its discretion in favour of the wife to

A alter the relief to be granted to her by this court in the way in which she requires it? Having considered the matter, with assistance from both counsel, I must answer the question in this way: I can find no grounds on which I, exercising the discretion judicially, can refuse the present application, and I therefore grant it. In the result, the decree nisi dated Apr. 30, 1954, will be rescinded, and the wife will be granted a decree of judicial separation.

B

Decree accordingly.

Solicitors: *G. E. C. Dougherty* (for the wife); *Queen's Proctor.*

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

C

D

CHANCERY DIVISION.

PRACTICE DIRECTION.

E

Infant—Guardianship of Infants Acts—Appeals from county courts or justices —Leave to appeal out of time—Guardianship of Infants Acts, 1886 *and* 1925—*R.S.C., Ord.* 55A, *r.* 6 (2).

In cases in which leave to appeal out of time is required the proposed appellant's F solicitors must apply to the clerk of ROXBURGH, J., for a date on which the judge will hear the application. Notice of motion for that date (no fee) must then be served on the proposed respondent, a copy being lodged at Room 136.

Unless the proposed respondent's solicitor accepts service of the notice of motion on behalf of his client, personal service on the proposed respondent must be effected.

G The motion will be heard in court and will be listed as a " motion by order ".

If leave is granted, the originating notice of motion will then be issued according to the Rules and the matter will proceed in the ordinary way.

This direction supersedes the note to Ord. 55A, r. 6 (2), in the ANNUAL PRACTICE.

By direction of ROXBURGH, J.

W. S. JONES,
Chief Registrar.

November 11, 1955.

CRAWFORD *v.* CRAWFORD.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Barnard, J.), November 3, 4, 1955.]

Divorce—Cruelty—Sexual offences by husband against third parties—Bullying and aggressive attitude towards wife—Mental cruelty—Different forms of mental ill-treatment taken together to found charge of persistent cruelty.

Justices—Husband and wife—Cruelty—Persistent cruelty—Sexual offences by husband against third parties—Bullying and aggressive attitude towards wife—Different forms of mental ill-treatment taken together to found charge of persistent cruelty.

In relation to cases of mental cruelty, the authorities lay down the following principles: (i) cruelty may be inferred from the whole facts and atmosphere disclosed by the evidence; (ii) actual intention on the part of the husband to injure the wife is an important but not an essential factor; (iii) it is impossible to create categories of acts or conduct which do or do not amount to cruelty; (iv) sexual offences directly relevant to the husband's conjugal obligations may constitute ill-treatment of the wife; (v) mental ill-treatment may be coupled with physical ill-treatment in order together to found a charge of persistent cruelty.

Since mental and physical ill-treatment can, though they are not ejusdem generis, be taken together, it must follow (vi) that different forms of mental ill-treatment may be taken together in order to found a charge of persistent cruelty.

The parties were married in 1947 and there was one child of the marriage. Throughout the marriage friction had developed to which the husband's bullying and aggressive attitude had contributed. On June 18, 1955, the wife discovered that a charge was pending against the husband that he had indecently exposed his person on June 8, and she thereupon left the matrimonial home. When charged with the offence the husband pleaded guilty and asked for six similar offences to be taken into consideration; he was placed on probation. Though the course of conduct relating to these offences had not been entered on by the husband with the object of injuring the wife's health he must have known, had he considered the matter, that it would be likely to injure her health when she came to know of it, by reason both of the shock of the disclosure and of the gossip which would arise. The wife's health did suffer in consequence. On a complaint by the wife of persistent cruelty by the husband the justices found the cruelty proved. On appeal by the husband,

Held: in taking into account the whole course of conduct, including both the bullying conduct of the husband and his acts of indecent exposure, the justices had not misdirected themselves in law; they had not failed to appreciate the nature and weight of the evidence, and accordingly an appellate court could not interfere with their finding.

Jamieson v. *Jamieson* ([1952] 1 All E.R. 875) and *Cooper* v. *Cooper* ([1954] 3 All E.R. 415) applied. *Lewis* v. *Lewis* (post, p. 598) distinguished.

Appeal dismissed.

[As to cruelty where no physical violence is alleged, see 12 HALSBURY'S LAWS (3rd Edn.) 270, para. 515 note (d); and for cases on the subject, see 27 DIGEST (Repl.) 303, 304, *2493-2506*.

As to sexual offences by the husband against third parties, see 12 HALSBURY'S LAWS (3rd Edn.) 276, para. 529 note (u); and for cases on the subject, see 27 DIGEST, 3rd Supp. *2537 a* and *b*.]

Cases referred to:

(1) *Cooper* v. *Cooper*, [1954] 3 All E.R. 415; [1955] P. 99; 119 J.P. 1; 3rd Digest Supp.

(2) *Jamieson* v. *Jamieson*, [1952] 1 All E.R. 875; [1952] A.C. 525; 1952 S.C. (H.L.) 44; 116 J.P. 226; 3rd Digest Supp.

(3) *Simpson* v. *Simpson*, [1951] 1 All E.R. 955; [1951] P. 320; 115 J.P. 286; 27 Digest (Repl.) 299, *2447*.

(4) *Boyd* v. *Boyd*, [1938] 4 All E.R. 181; 108 L.J.P. 25; 159 L.T. 522; 102 J.P. 525; 27 Digest (Repl.) 351, *2908*.

(5) *Ivens* v. *Ivens*, [1954] 3 All E.R. 446; [1955] P. 129; 3rd Digest Supp.

(6) *Lewis* v. *Lewis*, post, p. 598.

Appeal.

The husband appealed against an order of the Manchester justices, sitting at Strangeways, dated Aug. 24, 1955.

The parties were married in 1947 and there was one child of the marriage. On June 8, 1955, the husband indecently exposed his person. On June 18, the wife became aware that a charge was pending against the husband, although at that time he had not yet received a summons, and she left the matrimonial home. On July 8, 1955, the husband came before the justices on a charge of indecent exposure and pleaded guilty. The case was adjourned and on Aug. 19, the husband, having asked for six similar offences to be taken into consideration, was placed on probation. On Aug. 24, 1955, the wife's complaints that the husband had been guilty of persistent cruelty towards her and had wilfully neglected to provide reasonable maintenance for her were heard. The justices found that the course of conduct, viz., the offences of indecent exposure, though not entered on by the husband with the object of injuring his wife's health, was such as must have been known by him, had he considered the matter, to be likely to injure her health when she came to know of it, both by reason of the shock of the disclosure and of the gossip which would be sure to arise in the small community in which they both lived. The justices found that the wife's health suffered in consequence and also that a state of friction had existed throughout the marriage to which the husband's bullying and aggressive attitude had contributed. The justices then stated that the husband's failure to maintain the wife was wilful and unjustifiable. They adjudged the husband to have been persistently cruel to his wife and to have been guilty of wilful neglect to provide reasonable maintenance for her and her infant child and ordered him to make certain weekly payments towards her maintenance and the maintenance of the child. The husband appealed on the grounds that there was no evidence to support the findings of persistent cruelty or wilful neglect and that the justices were wrong in law in holding him to have been guilty of either charge.

M. R. Nicholas for the husband.
C. N. Lees for the wife.

LORD MERRIMAN, P.: It is said that the justices were wrong, in the circumstances of the present case, in finding cruelty at all, and certainly in finding persistent cruelty, and that we ought to set the order aside. Alternatively it is suggested that they have misdirected themselves and not fully appreciated the issues, and that the case ought to be remitted to a fresh panel of justices to be re-tried. The substance of the case made against the husband was twofold. First, it was said that an atmosphere of friction in the matrimonial home had been produced by the husband's bullying and nagging the wife. It was not suggested that that form of ill-treatment had involved any physical violence. If it was anything, it was what is described as mental cruelty. There was evidence corroborating the wife in that particular, though it is right to say that little or no detail was given beyond the fact that she said that he was very bullying and critical towards her, that he treated her as if he would like to make her inferior to him; never approved of anything; did not bother with the child; was always picking on the child, and so forth. If that evidence stood alone it would, perhaps, have been necessary to find out more about that type of conduct. It was, however, corroborated to some extent by the wife's aunt, who said that when she had seen them together he had an aggressive and bullying attitude towards the wife; and as the justices found that that was true it is impossible for us to say, on that aspect of the matter, that there was no evidence to support the finding. So much for that treatment in so far as it affected the wife's health.

The more serious allegation, and the one round which controversy has centred in the present case, is that on June 18, the wife became aware of a pending charge against the husband. The charge was of " wilfully openly and lewdly exposing his person with intent to insult a female." The date of that offence was June 8. Whether or not she knew anything more at that time is left in doubt, but it is common ground that he had wilfully openly and lewdly exposed his person with intent to insult one female or another on no less than seven occasions. However much of this the wife knew is, for the moment, immaterial, but on learning that a charge of that nature in connection with one or more females was pending, she left home. We are not trying a desertion case. We are trying a cruelty case, and the difference may be of importance in this respect, that it might, in a desertion case, be necessary to know precisely what the wife knew at the moment when she left home; but it is conceded that in the present charge of cruelty it is the whole course of conduct of the husband in this particular respect which we are entitled to take into account in its impact on the wife's mental health, and I repeat that we are concerned only with what, for short, is now called mental cruelty, and so called with the approval of the House of Lords.

In an admirable argument counsel for the husband cited the recent authorities on this matter, including the full review of the recent case law given by KARMINSKI, J., when he was sitting in this court with me in *Cooper* v. *Cooper* (1) ([1954] 3 All E.R. 415), and counsel's review was so full that I do not propose to repeat it. I content myself with extracting from the authorities one or two principles which I think are now established. In the appeal in the House of Lords in *Jamieson* v. *Jamieson* (2) ([1952] 1 All E.R. 875) emphasis was laid on the principle that cruelty might be inferred from the whole facts and atmosphere disclosed in the proof, and, without quoting the specific opinions in which this was stated, it was laid down by at least two of the noble Lords who decided that case (approving LORD KEITH who had dissented in the court below) that it is a wrong approach to put the various acts or conduct alleged into a series of separate compartments and say of each of them that by themselves they cannot pass the test of cruelty and, therefore, that the totality cannot pass that test. Another point which is plainly laid down in that case is that though actual intention to injure the wife in a case of mental cruelty must be important, and may be decisive in the particular case, it is not an essential factor. Finally, to quote from the opinion of LORD TUCKER ([1952] 1 All E.R. at p. 887):

> " It is . . . undesirable—if not impossible—by judicial pronouncement to create certain categories of acts or conduct as having or lacking the nature or quality which render them capable or incapable in all circumstances of amounting to cruelty in cases where no physical violence is averred."

I do not think that there is much doubt about the particular test which was being referred to, if obliquely, in that passage. In *Cooper* v. *Cooper* (1) it is laid down, borrowing a phrase which I am reported as using in *Simpson* v. *Simpson* (3) ([1951] 1 All E.R. at p. 962) that sexual offences "directly relevant to [the husband's] conjugal obligations" may be ill-treatment of the wife. I also derive from *Cooper* v. *Cooper* (1) the further principle that such ill-treatment may be coupled with physical ill-treatment, which manifestly is not ejusdem generis, for the one is mental ill-treatment and the other is physical ill-treatment, in order together to found a charge of persistent cruelty.

In passing I would make two observations. The first is that the principle that an offence against a third party may be ill-treatment of the wife goes back, as KARMINSKI, J., showed in his judgment ([1954] 3 All E.R. at p. 419), a long way. It is not a matter of recent decision, but a recent case, *Boyd* v. *Boyd* (4) ([1938] 4 All E.R. 181), which has been the subject of a certain amount of judicial controversy, was eventually decided on the ground of cruelty, and a petition which would have been dismissed on the ground of desertion was amended to a charge of cruelty, on which a decree was granted by BUCKNILL, J. The other thing which I wished to add was this, that although *Cooper* v. *Cooper* (1) was a decision only of this Divisional Court it was, in fact, approved within six days by the Court of Appeal, presided over by LORD GODDARD, C.J., in *Ivens* v. *Ivens* (5) ([1954] 3 All E.R. 446), where it was held that a criminal and indecent assault by a husband on a child might amount to cruelty to the child's mother although no intention to injure the mother was shown; that the husband must have known what the effect of his conduct would be on the wife and her state of health and yet, careless and indifferent to what the effect would be, he had continued with his indecent conduct; and that the facts proved constituted a strong case of cruelty and the wife was entitled to a decree. The dismissal of her petition by His Honour JUDGE GERWYN THOMAS, sitting as a special commissioner, was reversed.

I am not unmindful of the facts that the strength of the conduct in the several cases which have recently been reported differs, and that in another desertion case, *Lewis* v. *Lewis* (6) (post, p. 598), an isolated allegation of indecent assault by the husband on a woman at a cinema, which was unaccompanied by any other form of ill-treatment, did not justify the wife in leaving. Obvious as it may be that an assault of a criminal nature on a daughter or on a child of tender years in the family home, may almost speak for itself, in relation to the effect likely to be produced on the wife, it seems to me to be only a question of degree, and, therefore, a question for the court to decide, whether a series of offences of indecent exposure and the scandal resulting therefrom are likely to have a less unfavourable impact on the wife even than offences so gross as those I have referred to. I should have found it difficult to support a finding that the effect of the shock to the wife which this particular discovery had was due, to quote from the opinion of LORD NORMAND in *Jamieson* v. *Jamieson* (2) ([1952] 1 All E.R. at p. 877, letter H), "to abnormal hypersensitiveness." However, the justices have not found anything of the sort. On the contrary they have found that although this course of conduct was

> "not entered upon by the [husband] with the object of injuring his wife's health [it] was such as must have been known by him had he considered the matter to be likely to injure her health when she came to know of it, both by reason of the shock of the disclosure and of the gossip which would be sure to arise in the small community in which they both lived. It was found that the wife's health suffered in consequence."

The wife's evidence was that on learning this news on June 18 she lost the use of her legs and fainted with shock. The evidence of the aunt was that two days later the wife came round to her in a very distressed condition, that she was hysterical for two days, and that since she had returned home she had been very distressed and had lost weight. I emphasise the loss of weight, because one of the arguments of counsel for the husband was that we could attribute the loss of health only to this particular moment of discovery, and that there was nothing more; and that, as the husband did not, and was not likely to (for he was put on probation) repeat the offence, there was little likelihood of any apprehension of further injury. She did not lose all that weight on the day when she heard the news. That was one of the progressive effects of the shock, and if the matter stood alone, which it does not, I should be unable to agree with the proposition that such injury as was involved in her immediate reaction was all that we ought to take into account. There is the plainest evidence of injury to health. I do not think that that was originated, but no doubt it was gravely aggravated, by the initial news of this affair, and no doubt was increased when it turned out, as it probably did turn out when the whole truth came to light on Aug. 19, that on the first occasion she had not been told the whole story.

I do not think, on the evidence, that the injury to health originated only on this shocking discovery, and, indeed, in my opinion, the justices have found the opposite. After saying that her health suffered in consequence, they have also found

> "a state of friction existing throughout the marriage to which the husband's bullying and aggressive attitude had contributed."

As the wife left home on the day of the discovery it is obvious that the bullying and aggressive attitude preceded the shock to her mental health which she received on June 18. It was, therefore, a case of aggravation of a process which had already been begun by the husband's other conduct of a bullying and aggressive nature rather than of that conduct having contributed to an injury first received on June 18. I have already said that there is authority for what I should have thought was an obvious proposition, that one has to take account of the effect on her health of the whole conduct. There is authority for the fact that in considering the whole story one can take into account two matters which are of an essentially different character, namely, the injury to the mental health and the physical injury from violence, in order to show that the two combined amounted to persistent cruelty. If one can do that with regard to two different sorts of ill-treatment I am bound to say that I do not understand why one should not do it with regard to two different forms of mental ill-treatment, and take the whole story into account, and thus arrive at a conclusion of persistent cruelty.

I recognise that the present case is, to some extent, a border-line case, but it is in such border-line cases that unless the court below have misdirected themselves in some matter of law or some failure to appreciate the evidence, the principle that an appellate tribunal should not interfere with the decision of those who have heard and seen the witnesses most strongly prevails. For the reasons I have given, although I recognise that it is a very short and probably quite inadequate summary of the situation, I cannot see that the justices have misdirected themselves in any particular, or that they have failed to appreciate the nature and weight of the evidence. That being so, I do not think that we have any right to interfere with their decision.

BARNARD, J.: I agree entirely with what LORD MERRIMAN, P., has said. One fact is perfectly clear in the present case, that the husband's conduct caused injury to the wife's health. It by no means follows from that that the husband has been guilty of cruelty. LORD MERRIMAN, in his speech in *Jamieson* v. *Jamieson* (2), made it perfectly clear ([1952] 1 All E.R. at p. 881, letter D) that " *any* " conduct which brings about injury to health would not necessarily be cruelty, and LORD TUCKER said (ibid., at p. 887, letter H) that when one is dealing with conduct which is not physical violence it is impossible to say that any class of conduct must be cruelty or that it cannot be cruelty; and then he went on to give a very good guide, which I do not think I need repeat, in coming to a conclusion whether such conduct amounts to cruelty or not. In the present case I must admit that I have felt a grave difficulty. It certainly is, as LORD MERRIMAN, P., has said, a border-line case, and the question is: Is it on the side of *Cooper* v. *Cooper* (1), or is it on the side of *Lewis* v. *Lewis* (6) ? I fully realise that *Lewis* v. *Lewis* (6) was not a cruelty case. It was a desertion case. It was not unnaturally a desertion case, because the wife was relying on one isolated act of indecency committed by her husband, and there was not any suggestion that such act had injured her health, and that is no doubt the reason why she complained that her husband had deserted her not that he had been guilty of persistent cruelty towards her. The justices in the present case seem to me to have adopted the very proper attitude of looking at the facts as a whole. The facts as a whole do not consist solely of the husband's act of indecent exposure, which undoubtedly was the culminating act, and caused the wife to leave. They have fully taken into account all the previous conduct of the husband of a bullying and aggressive character towards the wife.

I agree with LORD MERRIMAN, P., that, in considering the reasons given by the justices, I fail to find that they have, in any respect, misdirected themselves. In those circumstances it would be wrong to interfere with their findings on those facts, and I agree that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Pattinson & Brewer*, agents for *F. Edwin Monks & Co.*, Manchester (for the husband); *John Pinto*, agent for *J. N. Brooks*, Manchester (for the wife).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

LEWIS *v.* LEWIS.

[Probate, Divorce and Admiralty Division (Barnard and Willmer, JJ.), May 19, 20, 1954.]

Divorce—Desertion—Constructive desertion—Husband convicted of indecent assault—Wife leaves matrimonial home—Isolated offence—Husband's desire for reconciliation with wife—Whether just cause for wife leaving.

The parties were married in 1942. In May, 1952, the husband indecently assaulted another woman in a cinema. The wife read in a newspaper the account of the preliminary hearing before the justices of the charge against the husband. She thereupon left the matrimonial home. At the trial in September, 1952, the husband pleaded guilty and he was granted an absolute discharge. In March, 1953, a summons was issued against the husband on the wife's complaint that he had deserted her. In evidence the wife said that from the moment she heard about the case against the husband she left the house and completely finished with him from that day. The husband said that he had written to the wife asking her to take him back but his letters were ignored, that he was sorry for what he had done and that he wished to return to cohabitation with the wife.

Held: the offence was committed by the husband without the consent of the woman assaulted, so that it could not prompt any reasonable suspicion of adultery; in the circumstances, the husband's one isolated offence did not afford the wife just cause for leaving and staying permanently away from him, and the uncompromising attitude which she had adopted and maintained was not the natural consequence of his behaviour so as to justify the conclusion that he must presumptively have intended to drive her out; accordingly, her complaint would be dismissed.

Boyd v. *Boyd* ([1938] 4 All E.R. 181) criticised (see p. 601, post); *Haswell* v. *Haswell & Sanderson* (1859) (29 L.J.P. & M. 21) distinguished (see p. 603, post).

Appeal allowed.

[**Editorial Note.** This case was discussed and distinguished in *Crawford* v. *Crawford* (see pp. 595, letter F, 597, letter B, ante).

As to conduct by one spouse with third party constituting constructive desertion, see 12 Halsbury's Laws (3rd Edn.) 251, para. 465 note (f); and for a case on the subject, see 27 Digest (Repl.) 350, *2899*.

As to sexual offences by the husband against third parties, see 12 Halsbury's Laws (3rd Edn.) 276, para. 529 note (u); and for cases on the subject, see 27 Digest, 3rd Supp. *2537 a* and *b*.]

Cases referred to:

(1) *Simpson* v. *Simpson*, [1951] 1 All E.R. 955; [1951] P. 320; 115 J.P. 286; 27 Digest (Repl.) 299, *2447*.

(2) *Buchler* v. *Buchler*, [1947] 1 All E.R. 319; [1947] P. 25; [1947] L.J.R. 820; 176 L.T. 341; 111 J.P. 179; 27 Digest (Repl.) 350, *2899*.

(3) *Boyd* v. *Boyd*, [1938] 4 All E.R. 181; 108 L.J.P. 25; 159 L.T. 522; 102 J.P. 525; 27 Digest (Repl.) 351, *2908*.

(4) *Edwards* v. *Edwards*, [1948] 1 All E.R. 157; [1948] P. 268; [1948] L.J.R. 670; 112 J.P. 109; 27 Digest (Repl.) 351, *2911*.

(5) *Holborn* v. *Holborn*, [1947] 1 All E.R. 32; 176 L.T. 57; 111 J.P. 36; 27 Digest (Repl.) 703, *6719*.

(6) *Haswell* v. *Haswell & Sanderson*, (1859), 1 Sw. & Tr. 502; 29 L.J.P. & M. 21; 1 L.T. 69; 23 J.P. 825; 164 E.R. 832; 27 Digest (Repl.) 444, *3759*.

(7) *Glenister* v. *Glenister*, [1945] 1 All E.R. 513; [1945] P. 30; 114 L.J.P. 69; 172 L.T. 250; 109 J.P. 194; 27 Digest (Repl.) 367, *3040*.

Appeal.

The husband appealed against an order of the Port Talbot justices dated Jan. 20, 1954.

The facts appear in the judgment of WILLMER, J.

R. E. G. Howe for the husband.
H. T. Buckee for the wife.

BARNARD, J.: WILLMER, J., will give the first judgment.

WILLMER, J.: The parties were married on Aug. 1, 1942, and the matrimonial home was at the home of the husband's mother. The parties cohabited at that address until a date in May, 1952, or thereabouts, when the wife left the husband in circumstances which I will describe in a moment. During those ten years of cohabitation there were some disputes between the parties, and some unpleasantness, largely due to the wife's complaint against the husband that he would not work, but all that was dismissed by the justices as amounting to no more than the ordinary wear and tear of married life, and I need say no more about that aspect of the case. The sole reason given by the wife, who now claims that the husband is in desertion, for leaving him was that he was charged with the offence of indecently assaulting another woman. The assault is alleged to have taken place in a picture theatre. Our information as to the assault is in the main derived from the husband's own evidence given before the justices, but it does not seem to have been of a particularly serious nature. He was charged with, and admitted, making indecent advances towards the woman who was sitting next to him in the picture theatre. The wife first learned of the charge against her husband when she read in the local newspaper the account of the proceedings before the committing justices, when he was committed for trial. Without waiting for the trial to take place, the wife forthwith packed up and left the husband. It appears that the husband suffered from a nervous breakdown at about that time, and he appears to have been in a mental hospital for some months, but whether or not for that reason I do not know. The trial of the husband did not take place until September, 1952; he then pleaded guilty to the offence charged, and we were informed that he was granted an absolute discharge. The husband, in his evidence before the justices, said that on a number of occasions he approached his wife to take him back. In particular, he said that while he was in the mental hospital he wrote her two letters asking her to take him back, but these were ignored by the wife.

The summons in the present proceedings was issued on Mar. 24, 1953. For some reason which I do not know there appears to have been a number of adjournments, and the hearing did not take place until Jan. 6, 1954, when both the wife and the husband gave evidence before the justices. The justices adjourned consideration of the matter and did not give their decision until Jan. 20, 1954. The husband in his evidence before the justices again said that he was sorry for what he had done, and that the one thing which he wanted to do was to patch up the quarrel and return to cohabitation with the wife. The wife's case, on the other hand, may be summed up, I think, in one sentence from the notes of her cross-examination. She said:

> "From the moment I heard about the case against my husband I left the house to go on my own, and I completely finished with him that day."

The sole question raised by the present appeal is whether, on those facts, the justices were justified in finding the husband guilty of desertion, which means finding him guilty of constructive desertion, since it was the wife who left the home.

It is clear that the justices took a great deal of care in considering the case, and the reasons which they give for the conclusion at which they arrived are a model of clarity, and reflect the great pains which they took. It appears that their attention was called to the judgment of this court in *Simpson* v. *Simpson* (1), in which Lord Merriman, P., quoted ([1951] 1 All E.R. at p. 960) a considerable extract from the well-known judgment of Asquith, L.J., in *Buchler* v. *Buchler* (2) ([1947] 1 All E.R. at p. 326). All that was clearly very much in the minds of the justices. I will read a passage from the reasons given by the justices so as to make it clear how they arrived at their conclusion. They say:

> " The husband committed the indictable offence of indecent assault which we considered to be conduct and behaviour of a more vexatious character than the wife might reasonably be expected to endure in the normal course of married life . . . We further considered that how a wife might behave towards her husband in similar circumstances would vary according to the facts of each particular case and according to the view the wife concerned took of the offence committed, and that whereas one wife might stand by her husband, another wife—and in this particular instance this wife—could not be said to be unreasonable because she did not take that view, and, therefore, we considered, could not be blamed for leaving him. Although the husband might not have intended that the offence committed should have been committed with the intention of causing his wife to leave him, he must surely have realised, or acted so recklessly as not to care, that his conduct might have serious consequences so far as his wife was concerned."

Those paragraphs seem to be the reasons on which the conclusion of the justices was based.

The first ground of attack on behalf of the husband before us on that decision of the justices was that assuming, without admitting, that the wife had just cause for leaving her husband, it would not in the least follow that the husband was guilty of driving her out so as to be held to be constructively the deserter. In my judgment, on the particular facts of the present case, there is no room for that distinction to be drawn, and I say that for this reason—if the wife were to be held to have had just cause for leaving the husband, it could only be on the basis that that was the natural consequence of the husband's behaviour. To put it the other way round, if her leaving was not the natural consequence of the husband's behaviour, how could it possibly, on any view, be justified? If it was the natural consequence of the husband's behaviour, then clearly it was open to the justices to say that the husband must in the circumstances be presumed to have intended the natural consequence of his conduct. If, therefore, the justices were right in the view which they took, that in the circumstances the wife had just cause for leaving, it would be difficult for this court to say that there was no evidence on which they could find the husband guilty of driving her out. To my mind the crux of the present case is whether the justices were, in all the circumstances, justified in concluding that the wife did have just cause for leaving the husband and remaining away from him merely on the ground that he was charged with this one isolated offence. I stress that it was a single isolated offence. There is no evidence at all that throughout the ten years of cohabitation the husband had been guilty of any similar conduct before.

In the course of the discussion before us, reference was made to *Boyd* v. *Boyd* (3) ([1938] 4 All E.R. 181), a case which, as is well known, has provoked a good deal of controversy. I have no wish to contribute anything to that controversy, but it is necessary for me to refer to what was decided in that case, and to what has been the subject of the criticism. The statement of principle by Bucknill, J. ([1938] 4 All E.R. at p. 182) that

> ". . . . before there can be a case of constructive desertion, the court must be satisfied that the conduct of the husband was such as to show a clear intention on his part to drive the wife away "

has several times been expressly approved by the Court of Appeal, notably by LORD GREENE, M.R., in *Buchler* v. *Buchler* (2) ([1947] 1 All E.R. at p. 320). The actual decision of the case has since been disapproved on more than one occasion by this court, notably in *Edwards* v. *Edwards* (4) ([1948] 1 All E.R. 157) a case which itself more than once has been expressly approved.* In *Boyd* v. *Boyd* (3) the material facts were that early in the married life the husband had been convicted and sentenced to five years' penal servitude for incestuous adultery. The wife forgave him and took him back, and they lived together again for a period. Later, the husband was again convicted, this time for an indecent assault on a girl of under thirteen years of age. For that offence he was sentenced to imprisonment for twenty months. This second conviction caused a grievous shock to the wife, and on this occasion she left him for good. On those facts BUCKNILL, J., declined to find the offence of desertion proved against the husband, because he could find no evidence of any intention on his part to drive the wife out. He did, however, give leave to amend the petition so as to enable the wife to allege cruelty, and at a subsequent hearing he did on that ground grant the wife a decree. The criticism of BUCKNILL, J.'s decision which has more than once been made by this court is that he does not appear to have applied his mind to the maxim that in the circumstances the husband could be presumed to have intended the natural consequences of his acts. It has been said that had the learned judge applied his mind to that question he could hardly have failed to come to the conclusion that the husband must be presumed to have had the necessary intent. As LORD MERRIMAN, P., said in *Edwards* v. *Edwards* (4) ([1948] 1 All E.R. at p. 159):

> " Here it is found that the husband's conduct did cause injury to the wife's health, and I cannot understand how any man who has been taken back after one such incident by a sensitive and decent woman could contemplate anything else than that a repetition of his conduct would have the same result."

If it were open to us, having regard to the decision in *Edwards* v. *Edwards* (4) to proceed on the basis that *Boyd* v. *Boyd* (3) was rightly decided on its facts it would clearly cover the facts of the present case, which are not nearly so strong against the husband as were the facts in *Boyd* v. *Boyd* (3). Accepting as I do that on its facts *Boyd* v. *Boyd* (3) was wrongly decided, nevertheless it remains true to say that that case was by no means on all fours with the present case. There the question was as to the inference to be drawn from the commission of an act, itself a good deal more serious than the act committed by the husband in the present case, but an act which followed on a previous even more serious offence. In the present case, on the contrary, we are dealing with a single isolated act, and one of nothing like so serious import as those dealt with in *Boyd* v. *Boyd* (3), and I desire to emphasise that in the present case the stand taken by the wife, as is shown by the sentence which I have already quoted from the note of her evidence, is that that justified her in saying once and for all that she had finished with the husband.

The legislature has enacted† that certain sexual offences—rape, sodomy, bestiality—shall of themselves be grounds for seeking a decree of divorce. It has not enacted that the commission of an indecent assult on a third person shall be a ground for divorce. It seems to me that if we are to hold that the commission of such an offence as in the present case is to provide a wife with just cause for withdrawing from cohabitation and staying permanently away from her husband, and, furthermore, is to provide grounds whereby she can allege constructive desertion against him, we shall, in effect, be laying down a new ground for the relief of divorce which was not provided by the legislature. I say that, because what puzzles me is to see how, in practice, a husband who has committed an offence of this nature is to terminate his desertion, if desertion it be. When I asked that question in the course of the argument I was referred to the concluding part of the judgment of LORD MERRIMAN, P., in *Edwards* v. *Edwards* (4), to which I have already referred, and also to *Holborn* v. *Holborn* (5) ([1947] 1 All E.R. 32). Those are cases in which the learned President pointed out that desertion is a continuing offence which may be brought to an end, and that the offending husband in those cases might make amends in such a way that the wife would be no longer justified in sustaining her refusal to resume cohabitation. One must, however, read what was said by the learned President in those cases in relation to the facts of those cases. They were both cases where what was relied on by the wife in support of her allegation of constructive desertion was a course of conduct directed against her by the husband and extending over a prolonged period of time. I can understand that when one is dealing with that sort of case opportunity should clearly be given to the husband to satisfy the wife that he has abandoned the course of conduct which gave her her ground for complaint, and if that state of affairs comes about then the wife would no longer have justification for continuing to absent herself from the husband.

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* See *Simpson* v. *Simpson*, [1951] 1 All E.R. 955; *Lang* v. *Lang*, [1954] 3 All E.R. 571.

† See the Matrimonial Causes Act, 1950, s. 1 (1): 29 HALSBURY'S STATUTES (2nd Edn.) 390.

In the present case we are not dealing with anything in the nature of a course of conduct. We are dealing with a single isolated act, and an act committed as long ago as May, 1952, that is to say an act now two years old. It is, I think, not unimportant to remark that the justices did not deal with the case until January, 1954, by which time, of course, the husband had stood his trial for the criminal offence of which he was guilty. In the meantime he had approached the wife for a reconciliation; he had written her the letters to which I have referred and which were ignored; he had, in his evidence before the justices, expressed his contrition to the court and stated his desire that the quarrel with his wife should be patched up. If this was not enough, in January, 1954, to bring to an end his desertion, if desertion it were, one asks oneself the question: What more could the husband do? How is he to be any better off in 1955, or 1956, and what is his answer to be if at the end of three years' separation the wife puts on the file a petition for divorce on the ground of desertion, relying, of course, as part of her case on this decision of the justices, the subject of the present appeal? Another point which seems to me to be of some substance was brought to our attention by counsel for the husband. It was pointed out that in the present case the offence of which the husband was guilty was an assault, that is to say an act done against the will of the woman on whom it was committed. In those circumstances it was not an act which could possibly prompt any reasonable suspicion of adultery, such as might have arisen if the act of the husband had been committed on a woman who consented to his advances. Had the case been one where the wife could say that she had reasonable grounds for suspecting her husband to be guilty of adultery, if that were established it would have given cause for absenting herself from cohabitation; but it also is established that that good cause would be removed by a judgment of the court deciding that as a fact adultery had not been proved. In such circumstances the wife's ground for continuing to absent herself from her husband would be removed, and if she did not return to him it would be she who was the deserter. No such question can possibly arise in the present case, and one asks oneself the question: Can it be right that a husband whose conduct is directed against an unwilling woman, in circumstances from which the inference of adultery could not possibly be drawn, should be in a worse position than a husband whose conduct might prompt a reasonable suspicion of adultery? It seems to me that that is a point of some substance.

In the result the conclusion at which I have arrived is that notwithstanding the great care which the justices clearly took in their consideration of the present case they came to a wrong conclusion in deciding on the facts that the wife was justified in maintaining her uncompromising attitude, an attitude to which I have already drawn attention by quoting the words which she herself used in giving her evidence, and an attitude which she clearly adopted from the moment when she first heard of her husband's behaviour and which she has maintained ever since. I find myself unable to accept the proposition that this attitude on the part of the wife was a natural consequence of the husband's behaviour so as to justify the conclusion that he must presumptively have intended to drive her out. In those circumstances it seems to me that the finding of desertion cannot stand, and the order made by the justices ought to be set aside.

BARNARD, J.: I entirely agree with what WILLMER, J., has said. Counsel for the wife relied strongly on *Haswell* v. *Haswell & Sanderson* (6) (1859) (1 Sw. & Tr. 502). It is none the worse for being an old case. It was tried only two years after the first Matrimonial Causes Act was passed (in 1857), and we are now in 1954. The facts of that case were shortly these: The marriage was a secret marriage between two very young people. There was never any matrimonial home, and the husband was in the habit of visiting his wife from time to time at her mother's house, and when he paid one of these visits he found his wife behaving indecently with another man. The other man was named, and he was known to the husband, and subsequently the wife committed adultery, not with that man but with the co-respondent in the case. There was no doubt about the adultery, and the only question that troubled the court was whether or not there was a discretionary bar to the decree. The court was asked by counsel appearing for the husband to consider s. 31 of the Act of 1857*, which provided that the court was not bound to pronounce a decree if the petitioner had deserted or wilfully separated himself or herself from the other spouse without reasonable excuse. That case was tried in 1859, and certainly public opinion does not regard conduct of that nature so strictly today as it did one hundred years ago. Public opinion then would certainly have regarded acts of indecency on the part of a wife with more stringency than those on the part of a husband. I think that it would be right to say that the law, where it is considering conduct, does try, so far as it can, to keep up with public opinion. The Judge Ordinary, SIR CRESSWELL CRESSWELL, in giving the judgment of the full court, concluded his judgment by saying (1 Sw. & Tr. at p. 505):

> "It is not necessary for the court to say that this would have justified him in turning her out of his house; that it would have enabled him to resist an action of debt for necessaries supplied her; or would have been a sufficient answer in a suit for restitution of conjugal rights. But the question is, whether we are in a position to exercise a discretionary power. The adultery has been fully proved, and we cannot say that the petitioner

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* See now s. 4 of the Matrimonial Causes Act, 1950: 29 HALSBURY'S STATUTES (2nd Edn.) 394.

> comes within the description of a person 'wilfully separating himself without reasonable excuse'."

In that case the two parties, the wife and the man, were both consenting parties, and it might well be that the husband in that case could have justified his conduct in having no more to do with his wife within the law as laid down in *Glenister* v. *Glenister* (7) ([1945] 1 All E.R. 513).

In the present case the woman with whom the husband was found guilty of committing an indecent assault was not a consenting party, and there could never be any suggestion that the wife had any reasonable ground for supposing that the husband had committed adultery. It seems to me that that really is the fundamental difference between *Haswell* v. *Haswell & Sanderson* (6) and the present case. We are not, of course, deciding whether the wife, in leaving the house as she did, had deserted her husband. That is not a question for us to decide at all. For these reasons I think that *Haswell* v. *Haswell & Sanderson* (6), which was so strongly relied on by counsel for the wife, is not really applicable to the case we have been considering, and I agree with WILLMER, J., that the appeal must succeed and that the order made by the justices must be set aside.

Appeal allowed.

Solicitors: *Chamberlain & Co.*, agents for *R. S. Bowen & Hopkin W. Evans*, Port Talbot (for the husband); *Silkin & Silkin*, agents for *K. S. Wehrle, Son & Maurice Sheehan*, Port Talbot (for the wife).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

R. *v.* ASHFORD (KENT) JUSTICES, *Ex parte* RICHLEY.

[COURT OF APPEAL (Singleton, Jenkins and Parker, L.JJ.), November 2, 3, 1955.]

Certiorari—Perjury—Witnesses' perjury—Whether a ground for granting certiorari to quash proceedings—Witness not in collusion with party—Facts in dispute.

In December, 1953, the mother of a child obtained an affiliation order against the putative father, the present applicant. At the hearing before the magistrates she and other witnesses gave evidence, and the present applicant gave evidence denying paternity and called one R. as a witness with a view to his testifying that he had had sexual intercourse with the mother at about the date of the conception of the child. R. gave evidence to the effect that he had not had intercourse with her. The present applicant having appealed, the Appeal Committee heard evidence, including that of R. who, after answering certain questions, declined to give further evidence and did not testify whether he had had sexual intercourse with the mother. The appeal was dismissed. Subsequently R. was charged with perjury in respect of his evidence at the original hearing that he had not had intercourse with the mother. At his trial she gave evidence that she had not had intercourse with him, but he was convicted and sentenced. The applicant applied for certiorari to quash the affiliation order on the ground that R. had committed perjury and that his conviction therefor showed that the mother's evidence at his trial to the effect that she had not had intercourse with him was untrue, and that accordingly the affiliation order should not stand. There was no evidence that R. and the mother acted in collusion in the affiliation proceedings. No criminal proceedings for perjury had been taken against the mother.

Held: an order for certiorari should not be granted (i) merely because a witness had committed perjury, particularly when the witness was not shown to be in collusion with the party who had invoked the jurisdiction in the proceedings (*R.* v. *Gillyard* (1848) (12 Q.B. 527) considered and distinguished) or (ii) when granting the order would involve the court in weighing one set of alleged facts against another (*R.* v. *Leicester Recorder* ([1947] 1 All E.R. 928) considered); and accordingly the order would not be granted in the present case, particularly in view of the determination of the Appeal Committee.

Appeal dismissed.

[**Editorial Note.** One factor which may greatly influence the court when application is made to it to quash proceedings on the ground that the order made was procured by fraud or perjury is whether the facts relating to the fraud or perjury have been made the subject of criminal proceedings. If the perjury has not been confessed, or has not been proved in criminal proceedings, it seems that an order of certiorari to quash should seldom, if ever, be made (see p. 610, letter B, post). Moreover if, as in the present case, the perjury alleged is that of a witness, not of a party, it seems that to grant certiorari to quash the order made would amount to extending the court's jurisdiction, unless it were shown that the perjured evidence was given in collusion with one of the parties, and that there is no reason for making such an extension of jurisdiction (see p. 610, letter H, post).

As to the granting of an order of certiorari where there has been fraud or perjury, see 11 HALSBURY'S LAWS (3rd Edn.) 70, para. 125; and for cases on the subject, see 16 DIGEST 443, *3087-3089.*]

Cases referred to:

(1) *R.* v. *Leicester Recorder,* [1947] 1 All E.R. 928; [1947] K.B. 726; [1947] L.J.R. 1045; 111 J.P. 355; 2nd Digest Supp.

(2) *R.* v. *Recorder of Burnley, Ex p. Mousdale.* (Unreported, referred to in 98 J.P. Jo. 315, 316).

(3) *R.* v. *Gillyard,* (1848), 12 Q.B. 527; 17 L.J.M.C. 153; 11 L.T.O.S. 240; 12 J.P. 456; 116 E.R. 965; 16 Digest 443, *3088.*

(4) *Colonial Bank of Australasia* v. *Willan,* (1874), L.R. 5 P.C. 417; 43 L.J.P.C. 39; 30 L.T. 237; 16 Digest 440, *3060.*

Appeal.

The applicant appealed from an order of the Divisional Court dated Apr. 27, 1955*, whereby they refused his application for an order of certiorari to quash an order made by the Ashford, Kent, justices adjudging him to be the father of the respondent's child.

The facts appear in the judgment of SINGLETON, L.J.

Frank Whitworth for the applicant.

J. H. Gower for the respondent.

SINGLETON, L.J.: On Apr. 27, 1955, there was before the Divisional Court a motion on behalf of Mr. Richley for an order of certiorari to quash an order made by the Ashford, Kent, justices, whereby he was adjudged the father of an illegitimate child of one Pansy Patricia Mann, the respondent. The Divisional Court refused the application, and from that order the applicant appeals to this court.

On Oct. 6, 1953, a child was born to the respondent. It was said that it was a late delivery, and the probable time of conception was about the end of December, 1952. The respondent took proceedings before the justices at Ashford, and on Dec. 29, 1953, the justices adjudged the applicant to be the father of her child; and he was ordered to pay certain sums by way of maintenance for the child.

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* See [1955] 2 All E.R. 327 where the case is reported only on a practice point which is not the subject of this appeal.

On Mar. 1, 1954, he appealed against that order to the Appeal Committee who dismissed the appeal. In October, 1954, the applicant laid an information against one Ricket, who had given evidence before the justices, having been called as a witness by the applicant's counsel. On Nov. 18, 1954, Ricket was committed for trial at the Kent Assizes at Maidstone. The trial took place on Dec. 2 and 3, 1954; he was convicted of perjury and sentenced to eighteen months' imprisonment.

When the hearing of the affiliation summons took place before the magistrates in December, 1953, evidence was given by the respondent, and witnesses were called on her behalf. Both her father and her mother gave evidence as to frequent visits by the applicant to the house at which the respondent was living, and there were documents—a letter and a postcard—written by the applicant which provided support for her case. Undoubtedly there was a case on which the magistrates might make an order, and there was sufficient corroboration for the purposes of the statute. The applicant himself gave evidence, denying the evidence of the respondent. Ricket was called on his behalf and it is clear that he was expected to say that he had had sexual intercourse with the respondent about the date of conception. His evidence was not to that effect, however, but merely that he had driven the respondent in a taxicab occasionally, that on one occasion he had had coffee and biscuits with her, and that that was the extent of his association with her. When the case came before the Appeal Committee, Ricket was again called on behalf of the applicant, and, having answered one or two questions of no materiality, declined to answer further questions. His evidence was of no use whatever to the Appeal Committee, who upheld the order of the magistrates.

The trial of Ricket for perjury developed in a somewhat extraordinary way. The applicant gave evidence; several witnesses were called as to conversations with Ricket, evidence of a kind which clearly would not have been admissible against the respondent; and a police officer gave evidence to the effect that Ricket had admitted to him that he had had sexual intercourse with the respondent. There was a substantial case in support of the allegation that Ricket had committed perjury on the hearing before the magistrates at Ashford. At the conclusion of the prosecution's case, Ricket did not give evidence, but his counsel called the respondent, who gave evidence in support of Ricket's defence, denying that she had had sexual intercourse with him at any time.

The issues before the jury were whether or not it was proved that Ricket had committed perjury when he gave evidence before the Ashford justices. The jury convicted Ricket, and it is not surprising that they did so, for he must have said to someone before he was called as a witness at Ashford that he had had sexual intercourse with the respondent; otherwise he would not have been called. When he was called he said he had not had sexual intercourse with her; when he was seen by the police inspector, he said that he had, and when he was on trial on a charge of perjury, he did not give evidence.

On that conviction and on what took place at the trial, counsel on behalf of the applicant bases his motion for an order of certiorari. He submitted that the evidence proved by the conviction for perjury to have been false and which was given by Ricket showed that the order in favour of the respondent at Ashford was obtained by fraud; further, that as the respondent's evidence before the magistrates and before the judge at Maidstone was to the same effect, this court should say that her evidence was proved to be untrue, and that she herself had been guilty of perjury. Thus he submitted that the order of the magistrates should be quashed, because she must have been a party to the fraud as she herself had given false evidence.

The first question to be considered is: Is it proved that her evidence was false? She has not been convicted of perjury and I am far from satisfied that if she had been prosecuted, she would have been so convicted. Furthermore, I am not

A satisfied that if she were prosecuted now, she would be convicted of perjury. Much of the evidence given at the trial of Ricket was evidence against him but would not be admissible against her. The fact that he had been convicted would not be admissible to prove her guilt. The evidence to secure her conviction would have to be evidence admissible against her, sufficient to prove that she had committed perjury. I am not sure that it can be said with any certainty B that it follows either that she committed perjury, or that, if she were tried, she would be so convicted. In those circumstances, it seems to me that this appeal is misconceived; but there are other questions to be considered. I do not know of any case in which an order made at the behest of one party has been quashed by reason of perjury committed by a witness called for the other party, who now seeks to have the order quashed. It would be going a long way if such C a course was taken. Over and above that, although counsel seeks only to quash the order of the magistrates, it must be borne in mind that the case was considered by the Appeal Committee, who dismissed the appeal without any material evidence from Ricket. In the Divisional Court, LORD GODDARD, C.J., said:

> D "We are really, in effect, being asked to say that we disbelieve Miss Mann's evidence before the justices and, therefore, we are going to quash this order. We cannot possibly say that. The conviction of this man Ricket is no evidence against her. If she is prosecuted for perjury now, she could not be convicted merely by showing that Ricket had been convicted of perjury. It would have to be proved to the satisfaction of the jury that she had committed perjury, and I do not know whether a jury would have been satisfied or not."

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The cases to which we have been referred show that an order of this nature has been quashed in certain circumstances, and no one doubts that it can be done. In *R.* v. *Leicester Recorder* (1) ([1947] 1 All E.R. 928), the respondent in affiliation proceedings, against whom an order had been made by justices, appealed to quarter sessions. The appeal was heard by the recorder, who accepted the F evidence of the respondent in regard to material facts and allowed the appeal. The respondent was subsequently, on his own confession, convicted of perjury in respect of the evidence given by him on his appeal. On an application for an order of certiorari to quash the order of the recorder allowing the appeal, on the ground that it had been obtained by fraud, it was held that certiorari would lie, and the order of the Appeal Committee in that case was quashed. Thus the G order in favour of the girl stood. There was no dispute as to the facts in that case. The respondent himself had committed perjury. He was fraudulent and he had succeeded on appeal by giving false evidence. In another case of the like kind, *R.* v. *Recorder of Burnley, Ex p. Mousdale* (2), which is referred to in an article in the JUSTICE OF THE PEACE AND LOCAL GOVERNMENT REVIEW, Vol. 98, pp. 315 and 316, the facts were somewhat similar.

H In the present case I am uncertain whether, if the respondent were prosecuted, a jury would be satisfied that she had committed perjury on her application to the Ashford justices. In the circumstances, we are asked to determine a question of fact which is in dispute. On the one side, the respondent obtained a justices' order in her favour, and that order was upheld by the Appeal Committee. On the other side, the applicant has denied throughout that he is the father of her I child, and has secured the conviction of one of his own witnesses for perjury committed on the hearing before the Ashford justices. There is this dispute whether or not she had had sexual intercourse with Ricket; this court is asked to determine it, but it is no part of this court's duty so to do.

In *R.* v. *Gillyard* (3) (1848) (12 Q.B. 527), the first judgment of the court was given by LORD DENMAN, C.J., who held that the court had jurisdiction. COLERIDGE, J., who was of the same opinion, said (12 Q.B. at p. 530):

> "This is a rule for quashing a conviction: and we make the rule absolute

> on the ground that this conviction has been a fraud and mockery, the result of conspiracy and subornation of perjury. When the court observes such dishonest practices, it will interfere, although judgment has been given. The case involves the jurisdiction of this court as a court of control over all inferior courts. It is said that conspiracy is charged, and that the party charged ought not to be expected to answer upon affidavit. I think no honest man ought to think it beneath him, or a hardship upon him, to answer upon affidavit a charge of dishonesty made upon affidavit against him. If a man, when such a serious accusation is preferred against him, will not deny it, he must not complain if the case is taken pro confesso."

The court in that case, however, was not faced with the determination of a question of fact and there was no dispute on the evidence before it. There was, according to the judgment of COLERIDGE, J., a conviction which had been obtained by fraud and mockery, the result of conspiracy and subornation of perjury. Nothing of that kind has been alleged in this court. It has not been submitted that there was a conspiracy between Ricket and the respondent, or that there was subornation of perjury. There is a great difference between that case and this case.

We have not been referred to any case in which the Divisional Court has decided a question of fact so as to grant an order of certiorari when the facts are in dispute. In *Colonial Bank of Australasia* v. *Willan* (4) (1874) (L.R. 5 P.C. 417) before the Privy Council, these words were used by SIR JAMES COLVILE, and they apply to this case (L.R. 5 P.C. at p. 450):

> "The Court of Queen's Bench, whose exercise of this jurisdiction is discretionary, would certainly not quash an order of an inferior court upon the ground of fraud in the procuring of it, unless the fraud were clear and manifest."

In view of the dispute on the facts of this case, I fail to see that there is a fraud which is clear and manifest. The very fact that the person who has been convicted of perjury was a witness for the applicant himself makes the position quite unusual.

The remedy by way of certiorari is a valuable remedy. No court has a right to extend it. It should seldom be invoked in a case such as this where there is a real dispute as to the facts. This is not an appeal from the decision of the Ashford justices; and it is not possible to order a re-hearing. It was open to the applicant to launch proceedings for perjury against the respondent. I said to counsel this morning: "That might have been done", and he used these words: "Yes, if I could establish it". I believe that to be the answer to this case. This court ought not to grant an order of certiorari merely because a witness—particularly a witness called for the side seeking the order—has committed perjury. The fact that Ricket was convicted does not establish guilt on the part of the respondent; and unless she committed perjury or was in some way a party to fraud, the application for an order of certiorari ought not to succeed. For those reasons, I am of opinion that this appeal should be dismissed.

JENKINS, L.J.: I agree. The applicant claimed that the affiliation order made against him on Dec. 29, 1953, was procured by fraud in the shape of the perjured evidence of the respondent and of the applicant's own witness, Ricket, and that, consequently, the order of certiorari should issue in accordance with the principles stated in *R.* v. *Leicester Recorder* (1).

The argument in support of the appeal is, in effect, put in two ways. First, it is said that the giving of evidence by Ricket before the magistrates to the effect that he had never had sexual intercourse with the respondent, once it was held to have been untrue by his conviction for perjury, in itself vitiated the proceedings before the magistrates, and amounted to a procuring of the affiliation order by perjury. The second branch of the argument is that, in the light of subsequent events in the shape of the conviction of Ricket for perjury by a jury which had heard the evidence of the respondent in Ricket's defence, the evidence given by the respondent before the magistrates was demonstrably false so far as it denied intercourse between herself and Ricket, and that she procured the affiliation order by means of this false evidence. I find myself unable to accept either branch of the argument. First, as to the direct effect of Ricket's evidence before the magistrates, I find it impossible to hold that this amounted to a procuring of the affiliation order by the respondent by means of perjured evidence. The witness was the applicant's witness and not the respondent's witness. She had no control over the evidence that the applicant might or might not wish to call. For the purpose of testing this branch of the argument, one must assume that she herself was an honest witness. It seems to me impossible to hold that, where a claimant gives honest evidence in support of his or her claim and the claim is held to be established by the court, it should be possible for the defendant to contend that the proceedings are invalidated by some untrue evidence tending to support the claimant's case, put forward by the defendant himself. Secondly, I cannot be satisfied that if Ricket had given evidence before the magistrates to the effect that he had had sexual intercourse with the respondent, the result before them would have been any different. The result might well have been that they would have believed the respondent and rejected the evidence of Ricket. Finally, on this branch of the argument, it seems to me that whatever effect is to be attributed to Ricket's evidence as given before the magistrates in the first instance, and even if it can be said that it did amount at that stage to a procuring of the order by perjured evidence, the vitiating effect of that evidence can hardly be taken to have survived the hearing before the Appeal Committee, for at the hearing before the committee, as my Lord has said, Ricket, after answering certain questions, declined to answer one way or the other further questions bearing on the suggestion of his having had intercourse with the respondent. Accordingly, I reject the first branch of the argument.

The second branch of it seems to me to be a more formidable one. It is said that Ricket was charged with and convicted of perjury for giving evidence to the effect that he had never had sexual intercourse with the respondent. It is said truly that the verdict against him was obtained in proceedings in which the respondent herself gave evidence on his behalf to the effect that he never had had intercourse with her. It is submitted that, in those circumstances, the evidence of the respondent cannot be other than false, and, accordingly, that, from beginning to end the proceedings were vitiated by reason of the fact that first the order of the justices, and then the order of the Appeal Committee, were procured by the respondent's own perjury. That, as I have said, seems to me to be the more formidable branch of the argument, but in my view it should not prevail. In my judgment, it should not be assumed, for the purposes of the jurisdiction we are now being asked to exercise, that if the respondent had been prosecuted for perjury, her prosecution would have led to a conviction. Much of the evidence on the strength of which Ricket was convicted was wholly inadmissible against the respondent. For example, his statements to the police, his lying stories about how he had spent the night of Dec. 28, 1952, his boastful talk to his fellow workmen—none of these matters would have been admissible against the respondent at all in any proceedings for perjury that might have been brought against her. Counsel for the applicant contended that, for the present purpose, the court should be content with something less than the evidence that would be necessary to secure a conviction for perjury against the respondent. I accept that argument to the limited extent that it might be superfluous for the court to insist on all the technicalities of a prosecution of this sort as regards proof being satisfied, but to my mind, at all events, the court must be satisfied, beyond a peradventure, that if the issue whether the respondent had committed perjury or not had come to be tried, it would have been proved, by evidence wholly admissible against her, that she had given the false evidence in question. I would add that, in my view, the court should not, in exercising this jurisdiction, weigh one set of alleged facts against another. If such a weighing of facts is necessary, I think that demonstrates that the case is not a proper one for the exercise of the jurisdiction. I would not attempt to state exhaustively the requirements that should be insisted on as regards the state of the facts underlying an application of this sort, but, without attempting to lay down any general rule, I venture to say that I think an order of certiorari to quash proceedings on the ground that they were procured by fraud or perjury should seldom if ever be made unless the facts regarding the alleged fraud or perjury have either been the subject of a conviction in regular criminal proceedings against the person to whom the fraud or perjury is imputed, or else have been admitted by something amounting to a confession by such person. In the present case, neither of these conditions is satisfied, and it is by no means clear to me that the charge of giving false evidence has been brought home against the respondent.

Bearing in mind the passage quoted by my Lord from *Colonial Bank of Australasia* v. *Willan* (4) (L.R. 5 P.C. at p. 450), I cannot hold that the fraud here alleged is sufficiently clear and manifest to warrant the court in exercising this discretionary jurisdiction. Accordingly, for the reasons I have endeavoured to state, and those given by my Lord, I agree that this appeal fails and should be dismissed.

PARKER, L.J.: I agree, and I would only add a few words in deference to the able argument of counsel for the applicant. It is, I think, important to remember that the supervisory jurisdiction of the High Court, exercised originally by way of a writ of certiorari and now by an order of certiorari, does not extend to the curing of all alleged irregularities in an inferior court. As LORD GODDARD, C.J., said in *R.* v. *Leicester Recorder* (1) ([1947] 1 All E.R. at p. 928):

> " [Certiorari] is a remedy of a peculiar character and there is a great deal of authority as to when it will and when it will not lie."

But, in general, this valuable jurisdiction is exercised along well-defined lines, such as lack of jurisdiction and matters akin to lack of jurisdiction and errors of law appearing on the face of the record. The one thing, however, that must be borne in mind is that the jurisdiction is never exercised by way of appeal. It has for long been recognised, however, that it is a ground for quashing the decision of an inferior court if the decision has been obtained by the fraud or on the perjured evidence of the person invoking the jurisdiction of the court, either originally, as in *R.* v. *Gillyard* (3) or by way of appeal, as in *R.* v. *Leicester Recorder* (1). It may be—and this view was expressed by LORD GODDARD, C.J., in *R.* v. *Leicester Recorder* (1)—that it may also extend to perjury committed by the other party—not the party seeking relief, but the party who has been brought before the court. But one thing is clear, and that is that there is no case to which counsel have been able to refer us in which certiorari has lain where the fraud or perjured evidence is that of a witness called by one of the parties, unless it is also shown that that perjured evidence was given in collusion with one of the parties. That, indeed, was the position in *R.* v. *Recorder of Burnley* (2), where one of the witnesses called by the appellant on appeal was shown to have committed perjury, but to have committed it in collusion with the appellant. I see no ground, at this date, for extending the jurisdiction any further. Apart from that, it is, in my view, very relevant in the present case to realise that Ricket gave no evidence on the vital matter before the Appeal Committee. It cannot, accordingly, be said that the decision on appeal, an appeal which was by way of re-hearing, was itself affected by any fraud or perjured evidence on the part of Ricket. That disposes of counsel's first line of argument.

A Secondly, however, he says that in the present case the true implication is that the person who invoked the jurisdiction of the court, namely, the respondent herself, was fraudulent in that, on oath before the magistrates, she wilfully gave false evidence. She has not been convicted of perjury and she has not confessed perjury, but, nevertheless, says counsel, she must have been guilty of perjury since quite plainly the jury, in convicting Ricket, must have disbelieved her B evidence. The question, as it seems to me, is: Is that sufficient proof of fraud to enable this court to quash the decision ? The fraud must be clear and manifest, as appears from the passage from SIR JAMES COLVILE in *Colonial Bank of Australasia* v. *Willan* (4) (L.R. 5 P.C. at p. 450) to which my Lords have referred. If conviction is proved, then, of course, it is not for this court to say that the jury were wrong, but in this case, as I have said, the respondent has not been convicted, and as LORD GODDARD, C.J., said in his judgment: C

> "But it is still open to Miss Mann to say: 'I have never committed perjury; I have never been convicted. I gave evidence at this man's conviction, but I have not been convicted'; and it is necessary to emphasise that this court does not sit as a court of appeal."

D What evidence is sufficient to enable this court to quash a decision of this kind it is unnecessary to say, but I conceive that, in the case of a voluntary confession, this court would interfere; and, indeed, as it seems to me, that in effect was the position in *R.* v. *Gillyard* (3). In that case affidavit evidence was produced of fraud and collusion, and although an opportunity was given to answer the charge made on affidavit, the respondent failed to do so. COLERIDGE, J., said in those E circumstances (12 Q.B. at p. 530):

> "If a man, when such a serious accusation is preferred against him, will not deny it, he must not complain if the case is taken pro confesso."

F To go further in the present case and to say that, on the evidence available here, it is shown that the respondent wilfully gave false evidence before the magistrates seems to me to be substituting the view of this court as to the credibility of the respondent for the view of the magistrates, a matter which is the one thing that this court cannot do. I would dismiss the appeal.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Kingsford, Dorman & Co.*, agents for *Kingsford, Flower & Pain*, Ashford, Kent (for the applicant); *Lovell, Son & Pitfield*, agents for *W. Taylor & Co.*, Ashford, Kent (for the respondent).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

PAYNE *v.* WELDLESS STEEL TUBE CO., LTD.

[COURT OF APPEAL (Denning, Hodson and Morris, L.JJ.), October 26, 27, 1955.]

Factory—Floor—Maintenance—Finding that floor not dangerous—Consideration jointly with duty to provide safe means of access—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6 *c.* 67), *s.* 25 (1), *s.* 152 (1).

To prevent trolleys bumping too much when crossing a groove in a floor in a factory, a steel plate had been placed in the groove. The plate tipped slightly when a workman was walking across it, and he overbalanced and was injured. In an action by the workman against his employers, claiming damages for breach of their duty to ensure that the floor was " of sound construction and properly maintained " under s. 25 (1) and s. 152 (1)* of the Factories Act, 1937, and to provide " safe means of access " under s. 26 (1)* of the Act and for negligence, the county court judge found that the floor was not dangerous and therefore the employers were not liable for breach of statutory duty under the two enactments (s. 25 (1), s. 26 (1)), considered together, or for negligence. On appeal,

Held: notwithstanding the absence of any reference to safety in s. 25 (1) of the Factories Act, 1937 (by contrast with s. 26 (1)), and in the definition of " maintained " in s. 152 (1), s. 25 (1) required the floor to be maintained in good repair so as to be safe for persons using it, and the judge had not misdirected himself in arriving at his decision.

Appeal dismissed.

[For the maintenance of the floor of a factory, see SUPPLEMENT to 21 HALSBURY'S LAWS (2nd Edn.) para. 1144; and for cases on the subject, see DIGEST Supp.

For the Factories Act, 1937, s. 25 (1) and s. 152 (1), see 9 HALSBURY'S STATUTES (2nd Edn.) 1017 and 1116.]

Cases referred to:

(1) *Galashiels Gas Co., Ltd.* v. *O'Donnell or Millar*, [1949] 1 All E.R. 319; [1949] A.C. 275; 1949 S.C. (H.L.) 31; [1949] L.J.R. 540; 113 J.P. 144; 2nd Digest Supp.

(2) *Latimer* v. *A.E.C., Ltd.*, [1953] 2 All E.R. 449; [1953] A.C. 643; 117 J.P. 387; 3rd Digest Supp.

Appeal.

The plaintiff was employed by the defendants as a turner at their factory premises in Harts Road, Wednesfield, Staffordshire. While crossing a groove in the floor of the factory, he stepped on a metal plate which had been placed in it, and, through the plate shifting, was thrown against a stack of steel rolls, one of which fell on and injured his left foot. He brought an action against the defendants claiming damages for breach of statutory duty in failing properly to maintain the floor of the factory and to provide safe means of access to every place therein as required by the Factories Act, 1937, s. 25 (1) and s. 26 (1), and for negligence. On Aug. 12, 1955, His Honour JUDGE NORRIS in Wolverhampton County Court dismissed the action, holding that the groove was not dangerous and that there was no breach of duty under the two enactments. The plaintiff appealed.

F. W. Beney, Q.C., and *M. Waters* for the plaintiff.

John Thompson, Q.C., and *E. G. H. Beresford* for the defendants.

DENNING, L.J.: This is a case of an accident in a factory which occurred in May, 1953. There was a concrete floor in the factory and in it there was a groove. This groove was crossed by trolleys; so much so that some of it had become worn so that it was about nine inches in width and about $1\frac{1}{2}$ to $\frac{3}{4}$ inches in depth. To prevent the trolleys bumping on it too much, someone had put a steel plate in this groove, on which trolleys crossed the groove. Many people used it with no trouble until one day, when the plaintiff was walking across, the iron plate tipped a little, he overbalanced towards some steel rolls and one of them came on to his foot and he was injured. He now brings an action against his employers, the defendants, alleging that they were guilty of negligence at common law, or, alternatively, of breaches of the Factories Act, 1937.

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* The terms of s. 25 (1) and s. 152 (1) are printed at p. 613, letter C, post, and of s. 26 (1) at p. 614, letter A, post.

The judge has held that the defendants were not guilty of any negligence at common law and that is a finding which we cannot disturb. The argument before us has turned mainly on s. 25 (1) of the Factories Act, 1937, which provides:

> "All floors, steps, stairs, passages and gangways shall be of sound construction and properly maintained."

"Maintained" is defined in s. 152 (1) as meaning:

> "maintained in an efficient state, in efficient working order, and in good repair."

Section 25 (1) means that the floors, steps and stairs must be maintained in good repair so as to be safe for persons using them. In the course of the argument I took the instance of stone steps which in the course of years get worn away. When they are worn to a depth of one-eighth of an inch, they are still in good repair, but, when they are worn away to a depth of four inches, they are not in good repair. It is a question of degree depending on whether they are safe or not.

Counsel for the plaintiff drew our attention to *Galashiels Gas Co., Ltd.* v. *O'Donnell or Millar* (1) ([1949] 1 All E.R. 319), where there was a defect in a lift which could not have been discovered by using reasonable care. Yet the employers were held liable because the lift was unsafe. There was therefore a breach of duty. Once there is a breach of duty, the liability of the occupier is an absolute liability. The question in this case, however, is whether there was a breach of duty at all. That depends on whether the floor was in good repair so as to be safe for persons using it.

It seems to me that the learned judge here found that this floor was safe despite the groove. He said:

> "I am not one who believes that the floor of a factory is unsafe merely because it is slightly uneven."

It would be going much too far to hold that an occupier of a factory was guilty of a breach of duty because the floor happened to be a little worn and uneven.

The judge went on to give reasons why he thought the groove was not dangerous. He pointed out:

> "The plaintiff knew of its existence. He had been through the gap in the fence scores of times. It had never occurred to him that it was dangerous. This is a modern factory and well lighted. I should not, if I were a factory inspector, have considered it a source of danger to those passing through the gap. Mr. Williams, who is a shop convener, knew of it. I am satisfied that it had never occurred to him that it was dangerous or that it could cause an accident."

Those passages show that in the opinion of the learned judge this floor was in good repair so as to be safe for persons using it.

Section 26 (1) of the Act of 1937 provides:

> " There shall, so far as is reasonably practicable, be provided and maintained safe means of access to every place at which any person has at any time to work."

The judge's finding on safety means that that section also was not broken.

I do not say what conclusion I myself might have reached on this question of degree in this particular case. It seems to me that is essentially a matter for the county court judge with which this court cannot interfere, and I would dismiss the appeal.

HODSON, L.J.: I agree. I add only a few words on s. 25 of the Factories Act, 1937, because, if there was no misdirection with regard to that section, the matter before the learned county court judge was a matter of degree and for him to decide. The judge heard evidence as to the condition of the floor of the factory where the plaintiff sustained his accident and he came to a conclusion of fact which cannot be disturbed. The main attack on his judgment is that he misdirected himself in dealing with s. 25 which provides:

> " Construction and maintenance of floors, passages and stairs. (1) All floors, steps, stairs, passages and gangways shall be of sound construction and properly maintained."

It was pointed out that in his judgment the learned county court judge had referred to the groove in the floor which was the cause of the plaintiff's fall and asked himself the question whether the existence of this groove constituted a breach either of s. 25 (1) or of s. 26 (1), or, alternatively, whether the defendants were negligent at common law in having the groove, so that he did not direct himself separately as to s. 25 (1) as opposed to s. 26 (1).

Section 26 (1) has to do with safe means of access and the word " safe " appears in the section, whereas in s. 25 (1) there is no mention of the word " safe " and the judge, in dealing with the matter, undoubtedly addressed himself to the element of safety. In his main contention, counsel for the plaintiff said that in that he was wrong, because there was nothing about " safety " in s. 25 (1). The words in that sub-section imply an absolute obligation on the factory owner, and in s. 152 (1), the definition section, " maintained " is defined as meaning:

> " maintained in an efficient state, in efficient working order, and in good repair."

It is said, therefore, that the learned county court judge has omitted to direct himself specifically in accordance with the definition and that there ought to be a new trial.

In my judgment the county court judge, although in an extempore judgment he may have, in a sense, telescoped his observations on the three matters before him, did essentially look at the problem in the right way. In the final address by counsel for the plaintiff, one of the main matters discussed was: Was there a groove ?; secondly, was it safe ?; and thirdly, did it cause the accident ? That was the way in which, after consideration of whether or not the accident happened in the way alleged by the plaintiff, the matter was discussed. While the question must be approached in the light of the definition of the word " maintained ", I think this definition must involve a consideration of safety. " Properly maintained ", to my mind, means properly in relation to safety; " efficient " connotes safety in achieving the result which is intended, and the words " in good repair " also, I think, connote safety. That construction is supported by the placing of this section in a group of sections in Part 2 of the Act which are headed: " Safety (General Provisions) ". They are provisions inserted in that Act for the safety of the workman, and one can only consider efficient maintenance and good repair against a background of safety.

It is true that the obligation is an absolute obligation, but the first thing to decide is whether the thing concerned is in an efficient state of repair and properly maintained from the safety point of view. Accordingly, no assistance at all is gained from the *Galashiels* case (1) cited to us, because there the lift in question was admittedly unsafe. Everybody agreed that it was unsafe when it moved from one floor to another when it should not have moved. The only question under discussion was whether the employers could be absolved from liability because they had no reason to foresee that the lift was unsafe.

In this case the learned county court judge addressed himself to the question of safety and considered the admissible evidence on that topic. The fact that he admitted evidence from people who formed their own opinions as to the safety or lack of safety of the floor does not, to my mind, make it legitimate to say that he therefore applied the wrong test, namely, a subjective test of some kind rather than the correct test, an objective test. I think, therefore, that this appeal fails and should be dismissed.

MORRIS, L.J.: I have found much more difficulty in regard to this case than I think has been found by my Lords. I approach it in this way. The obligation under s. 25 (1)—with which alone I propose to deal—is that " all floors . . . shall be of sound construction and properly maintained ". Reading in the definition of " maintained " in s. 152 (1), that means that " all floors shall be of sound construction and shall be properly maintained in an efficient state, in efficient working order, and in good repair ". It seems to me that the learned county court judge had to address himself to a consideration of the matters denoted by those words.

It is emphasised by the speeches in the *Galashiels* case (1) that the obligation imposed by s. 25 (1) is an absolute obligation. In his speech, LORD MORTON OF HENRYTON adopted what had been said by LORD BLADES (Lord Ordinary) ([1949] 1 All E.R. at p. 321):

> " ' . . . in my opinion, there is imposed on the defenders an absolute and continuing obligation binding upon them which is not discharged if at any time their lift mechanism, in this case the brake, is not maintained in an efficient state, in efficient working order, and in good repair '."

LORD MORTON continued (ibid.):

> " The words in the sub-section ' shall be properly maintained ', are imperative, and I can find nothing in the context or in the general intention of the Act, read as a whole, which should lead your Lordships to infer any qualification on that absolute obligation. It is quite true that the sub-section, so read, imposes a heavy burden on employers, but the object of this group of sections is to protect the workman. I think the sub-section must have been so worded in order to relieve the injured workman from the burden of proving that there was some particular step which the employers could have taken and did not take. This would often be a difficult matter, more especially if the cause of the failure of the mechanism to operate could not be ascertained. The statute renders the task of the injured workman easier by saying: ' You need only prove that the mechanism failed to work efficiently and that this failure caused the accident '."

LORD MACDERMOTT said (ibid., at p. 324):

> " . . . but when the terms of the definition are regarded the meaning for which [counsel] has contended is, in my opinion, at once displaced. To my mind, they indicate conclusively that in s. 22 (1) ' maintained ' is employed to denote the *continuance* of a state of working efficiency. In the ordinary use of language one cannot be said to maintain a piece of machinery in

efficient working order over a given period if, on occasions within that period, the machinery, whatever the reason, is not in efficient working order. In short, the definition describes a result to be achieved rather than the means of achieving it."

In *Latimer* v. *A.E.C., Ltd.* (2) ([1953] 2 All E.R. 449) LORD OAKSEY said (ibid., at p. 453):

> "On the question of the construction of s. 25 (1) of the Factories Act, 1937, I am of opinion that, by virtue of that sub-section and the interpretation section, s. 152 (1), the respondents were bound to maintain the floors and passages in an efficient state, but I do not consider that it was proved that they were not in an efficient state. A floor does not, in my opinion, cease to be in an efficient state because a piece of orange peel, or a small pool of some slippery material, is on it. While I do not agree that the maintenance of the floors is confined to their construction, I think the obligation to maintain them in an efficient state introduces into what s an absolute duty a question of degree as to what is efficient."

This section is found in the part of the Act dealing with safety, and safety is certainly the underlying conception. I agree with the submission of counsel for the defendants that, when considering a floor and its state and whether it is in good repair, one does not consider it from, e.g., an aesthetic point of view, and certainly, as LORD OAKSEY says, a question of degree is introduced. But the doubt that I have had is whether the learned judge approached the matter quite in the right way, and whether he may not have misdirected himself in arriving at his conclusion. I have wondered whether it might have been necessary for the case to go back to get a further finding from the learned judge, and had that happened there would, possibly, have been the necessity for a finding on the question of contributory negligence. The learned judge, I think, was invited to deal with the matter in the way in which he did, and therefore should not be criticised by the parties, but it would have been easier for us if he had directly applied himself to the actual words of the relevant definition. The learned judge said (inter alia):

> "One must look at the nature of the thing itself and the knowledge of the person injured and at the surrounding circumstances."

I agree that the knowledge of the person injured may be a part of the evidence to be considered, but this part of the judgment has given me the feeling that the learned judge was thinking: "As the plaintiff knew all about this, this floor was not other than in good repair and in an efficient state." What the plaintiff knew about it is only partially of assistance in deciding the question of fact, which was whether this floor was in an efficient state and in good repair —a question to be approached recognising that this floor was a floor in a factory. A little further on the learned judge said that it was an exaggeration

> "to call this groove a trench. It is no more than a small channel. The plaintiff knew of its existence. He had been through the gap in the fence scores of times. It had never occurred to him that it was dangerous."

Again, it may be relevant evidence that the plaintiff had been through the gap scores of times, but the way in which it is dealt with in this passage leaves me in doubt whether the learned judge was not applying himself to the question, not of whether this floor was in an efficient state and in good repair, but of whether the plaintiff knew all about it.

He says: "It had never occurred to him that it was dangerous." But that is not conclusive. It might not have occurred to the plaintiff, but still the test was: Was it in an efficient state and in good repair?

Therefore, I have had some doubt as to exactly what the learned judge found. He accepted the evidence of the plaintiff that while walking in an ordinary way across this floor—the plate must be regarded as part of the floor; it was put there to be walked on—he put his foot on a part of the floor which so rocked as to cause him to overbalance. I wondered, therefore, whether the learned judge was really intending to find that this floor was in an efficient state and in good repair.

My doubts have arisen, therefore, not in regard to the law on the matter, but in regard to the way in which the learned judge had dealt with it—which was very largely, I think, because of the way in which he was invited to deal with it. But, having indicated those doubts, I do not dissent from the conclusions expressed by my Lords.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *W. H. Thompson* (for the plaintiff); *E. P. Rugg & Co.*, agents for *Buller, Jeffries & Kenshole*, Birmingham (for the defendants).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

COLEMAN *v.* COLEMAN.

[COURT OF APPEAL (Denning, Hodson and Morris, L.JJ.), November 7, 1955.]

Divorce—Discretion—Exercise in favour of guilty party—Suspicion of undisclosed adultery during marriage—Court of first instance influenced by consideration of adultery before marriage—No grounds for refusal—Exercise of discretion by Court of Appeal—Matrimonial Causes Act, 1950 (14 *Geo.* 6 *c.* 25), *s.* 4 (2), *proviso.*

A wife, who had been divorced for adultery and had married a second time in March, 1947, petitioned for dissolution of that marriage and asked the court to exercise its discretion under the proviso to s. 4 (2) of the Matrimonial Causes Act, 1950,* in her favour. In her discretion statement she said that she had committed adultery on one occasion in October, 1951, and that "save as aforesaid I have never committed adultery". The husband did not give evidence, but in a statement he alleged that she had committed adultery with the person concerned on numerous occasions. This the wife denied in evidence. The commissioner criticised the passage quoted above from her discretion statement as inaccurate and refused her a decree on, among other grounds, the ground that she had not shown the frankness that someone who asked for the exercise of the court's discretion should show. On appeal,

Held: only adultery committed during the marriage of which dissolution was sought was relevant for the purposes of the court's discretion under the proviso to s. 4 (2) of the Matrimonial Causes Act, 1950, and the only adultery which the court might consider for those purposes was adultery which the court found to have been committed; the commissioner had allowed himself to be influenced by matters which were irrelevant or unproven, viz., the adultery before the second marriage and suspicions of further adultery during that marriage on other occasions than that referred to in the wife's discretion statement, and accordingly a decree nisi would be granted, the case being referred to the Queen's Proctor for him to make such inquiries as he thought fit.

Appeal allowed.

[As to the principles by which the court should be guided in exercising its discretion, see 12 HALSBURY'S LAWS (3rd Edn.) 311, para. 623; and for cases on the subject, see 27 DIGEST (Repl.) 427-431, *3582-3603*.

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* The terms of the proviso are printed at p. 618, letter G, *post.*

For the Matrimonial Causes Act, 1950, s. 4 (2), see 29 Halsbury's Statutes (2nd Edn.) 394.]

Case referred to:

(1) *Blunt* v. *Blunt*, [1943] 2 All E.R. 76; [1943] A.C. 517; 112 L.J.P. 58; 169 L.T. 33; 2nd Digest Supp.

Appeal.

The petitioner wife appealed against an order made by His Honour Judge Reid, sitting as a special commissioner, on June 29, 1955, whereby it was pronounced that the wife had sufficiently proved the contents of the petition as to the adultery of the husband, but that the discretion conferred on the court by s. 4 (2), proviso, of the Matrimonial Causes Act, 1950, would not be exercised in her favour. The petition was dismissed. The wife contended that the commissioner had wrongly attached weight to the non-disclosure in her discretion statement of her adultery during a previous marriage which she submitted was irrelevant thereto under the sub-section and that he had refused a decree nisi on suspicion of adultery which had not been proved or admitted to the court, contrary to the terms of the section.

A. Lipfriend for the wife.

The husband was not represented.

DENNING, L.J.: The petitioner in this case married her husband on Mar. 8, 1947, when she was eighteen years of age and he was nineteen. At that time she was the divorced wife of an American serviceman. In these proceedings she sues her second husband for divorce on the ground of his adultery. His adultery is established. He is living with another woman by whom he has a child. Nevertheless, the commissioner has refused to exercise his discretion in the wife's favour.

The first point arises on the wife's discretion statement in which she said that on one occasion in October, 1951, she committed adultery with Peter Cunningham at 36, Harp Road, Hanwell, and then said: " Save as aforesaid I have never committed adultery". The commissioner criticised that sentence. He said that it was inaccurate, because she herself had been divorced for adultery by her previous husband. It seems to me that in these proceedings the prior divorce for adultery was irrelevant. Section 4 (2), proviso, of the Matrimonial Causes Act, 1950, which confers a discretion on the court, provides:

> " . . . the court shall not be bound to pronounce a decree of divorce and may dismiss the petition if it finds that the petitioner has during the marriage been guilty of adultery . . ."

Those words show that the only relevant adultery is adultery *during the marriage*. The discretion statement should be construed in the light of the statute. On its proper construction, it meant: " Save as aforesaid I have never committed adultery during the marriage ". So read it was not inaccurate. It should not be taken against the wife in any way.

The second point on which the commissioner refused a decree arose out of the fact that the husband, in a statement which he had made, alleged that his wife had committed adultery on numerous occasions with a man named Pete. The commissioner asked the wife about that statement, and she denied that there were numerous occasions. She said: " That is just lies ". The commissioner was not satisfied. He said:

> " I am not satisfied about this story about the single act of adultery. I am not satisfied in this case that the wife has shown me the frankness which somebody who asks for the discretion of the court ought to apply."

On that account he refused to exercise his discretion in her favour.

A On the wording of the Act, in order to refuse a decree, it is plain that the only adultery on which the commissioner can act is adultery which he "finds" to have been committed, i.e., adultery which is proved or admitted before him. In this case, only one act of adultery was proved or admitted before the court. Suspicion of other acts is not enough. Suspicion that she is telling an untruth is not enough.

B Let me take a case which often happens. A petitioner may not put in a discretion statement at all; but the other spouse may have made a statement, not on oath, saying that the petitioner has committed adultery with other people. The judge cannot on that statement refuse to exercise his discretion in the petitioner's favour. He can only refuse a decree if he "finds" the petitioner guilty of adultery during the marriage. His proper course is to C put the statement before the petitioner to see if she admits it or not. If she denies it and he is still not satisfied where the truth lies, his proper course is to send the case for the Queen's Proctor to make inquiries.

In the present case, in my judgment, the commissioner ought not to have dismissed the petition altogether. If he was not satisfied and had his suspicions aroused, his proper course was to send the case to the Queen's Proctor. That, D indeed, is, I think, the course that this court should take today. In my judgment, in view of the one admitted act of adultery, the court should exercise its discretion and a decree nisi should be pronounced on the grounds of the husband's adultery, which has been clearly established, but, nevertheless, the court should send the matter to the Queen's Proctor so that he can look into it and see if there are any steps which he thinks he ought to take. I think the appeal should be E allowed accordingly.

HODSON, L.J.: I agree. This is an appeal against the refusal of the learned commissioner to exercise discretion. In *Blunt* v. *Blunt* (1) ([1943] 2 All E.R. 76), VISCOUNT SIMON, L.C., said in this connection (ibid., at p. 79):

> F "If it can be shown that the court acted . . . in that it either gave weight to irrelevant or unproved matters or omitted to take into account matters that are relevant, there would, in my opinion, be ground for an appeal."

In this case, counsel for the petitioner says, I think with justification, that in one respect the commissioner gave weight to an irrelevant matter, because the G petitioner had sworn that she had never committed adultery save as admitted in her discretion statement, whereas in fact she had previously been divorced from a former husband on the ground of adultery. I think the construction of what she said is quite plain. She intended to refer only to the particular marriage and ought not to be taken as referring to an irrelevant marriage, viz., her previous marriage. Indeed the only relevant adultery on her part (as s. 4 H of the Matrimonial Causes Act, 1950, says) is adultery during this marriage.

That is not to say that I wish in any way to criticise the form in which the statement was drawn. It was drawn in a form which counsel for the wife tells me is commonly used in compliance with r. 28 (1) of the Matrimonial Causes Rules, 1950 (S.I. 1950 No. 1940), which directs that the statement is to set out particulars of the act of adultery committed and all the facts which it is I material for the court to know for the purpose of the exercise of its discretion. It would be highly undesirable if the court were to endeavour to lay down lines or indicate forms to be rigidly followed in such cases.

I am afraid that the commissioner allowed himself to be influenced by a misconstruction of that sentence of the wife's, because he said in his judgment that, although he would agree that in one sense he was not concerned with it, he did feel that he was concerned that she should tell the truth in her discretion statement, and he did refer to the fact that that particular paragraph was not accurate. One cannot avoid the conclusion, therefore, that he was in some respect influenced by that matter.

The other complaint which counsel for the wife makes (which, I think, is well founded) is that the commissioner paid attention to an unproved matter, i.e., that, although she herself had admitted adultery once with a man called Pete, her husband, in a statement which he had given to an inquiry agent and which he did not support by evidence, alleged that she committed adultery more than once with Pete. The commissioner also heard during the course of the evidence of the existence of a diary which the wife had kept apparently containing references to Pete. He was left in this position, that he would not accept her statement that she had only committed adultery on one occasion with Pete. Counsel for the wife says that that is tantamount to saying, in the light of the husband's statement, that he was finding her guilty of further adultery without evidence.

One does not wish to say anything which would lead any trial judge to suppose that it was not for him to ascertain the facts and make up his mind whether or not a witness is telling the truth, and, so far as he is able, difficult though it must necessarily be in these undefended cases, to see that the court is not deceived. Yet in this case, in the state of the evidence as it stands, I feel that the commissioner, the husband not having given evidence in support of his charge of adultery, should have pronounced a decree in the exercise of the court's discretion and sent the matter to the Queen's Proctor for investigation, and I think that that is the course which the court ought to take.

I am not excluding the possibility that the commissioner might have refused to exercise discretion on some ground other than his refusal to accept the wife's evidence, but he did not state any other ground on which the discretion was refused. For these reasons and for those which my Lord has given I agree that we ought to substitute our decision for his and that the appeal should be allowed.

MORRIS, L.J.: I agree with the judgments which my Lords have delivered.

Appeal allowed. Decree nisi pronounced. Matter referred to the Queen's Proctor for any further investigations which may be necessary.

Solicitors: *Harold Stern & Co.* (for the wife).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

THE SOYA.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), November 7, 1955.]

Shipping—Collision—Damages—Detention in port to repair collision damage—Measure of damages—Whether profits of voyages subsequent to that for which ship was engaged at the time of collision to be taken into account.

The Dirphys was involved in a collision with the Soya while proceeding to London to load a cargo for carriage under charterparty to Bombay. Because of the collision she was diverted to Rotterdam where she remained under repair for twenty days. In due course she fulfilled the charterparty, earning a net profit at the daily rate of £144 3s. 10d. She then carried cargo from Malaya to Japan earning a net profit at the daily rate of £819 17s. 4d. She completed two more voyages in the Far East, earning profits at daily rates of over £800. All engagements to which the ship was committed were in fact carried out.

The plaintiffs, the owners of the Dirphys, claimed against the defendants, the owners of the Soya, the sum of £17,009 8s. 8d., as loss of profit for the period of detention under repair, computed at more than £850 per day based on the higher rates of profit earned by the Dirphys after the voyage to Bombay. The defendants contended that the loss of profit should be calculated at the average daily rate for the voyage from London to Bombay. The registrar upheld the defendants' contention and awarded the plaintiffs £2,884 0s. 2d. On objection by the plaintiffs,

Held: it was for the plaintiffs to prove their loss of profits with reasonable certainty and, although but for the collision the Dirphys would have started her Far Eastern trading twenty days earlier, yet what profits at the enhanced Far Eastern rates were lost by the delay in commencing that trading was a matter of speculation and too remote to be taken into account; accordingly, the loss of profits should be assessed on the basis of the rate applicable to the voyage for which the ship was engaged at the time of the collision, and the registrar's decision would be confirmed.

Observations of BOWEN, L.J., in *The Argentino* (1888) (13 P.D. at p. 201) applied.

[As to profits under existing contracts lost by detention, see 30 HALSBURY'S LAWS (2nd Edn.) 860, para. 1138; and for a case on the subject, see 41 DIGEST 802, *6627*.]

Cases referred to:

(1) *The Argentino*, (1888), 13 P.D. 191; 58 L.J.P. 1; 59 L.T. 914; *affd.* H.L. sub nom. *Gracie* (*Owners*) v. *Argentino* (*Owners*), *The Argentino* (1889), 14 App. Cas. 519; 59 L.J.P. 17; 61 L.T. 706; 41 Digest 802, *6627*.

(2) *Strathfillan S.S. Owners* v. *Ikala S.S. Owners, The Ikala*, [1929] A.C. 196; 98 L.J.P. 49; 140 L.T. 177; Digest Supp.

Motion.

This was a motion by the plaintiffs in objection to the decision of the registrar dated Aug. 24, 1955.

The plaintiffs were the owners of the Dirphys and the defendants were the owners of the Soya. On Dec. 30, 1950, the two ships collided. The Dirphys was then proceeding to London to fulfil a charterparty dated Oct. 13, 1950, for the carriage of sugar to Bombay, but because of the collision she was diverted to Rotterdam where she remained under repair from Jan. 1 to 20, 1951, an agreed period of twenty days. She then proceeded to London and duly completed the voyage to Bombay, for which she earned a net profit of £8,939 16s. 5d., giving a daily net profit of £144 3s. 10d. for sixty-two days. On completion of that voyage, she proceeded to Dungun in Malaya to fulfil a charterparty, dated Jan. 18, 1951, for which the Dirphys had been nominated on Feb. 1, 1951, for the carriage of goods to Japan. For that voyage she earned a net profit of £29,515 3s. 11d., giving a daily net profit of £819 17s. 4d. For two subsequent voyages in the Far East she earned profits at the daily rate of £892 1s. 9d. and £830 19s. 5d.

The parties agreed liability for the collision on the basis that the Dirphys was thirty per cent. and the Soya seventy per cent. to blame. All items of the plaintiffs' claim were agreed except the item for loss of profit during the detention for collision repairs, for which the plaintiffs claimed £17,009 8s. 8d., based on the enhanced rates of profit earned in the subsequent voyages, which they contended ought to be taken into consideration. This sum was computed on a daily profit exceeding £850. The defendants contended that the plaintiffs were entitled to assess their loss of profit only at the rate for the voyage from London to Bombay. On July 18, 1955, the matter came before the registrar who, by a decision dated Aug. 24, 1955, upheld the defendants' contention and allowed the plaintiffs £2,884 0s. 2d., i.e., a sum computed at the daily rate of £144 3s. 10d.

Kenneth Carpmael, Q.C., and *R. F. Stone* for the plaintiffs.
H. V. Brandon and *D. L. Rait* for the defendants.

WILLMER, J., after stating that the sole question before him was related to the measure of damages to be awarded to the plaintiffs in respect of the detention of their vessel during the repair of the collision damage and after stating the facts and the contentions as to the daily rates of profits on which the damages could be assessed, continued: All the authorities, I think, recognise that questions of this sort must, in the last resort, resolve themselves into questions of fact. It is a matter of fact to assess what the injured party has in fact lost by reason of the detention of his ship. It is elementary, of course, that it is for the party claiming damages for the loss of use of his vessel to prove to the satisfaction of the court both the fact of the loss and the amount of the loss. It is not, in the circumstances, particularly helpful to refer at length to authorities, but I think I may refer to two short statements, both of which have been referred to during the course of the argument, and which crystallise the question that the court has to decide in a case of this character.

First I want to refer to the well-known and often-quoted words of BOWEN, L.J., in *The Argentino* (1) (1888) (13 P.D. at p. 201):

> " A ship is a thing by the use of which money may be ordinarily earned, and the only question in case of a collision seems to me to be, what is the use which the shipowner would, but for the accident, have had of his ship, and what (excluding the element of uncertain and speculative and special profits) the shipowner, but for the accident, would have earned by the use of her."

The only remark I venture to make concerns the special exception which the learned lord justice makes in the case of " uncertain and speculative and special profits ". It is implicit in his statement of the law that it is for the plaintiff to prove his loss of profits at any rate as a matter of reasonable certainty. If that interpretation is correct, it marries very well with what was said by VISCOUNT SUMNER in *Strathfillan S.S. Owners* v. *Ikala S.S. Owners, The Ikala* (2) ([1929] A.C. at p. 205):

> " A ship's day is not like a unit of currency, always good for so many shillings. It has to be proved that, in doing the shipowner the wrong of laying his ship idle at the time in question, work, which she would otherwise have done during the time, went undone to his measurable loss or was only done by resorting to other expedients at a measurable outlay."

If I seem to emphasise the use in two places by VISCOUNT SUMNER of the word "measurable", it is for the purpose of stressing what is implicit in the words of BOWEN, L.J., that loss of profit is a matter to be proved or measured with reasonable certainty, and not a matter on which the court is entitled to speculate. The plaintiffs contend that they have proved a loss of over £800 a day for twenty days as a matter of reasonable certainty. Counsel for the defendants, on the other hand, applying himself to the question posed by BOWEN, L.J., in *The Argentino* (1) as to what was the use of his ship which the shipowner would have had but for the accident, contends that, but for the accident, this ship, during those twenty days, would in point of fact have been pursuing her voyage between London and Bombay in pursuance of the earlier charterparty. On that basis the defendants admit that the plaintiffs are entitled to recover some loss of profit, but they submit that the fair loss of profit to take is represented by the average daily profit made on that particular voyage, excluding, for the purpose of arriving at that figure, the twenty days that were lost during repairs.

The plaintiffs' claim that what they lost was twenty days at the enhanced rate of profit of over £800 per day. The argument is put in this way: but for the collision, the voyage from Bombay would have been completed twenty days earlier; the voyage from Dungun to Japan would equally have been arranged to begin twenty days earlier, and the result would have been that the plaintiffs would have enjoyed a further twenty days of trading at the extremely profitable rates which appear to have been maintained throughout at least several months of the year 1951. Persuasive as the plaintiffs' argument is, I am not satisfied that, by proving the facts they have proved, they have shown with any reasonable certainty that there was a loss of profit on anything like this scale. It may well be true that, but for the collision, the Dirphys would have started her profitable Far Eastern trading twenty days earlier than in fact she did. Whether or not in the long run the plaintiffs would have been any better off has been left, as far as I can follow the evidence, as a matter of complete speculation. If the plaintiffs could have proved that, because of those twenty days' detention, they lost the opportunity of a complete voyage at those enhanced rates, then that would have been a measure of damage which I could well understand. I do not know, on the evidence which has been given, what the ultimate outcome of this loss of twenty days may have been; that loss of twenty days may in fact have cost the plaintiffs nothing at all. All the engagements to which the ship was committed were in fact carried out. There is nothing to show, one way or the other, what would have been the result if the whole programme had been accelerated by twenty days. For all that I know, different rates of freight might have been agreed in relation to the subsequent charters if the loading had in each successive case been twenty days earlier. It is, I suppose, even conceivable that, working it out over a long period, the plaintiffs may have been left actually better off, having regard to the rates prevailing on the particular dates when their various commitments were negotiated. I mention these considerations as tending to confirm the view at which the learned registrar arrived, that the loss of profit at this enhanced rate which the plaintiffs are claiming on the basis of the subsequent charterparties into which they entered, was too speculative and too remote to be taken into consideration as a consequence in law of the detention in respect of which this claim arises. Attractive as the plaintiffs' argument is, and attractively as it has been presented by their counsel, I cannot persuade myself that the learned registrar was wrong, in all the circumstances, in coming to that conclusion.

The only question therefore remaining is whether I ought to leave the award of damages as it is, namely, calculated on the basis of the profit actually earned in the course of the voyage on which the vessel was engaged at the time of the collision, or whether I ought to look to the period both preceding and succeeding the collision voyage and average the daily profits so as to get a fairer basis of

comparison. If I am to do that, a further question arises: how many voyages A
ought I to go back and how many voyages ought I to go forward ? I have given very careful consideration to that and, on the whole, I am not prepared to depart from the method adopted by the learned registrar, namely that of assessing the loss of profit on the basis of the voyage on which the vessel was actually engaged at the time of the collision. I come to that conclusion largely because the only answer to the question, raised by BOWEN, L.J., in *The Argentino* (1), what use B
the shipowner would have had of the vessel during the period of detention, is that he would have used her for prosecuting the voyage from London to Bombay; and, if he had so used her during twenty days, he would have been earning a profit at the rate of £144 3s. 10d. per day. I cannot say that the learned registrar was wrong in arriving at that figure and, accordingly, I dismiss the objection and confirm the registrar's report. C

Kenneth Carpmael, Q.C.: I should like to mention one fact and that is that your Lordship's judgment converts this into a final order*.

WILLMER, J.: Has it ever been settled ?

Kenneth Carpmael, Q.C.: It has never been settled as far as I know. It used to be thought that it was still interlocutory, but your Lordship's confirma- D
tion of the registrar's report, as I understand it, makes it into a final order on which execution can be sought.

WILLMER, J.: That means that if you want to complain about what I have done you do not have to ask me for my permission to do so.

Kenneth Carpmael, Q.C.: That is what I was leading up to, my Lord, but in case a different view is taken in another place, perhaps I ought formally to ask your Lordship's leave. E

WILLMER, J.: If leave is required I grant it. Although, as I said at the outset, it is a question of fact, it is a peculiarly difficult question of fact, and one which would be suitable for the consideration of the Court of Appeal.

Objection dismissed. F

Solicitors: *Holman, Fenwick & Willan* (for the plaintiffs); *Thomas Cooper & Co.* (for the defendants).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

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* See R.S.C., Ord. 56, r. 11.

F. W. BERK & CO., LTD. *v.* STYLE.

[QUEEN'S BENCH DIVISION (Sellers, J.), October 11, 12, 13, November 2, 1955.]

Insurance—Marine insurance—Suing and labouring clause—Expenses due to condition of goods at time of shipment—Clause providing that insurance was not to cover loss, damage, or expense proximately caused by " inherent vice " of goods insured—Whether expenses recoverable from insurers—Marine Insurance Act, 1906 (6 *Edw.* 7 *c.* 41), *s.* 55 (2) (*c*)*—Institute Cargo Clauses* (*Wartime Extension*), *cl.* 6.

The plaintiffs had bought on a f.o.b. contract a consignment of kieselguhr to be shipped from Africa to London. The kieselguhr was packed in paper bags and the goods were insured in transit between warehouse and warehouse by two policies of marine insurance against " all risks of loss and/or damage from whatsoever cause arising ". Each policy included a suing and labouring clause binding the insurers to contribute to the charges of the assured in suing and labouring for the safeguard and recovery of the goods, and also incorporated the Institute Cargo Clauses (Wartime Extension), cl. 6 of which provided that the insurance should in no case be deemed to cover loss or damage or expense proximately caused " by . . . inherent vice or nature of the subject-matter insured ". On the kieselguhr being transferred at London from the ship's hold to a lighter a number of bags burst, and the plaintiffs incurred expenses in re-bagging and landing the kieselguhr. The court found that the subject-matter of the insurance was the kieselguhr packed in paper bags, not the kieselguhr alone, and that there was " inherent vice " in the goods because the bags in which the kieselguhr was packed were defective at the time of shipment. In an action to recover under the suing and labouring clause the expenses incurred in re-bagging and landing the kieselguhr, the defendant underwriter denied liability on the ground that the expenses were caused by the inherent vice of the goods within cl. 6 above mentioned and s. 55 (2) (c) of the Marine Insurance Act, 1906*.

Held: (i) the expenses were not recoverable since, being proximately caused by inherent vice in the subject-matter of the insurance, they were excluded by cl. 6 of the Institute Cargo Clauses (Wartime Extension), which restricted the scope of the risks covered by the words " all risks of loss or damage " in the policies, but which was not to be rejected as repugnant to those words, and

(ii) the expenses were also not recoverable under the suing and labouring clause because, in order to recover under such a clause the expenses must be shown to have been due to accident or casualty (dicta of LORD BIRKENHEAD, L.C., and LORD SUMNER in *British & Foreign Marine Insurance Co., Ltd.* v. *Gaunt* ([1921] 2 A.C. at pp. 47, 57) applied), and there was no accident or casualty in the present case as the bags were in such a condition at the time of shipment that it was certain that they would not hold their contents in the course of necessary handling and transhipment.

[Editorial Note. In the present case the policy contained an added clause expressly excluding liability for expenses proximately caused by inherent vice in the subject-matter insured. Section 55 (2) (c) of the Marine Insurance Act, 1906, which also excludes liability of the insurer for such inherent vice, is qualified, however, by the words " unless the policy otherwise provides ". SELLERS, J., citing *Dodwell & Co., Ltd.* v. *British Dominion General Insurance Co., Ltd.*, Lloyd's List and Shipping Gazette, Apr. 9, 1918, refers to that case as providing an illustration of a policy containing a contrary provision. The policy described the risks covered as including risk of leakage " from any cause whatever " and these words were held to constitute a sufficient contrary provision within s. 55 (2) (c), but the policy in that case did not incorporate such a clause as cl. 6 of the Institute Cargo Clauses (Wartime Extension) on which the decision in the present case turned.

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* The terms of the sub-section are printed at p. 629, letter B, post.

As to words which may constitute a contrary provision within s. 55 (2) (c) of the Marine Insurance Act, 1906, see 18 HALSBURY'S LAWS (2nd Edn.) 300, para. 425 note (k).

As to the occasions on which the suing and labouring clause applies, see 18 HALSBURY'S LAWS (2nd Edn.) 336, para. 472; and for cases on the subject, see 29 DIGEST 238, *1906*, *1907*.

For the Marine Insurance Act, 1906, s. 55 (2) (c), see 13 HALSBURY'S STATUTES (2nd Edn.) 40.]

Cases referred to:

(1) *Gaunt* v. *British & Foreign Insurance Co., Ltd. & Standard Marine Insurance Co., Ltd.*, [1920] 1 K.B. 903; 89 L.J.K.B. 289; 122 L.T. 406; *affd.* H.L. sub nom. *British & Foreign Marine Insurance Co., Ltd.* v. *Gaunt*, [1921] 2 A.C. 41; 90 L.J.K.B. 801; 125 L.T. 491; 29 Digest 95, *527*.

(2) *Schloss Brothers* v. *Stevens*, [1906] 2 K.B. 665; 75 L.J.K.B. 927; 96 L.T. 205; 29 Digest 226, *1882*.

(3) *Sassoon (E. D.) & Co., Ltd.* v. *Yorkshire Insurance Co.*, (1923), 16 Lloyd's Rep. 129.

(4) *Dodwell & Co., Ltd.* v. *British Dominion General Insurance Co., Ltd.*, (1918), Lloyd's List and Shipping Gazette, Apr. 9, 1918.

(5) *London & Provincial Leather Processes, Ltd.* v. *Hudson*, [1939] 3 All E.R. 857; [1939] 2 K.B. 724; Digest Supp.

Action.

The plaintiffs claimed suing and labouring charges under two Lloyd's policies of marine insurance dated Apr. 13 and May 8, 1951, and under declarations in these policies, which the plaintiffs had effected. Each policy covered in transit from warehouse to warehouse a cargo of one hundred tons of kieselguhr valued at £1,546 and being the property of the plaintiffs, on a voyage by steamer, the s.s. Rijeka, from Mostaganem in North Africa to London. The defendant was one of the subscribers of the policies, each of which contained the following clause:

> " This policy is to cover all risks of loss and/or damage from whatsoever cause arising irrespective of percentage. Average irrespective of percentage. As far as applying including War Time Extension Clauses including war, riots, strikes, civil commotions and malicious damage as per Institute Clauses attached."

Clause 6 of the Institute Cargo Clauses (Wartime Extension), which was attached to each of the policies, read:

> " This insurance shall in no case be deemed to extend to cover loss damage or expense proximately caused by delay or inherent vice or nature of the subject-matter insured."

In addition, each policy contained a suing and labouring clause, the material terms of which are at p. 627, letter F, post. The kieselguhr was packed in paper bags containing fifty-six pounds each. The Rijeka left Mostaganem on June 5, 1951, and reached London on June 12, 1951. On arrival at London, while the kieselguhr was being transferred to a lighter, a number of the bags in which the goods were packed broke and a large quantity of the goods became loose in the lighter's hold. The plaintiffs sought to recover from the defendant, under the suing and labouring clause, the cost of re-bagging and additional lighterage and landing charges incurred by reason of the condition of the goods. By his defence the defendant alleged, among other things, that any expenses incurred by the plaintiffs were incurred solely by reason of the inherent vice or the nature of the goods, and that, under cl. 6 of the Institute Cargo Clauses (Wartime Extension), which formed part of each of the policies, and under s. 55 (2) (c) of the Marine Insurance Act, 1906, the plaintiffs were not entitled to recover under the policies. The sixth paragraph of the defence read:

> " Further or alternatively the said expenses were not incurred by the plaintiffs in order to avert any loss of or damage to or in and about the defence, safeguard or recovery of any part of the kieselguhr. The said expenses were solely incurred in order to discharge the kieselguhr or to discharge the same more easily from the said vessel and/or from a lighter into which it had been discharged . . ."

Eustace Roskill, Q.C., and *C. T. Bailhache* for the plaintiffs.
M. R. E. Kerr for the defendant.

Cur. adv. vult.

Nov. 2. **SELLERS, J.**, read the following judgment: In the summer of 1951 the plaintiffs incurred considerable expense in and about the re-bagging and landing of a cargo of kieselguhr which had arrived in London aboard the s.s. Rijeka and had been transferred to a lighter for landing at Alpha Wharf. The goods had been covered in transit from warehouse to warehouse by two policies of marine insurance dated Apr. 13, 1951, and May 8, 1951, respectively, and subscribed by the defendant and other underwriters, and by a declaration made under each policy. In consideration of the premium paid by the plaintiffs, the defendant had agreed to insure one hundred tons of kieselguhr valued at £1,546, the property of the plaintiffs, on a voyage by a steamer (which was the s.s. Rijeka) from Mostaganem in North Africa to London against all risks of loss and/or damage from whatsoever cause arising irrespective of percentage. Each policy provided also as follows:

> ". . . in case of any loss or misfortune it shall be lawful to the assured, their factors, servants and assigns, to sue, labour, and travel for, in and about the defence, safeguard and recovery of the said goods and merchandises and ship, &c., or any part thereof, without prejudice to this insurance; to the charges whereof we, the assurers, will contribute, each one according to the rate and quantity of his sum herein assured."

The plaintiffs seek to recover under that clause on the ground, as they allege, that the expenditure was incurred by them in taking steps to safeguard and/or recover the goods insured and to avoid what would otherwise have been a loss or damage within the terms of the policies for which the underwriters would have had to indemnify them.

The defendant alleges by his defence that the kieselguhr was packed in paper bags which were defective and inadequate to withstand the ordinary incidents of the insured transit in that the seams opened because of no adhesive or inadequate adhesive matter to keep them firmly closed and the contents secure during ordinary and necessary handling and carriage. On these facts the defendant denies liability under s. 55 (2) (c) of the Marine Insurance Act, 1906,* and also under cl. 6 of the Institute Cargo Clauses (Wartime Extension) which is as follows:

> " This insurance shall in no case be deemed to extend to cover loss damage or expense proximately caused by delay or inherent vice or nature of the subject-matter insured."

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* The terms of s. 55 (2) (c) are set out at p. 629, letter B, post.

The defendant alleged that the expenses, for which the plaintiffs claim, were incurred by reason of the inherent vice or the nature of the goods. The defendant also alleged that the kieselguhr was packed wet or damp and so at least contributed to the weakness of the bags, but this was not established before me to be so. The substance itself arrived without loss or damage, and no claim for physical damage or loss arose.

These pleas and the submissions at the trial show that the defendant regarded the subject-matter insured to be kieselguhr packed, as it was, in paper bags. The main allegation was that the paper bags were defective and that it was that " inherent vice " of the goods which caused the spillage and necessitated the expenditure. As one way of avoiding this difficulty, it was submitted on behalf of the plaintiffs that the subject-matter of the insurance was kieselguhr only and not kieselguhr in bags, and that, even if the bags were defective and inadequate for their purpose, that would not establish " inherent vice " of the goods insured and would not permit the defendant to rely on the defence that the expense was proximately caused by the inherent vice or nature of the subject-matter insured. If this were the right view, I am inclined to think that it would in itself bring into operation the defendant's contentions raised in the sixth paragraph of the defence* and would defeat the plaintiffs' claim.

The cargo of kieselguhr was intact in the hold of the lighter without loss or damage and, as far as I can see, without there being any reason to suspect loss or damage. The expenses incurred in re-bagging and the incidental delay of the lighter were incurred in order to replace the defective bags and to discharge the kieselguhr from the lighter in bags. The purpose of re-bagging may possibly have been for the more convenient handling of the cargo after discharge or even after the transit had ended. There was no evidence that the discharge from the lighter of kieselguhr in bulk by some means of container, or by some method other than bags, and its subsequent conveyance to warehouse would have occasioned loss or damage. Bulk cargoes of many kinds are discharged in the ordinary course without bagging. On this view, the bagging was not done to avert any loss of or damage to the goods or in and about the defence, safeguard or recovery of any part of the kieselguhr from any insured peril which beset it. I prefer, however, the view accepted and alleged by the defendant that the subject-matter of the insurance was kieselguhr packed in paper bags.

It was, and still is, as far as I know, customary for this commodity to be packed in bags, either paper or jute, for shipment and carriage, and the insurance was to cover the goods in transit by sea. I think it must be taken that both parties to the insurance contemplated that the goods would be packed for carriage and would not be carried in bulk. If sea water or fresh water had entered the holds and had damaged the bags so that they required replacement, I apprehend that the underwriters would have been liable for the cost of re-bagging, whether the kieselguhr had been damaged or not. The issue of fact which has arisen is whether the paper bags in which the kieselguhr was packed and carried were defective and inadequate at the time the goods left the warehouse for the commencement of the transit or whether by some circumstance or event in the course of the period of the insurance they became damaged or deteriorated and became inadequate as containers.

[His Lordship reviewed the evidence and found that the plaintiffs' consignment of kieselguhr was packed in faulty and inadequate bags whose seams were insufficiently secured by adhesive and were insufficient to endure the ordinary contemplated handling and carriage, and that the bags must have been inadequate from the outset. His Lordship continued:] In my judgment, therefore, the evidence has established, in the language used in marine insurance, " inherent vice " in the goods insured, and it was this circumstance (that is, the faulty bags) which brought about the special expenditure of and occasioned by the re-bagging on the lighter.

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* See p. 627, letter B, ante.

The question of law which has arisen is whether on this finding the plaintiffs can recover under the policies on which they claim. The defendant relied on cl. 6 of the Institute Cargo Clauses (Wartime Extension) [see p. 627, letter I, ante], and s. 55 (2) (c) of the Marine Insurance Act, 1906, which is as follows:

> "Unless the policy otherwise provides, the insurer is not liable for ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject-matter insured . . ."

In *British & Foreign Marine Insurance Co., Ltd.* v. *Gaunt* (1) ([1921] 2 A.C. 41) the policy sued on covered risks

> "Including all risk of craft, fire, coasters, hulks, transhipment and inland carriage by land and/or water and/or risks from the sheep's back and/or stations while awaiting shipment and/or forwarding and until safely delivered into warehouse in Europe with liberties as per bills of lading."

The subject-matter of the insurance was wool produced in Patagonia to be delivered in bales f.o.b. an ocean steamer at Punta Arenas, a port in Chile. LORD BIRKENHEAD, L.C., said, in relation to that cover (ibid., at p. 46):

> "In construing these policies it is important to bear in mind that they cover 'all risk'. These words cannot, of course, be held to cover all damage however caused, for such damage as is inevitable from ordinary wear and tear and inevitable depreciation is not within the policies. There is little authority on the point, but the decision of WALTON, J., in *Schloss Brothers* v. *Stevens* (2), on a policy in similar terms, states the law accurately enough. He said ([1906] 2 K.B. at p. 673) that the words 'all risks by land and water' as used in the policy then in question 'were intended to cover all losses by any accidental cause of any kind occurring during the transit . . . There must be a casualty'. Damage, in other words, if it is to be covered by policies such as these, must be due to some fortuitous circumstance or casualty."

I quote also the oft-quoted words of LORD SUMNER ([1921] 2 A.C. at p. 57):

> "There are, of course, limits to 'all risks'. They are risks and risks insured against. Accordingly the expression does not cover inherent vice or mere wear and tear or British capture. It covers a risk, not a certainty; it is something, which happens to the subject-matter from without, not the natural behaviour of that subject-matter, being what it is, in the circumstances under which it is carried. Nor is it a loss which the assured brings about by his own act, for then he has not merely exposed the goods to the chance of injury, he has injured them himself."

In that case the claim against the underwriters succeeded because on the facts the plaintiff proved some casualty or accidental circumstance insured against.

The defendant's contention was that the decision in *British & Foreign Marine Insurance Co., Ltd.* v. *Gaunt* (1), was wholly against the plaintiffs' contention and defeated the claim, as it established that under an "all risks" policy an insured must prove that the loss was due to an accident, or that an apprehended loss, which justified expenditure to avert it, was due to an accident or casualty in the course of the adventure, and here the facts have shown "inherent vice" and no accident or casualty.

In *E. D. Sassoon & Co., Ltd.* v. *Yorkshire Insurance Co.* (3) (1923) (16 Lloyd's Rep. 129), ATKIN, L.J., said (ibid., at p. 133):

> "I think it is quite plain from the words of the Marine Insurance Act, s. 55 (2) (c), that a policy may provide, if it is done in express words, for the

> insurer being liable for losses which are excepted, the ordinary wear and tear, ordinary leakage and breakage and inherent vice from the nature of the subject-matter insured. The particular kind of loss, the amount of the loss, is one which, within the words of LORD STERNDALE [in *Gaunt* v. *British & Foreign Insurance Co., Ltd.* (1) ([1920] 1 K.B. at p. 910)], is a loss that may or may not happen and not one which certainly must happen; if it was a loss which certainly must happen within the voyage I doubt whether it could ever be made properly the subject-matter of a policy of insurance."

It was submitted by the plaintiffs in the present case that the policies here sued on did cover loss or damage by inherent vice; that they were in different terms from the material term in *British & Foreign Marine Insurance Co., Ltd.* v. *Gaunt* (1); that s. 55 (2) (c) of the Marine Insurance Act, 1906, only applies " unless the policy otherwise provides "; and that the policies themselves expressly, in typescript, state that the policies are to cover all risks of loss " and/or damage from whatsoever cause arising . . . As far as applying including War Time Extension Clauses "*; and it was submitted, therefore, that neither the exception in s. 55 (2) (c), that the insurer is not liable for inherent vice or nature of the subject-matter insured, nor the exception in cl. 6 of the Institute Cargo Clauses (Wartime Extension) is applicable. The policies, it was argued, covered all risks, however caused, and that would include the bursting or opening of bags, however caused, and any spillage or loss caused by the bursting or opening of the bags in the course of transit: the plaintiffs were buyers f.o.b. and had no control over the bags used, or the shipment, or stowage, or the handling of the goods at any time.

The words of these policies, " from whatsoever cause arising ", are wider than the " all risk " clause† in *British & Foreign Marine Insurance Co., Ltd.* v. *Gaunt* (1) concerning which LORD BIRKENHEAD said ([1921] 2 A.C. at p. 46) that they could not be held

> " to cover all damage however caused, for such damage as is inevitable from ordinary wear and tear and inevitable depreciation is not within the policies."

Counsel for the plaintiffs, as a result of commendable resource or research, produced a decision of BAILHACHE, J., apparently reported only in Lloyd's List and Shipping Gazette of Apr. 9, 1918, *Dodwell & Co., Ltd.* v. *British Dominion General Insurance Co., Ltd.* (4). The plaintiffs were importers of two shipments of barrels of oil carried from Hankow, including transhipment at Shanghai to this country. In the transit in 1916, in wartime, there was a very serious and abnormal leakage of oil from the barrels. Apparently, heat on the voyage had caused the staves of the barrels to shrink and so loosened the hoops, and this had been accentuated by a prolonged voyage and, perhaps, bad stowage. The two policies sued on covered all risks, that is to say, war risks, general marine risks and particularly leakage. The claim was contested by underwriters on the ground of non-disclosure at the time of entering into the policies. BAILHACHE, J., found against this contention and found for the plaintiffs for the loss occasioned by the leakage, in so far as it was in excess of the ordinary leakage under one policy; but in the other policy the underwriters had used the words " including risk of leakage from any cause whatever ", and the learned judge held the underwriters bound by their own expression and held that the words " clearly included all leakage to which these barrels of oil were subjected ": and in this case the underwriters had to pay for the whole of the leakage proved. The case, it would seem, is an illustration of what ATKIN, L.J., in *E. D. Sassoon & Co., Ltd.* v. *Yorkshire Insurance Co.* (3) (16 Lloyd's Rep. at p. 133), stated as possible, namely, that a policy may provide, if it is done in express words, for

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* The clause is set out full at p. 626, letter G, ante.

† See p. 629, letter C, ante.

A the insurer to be made liable for loss and damage which are excepted by s. 55 (2) (c), for example, for inherent vice.

London & Provincial Leather Processes, Ltd. v. *Hudson* (5) ([1939] 3 All E.R. 857) is an interesting case in which GODDARD, L.J., found the underwriters liable under a policy " against all and every risk whatsoever, however arising ", in respect of skins which had been detained by sub-contractors in purported exercise of a B general lien for money owing to them from the person to whom the plaintiffs had, in the first place, entrusted the skins. I do not think, however, that these authorities help the plaintiffs. Clause 6 of the Institute Cargo Clauses (Wartime Extension) remains part of the policy, and it is in emphatic terms: " This insurance shall in no case be deemed to extend to cover loss damage or expense proximately caused by . . . inherent vice . . . of the subject-matter insured." C This clause restricts the scope of the clause covering all risks of damage " from whatsoever cause arising ", but it is not wholly repugnant to it. Having regard to the established law in the matter, if the plaintiffs had wished and had been able to insure against inherent vice they should have used specific words to that effect, or, at least, have had cl. 6 or the relevant part of it struck out.

British & Foreign Marine Insurance Co., Ltd. v. *Gaunt* (1) establishes that the D plaintiff in such a case as this must prove that the loss or expense, or the " suing and labouring ", was due to an accident or casualty, although he does not necessarily have to prove the exact nature of the accident or casualty. I cannot find that there was any accident or casualty. As LORD SUMNER pointed out ([1921] 2 A.C. at p. 57), the policy covers a risk, not a certainty. With the bags in the condition in which these bags must have been, it could be said to be E certain that they would not hold their contents in the course of necessary handling and transport; and, if at the end of the sea voyage it was desired to have the kieselguhr in bags, it would be necessary to re-bag it. If the underwriters were to be held liable, they would be paying for the cost at the time and place of discharge of putting the goods into bags in the condition in which they ought to have been, but were not, on shipment. Such cost clearly does not fall within the F terms of these two policies of marine insurance. In my opinion, the claim fails and I give judgment for the defendant.

Judgment for the defendant.

Solicitors: *Ince & Co.* (for the plaintiffs); *William A. Crump & Son* (for the defendant).

[*Reported by* A. P. PRINGLE, ESQ., *Barrister-at-Law.*]

WALSH *v.* NATIONAL COAL BOARD.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett and Romer, L.JJ.), November 2, 3, 4, 1955.]

Coal Mining—Statutory duty—Breach—Security of travelling road and working place—Workman sent to make roof and sides secure—Fall of stone from roof—Whether "reasonably practicable to avoid or prevent breach"—Coal Mines Act, 1911 (1 *&* 2 *Geo.* 5 *c.* 50), *s.* 49, *s.* 102 (8).

The plaintiff, who was employed by the defendants in their coal mine, was one of a team engaged in ripping the roadway at the coal face. In the course of this work, charges were blown in the ceiling, the rubble which came down was packed on each side of the roadhead where the coal had been cut out, and then girders and arches were fitted to make the roof and sides secure. After a shot had been fired, a boulder was observed in the ceiling, and, as it could not be dislodged with safety, the charge hand decided to have it "spragged", that is, propped up and wedged in with a piece of timber, this operation being in accordance with good mining practice. Later, while the plaintiff was engaged in the work of making the roof and sides secure, the boulder fell and injured him. The plaintiff claimed damages against the defendants for breach of their statutory duty under s. 49 of the Coal Mines Act, 1911, which provides: "The roof and sides of every travelling road and working place shall be made secure, and a person shall not, unless appointed for the purpose of exploring or repairing, travel on or work in any travelling road or working place which is not so made secure."

Held: as the opening words of s. 49 of the Act of 1911 imposed an absolute obligation on the owners of a mine to make the roof and sides of every working place secure, the owners did not contravene the latter words of the section by setting the plaintiff to work on making the roof and sides secure, even though the plaintiff's work was not that of exploring or repairing; accordingly the plaintiff was outside the scope of the section and was not entitled to damages against the defendants.

Dictum of LORD ASQUITH OF BISHOPSTONE in *Stapley* v. *Gypsum Mines, Ltd.* ([1953] 2 All E.R. at p. 488) applied.

Per CURIAM: if s. 49 of the Act of 1911 had been contravened the defendants would have been freed from liability by s. 102 (8)* of the Act, since they had shown that it was not reasonably practicable to avoid or prevent the breach.

Appeal dismissed.

[**Editorial Note.** Sections 49 and 102 (8) of the Coal Mines Act, 1911, will be replaced by s. 48 (1) and s. 157 of the Mines and Quarries Act, 1954, 34 HALSBURY'S STATUTES (2nd Edn.) 555, 627, when that Act is brought into force.

As to the duty to make secure the roofs and sides of working places, see 22 HALSBURY'S LAWS (2nd Edn.) 798, para. 1646.

As to civil liability in respect of a breach of a provision of the Coal Mines Act, 1911, see 22 HALSBURY'S LAWS (2nd Edn.) 824, para. 1689.

For the Coal Mines Act, 1911, s. 49, s. 75, and s. 102 (8), see 16 HALSBURY'S STATUTES (2nd Edn.) 133, 144, and 162.]

Cases referred to:

(1) *Stapley* v. *Gypsum Mines, Ltd.*, [1953] 2 All E.R. 478; [1953] A.C. 663; 3rd Digest Supp.
(2) *Wraith* v. *National Coal Board*, [1954] 1 All E.R. 231; 3rd Digest Supp.
(3) *Turner* v. *National Coal Board*, (Dec. 8, 1954), unreported.
(4) *Edwards* v. *National Coal Board*, [1949] 1 All E.R. 743; [1949] 1 K.B. 704; 2nd Digest Supp.

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* The terms of s. 102 (8) are printed at p. 635, letter D, post.

A (5) *Marshall* v. *Gotham Co., Ltd.*, [1954] 1 All E.R. 937; [1954] A.C. 360; 3rd Digest Supp.

Appeal.

This was an appeal by the plaintiff from a judgment of STABLE, J., at Derby Assizes on Feb. 22, 1955, in an action for damages for personal injuries. The plaintiff was employed as a miner in one of the defendants' coal mines. On B July 1, 1952, he was injured by the fall of a stone from the roof of the place where he was working. He claimed damages against the defendants for negligence and breach of their statutory duty under s. 49 of the Coal Mines Act, 1911. By their defence the defendants denied negligence or breach of statutory duty and pleaded that they would rely, if necessary, on s. 102 (8) of the Act of 1911. Alternatively, they alleged that the plaintiff caused or contributed to the accident C by his negligence and/or by a breach of his statutory duty under r. 28 of the General Regulations (Coal Mines), 1913, in that he dislodged or caused to be dislodged a sprag supporting the stone, thereby causing the stone to fall. STABLE, J., found that at the time when the plaintiff met with the accident he and the party of men with whom he was working were engaged in making the roof and sides of the place where they were working secure, and that the work was being D done in accordance with good mining practice. The learned judge held that there was no negligence on the part of the defendants, and that they were not in breach of s. 49 of the Act of 1911 because, since the plaintiff's duty was to make the place secure, the section did not apply to him. The learned judge further held that, if the defendants were in breach of s. 49, under s. 102 (8) they were not liable to the plaintiff in damages, because it was not shown that it was E reasonably practicable to avoid or prevent the breach, and, accordingly, he gave judgment for the defendants. At the conclusion of his judgment the learned judge said that he suspected that the real cause of the subsidence was an act of the plaintiff, but it was not necessary, in the circumstances, to draw that inference.

F *F. S. Laskey* and *J. D. F. Moylan* for the plaintiff.

Gerald Gardiner, Q.C., and *G. R. Swanwick* for the defendants, the National Coal Board.

SIR RAYMOND EVERSHED, M.R.: I will ask ROMER, L.J., to deliver the first judgment.

G **ROMER, L.J.:** This is an appeal from a decision of STABLE, J., in which he dismissed a claim brought by the plaintiff, Patrick Joseph Walsh, against the National Coal Board for damages in respect of an injury which occurred to the plaintiff while working at a mine called Merrylees Pit, Desford, in the county of Leicester on July 1, 1952.

The plaintiff was described as a " lipper ", and his job in the mine at the time H of and some time prior to the accident was to work with other men under a charge hand, following up behind the coal face workmen and, putting it briefly, taking part in the work of enlarging and constructing the working roadhead, so as to form a continuation of the travelling road which leads up to the coal face and to heighten it to about nine feet. The coal seam in this mine is about five feet six inches thick, and the practice is only to work out four feet nine inches of I it, thus leaving about nine inches as a safe support to the roof. In this work of ripping the roadway at the coal face, as it is called, the practice is to blow charges in the super-adjacent ceiling, and this of course brings down a lot of earth and debris. The plaintiff's particular job was to clear away this material and pack it into the pack hole, which is the space on each side of the roadhead where the coal has been excavated. The plaintiff was working on the left-hand side of the roadhead. The material, when packed in, forms a part of the support for the sides of the road and, therefore, for the roof, and the packing also constitutes a convenient means of getting rid of the material and making the road fit for use. The operation as finally concluded involves the fitting of girders and arches in a somewhat complicated manner, into which it is unnecessary to go.

On July 1, 1952, the plaintiff was engaged in this work of lipping and clearing away the rubble which had come down as the result of the charges which had been blown. The shot-firing was done by a Mr. Fraser, who was the deputy of the district and who was concerned with the safety of the men and of the place where they worked. On this day, after a shot had been fired, a stone or boulder of considerable size was observed at about four feet six inches up at the side of the lip embedded in the face. Its weight was variously estimated at one to two tons. Mr. Golding, the charge hand at the time, said in evidence that he prised at this boulder with a crowbar to see whether he could dislodge it. If it had been a small stone or boulder, he thought he could have dislodged it without any harm, but he found that he could not, and, therefore, he decided that the boulder should be " spragged up ". This was done by him and a man called Merriman. The operation of spragging up consisted of driving in a piece of timber prop and wedging it, so as to afford a support for the stone to keep it securely in place and prevent it from falling. There was a conflict of evidence as to what happened then. The plaintiff said that he told Mr. Golding that he ought to take the boulder down, and that later the stone shifted its position to some extent and rested against a girder. The plaintiff said that he mentioned this to Mr. Golding and suggested again that the boulder should be brought down, but that Mr. Golding said " Leave it ". Mr. Golding said that nothing of the kind happened, and the judge did not accept the evidence of the plaintiff on that point. Be that as it may, later on the stone fell while the plaintiff was working, and the stone injured him. The injury which was inflicted on him was a small spinal injury in the lumbar region, and as the result of that he was away from work for a long time. In fact, when the case came before the learned judge, the plaintiff had not returned to work but he had received various treatments.

On June 30, 1953, the plaintiff issued his writ in this action claiming damages. The statement of claim was delivered on July 16, 1954, and the injuries on which he relied were those to which I have already referred. It was alleged in the statement of claim that the plaintiff still suffered from pain at the bottom of his back and around the right hip and discomfort in the right leg. In fact, the medical evidence which was before the learned judge demonstrated beyond doubt that the plaintiff's trouble was not so much due to the physical injury which he had sustained as to traumatic neurasthenia which had resulted in keeping him away from work for all that long time. The judge dismissed the plaintiff's action; he did not assess the amount of damages provisionally on the footing that he might be wrong, and that matter has not been discussed before us.

The plaintiff relied in his statement of claim on breach of statutory duty and breach of the defendants' duty to him at common law, and the learned judge, on both those matters, decided against the plaintiff. It is possible to deal briefly with the issue of common law negligence, because the learned judge held as a fact on the evidence which was adduced before him that the spragging up of the stone and the method of doing it were in accordance with the accepted and best mining practice, and in that he was plainly right, so that any claim founded on common law negligence disappears from the scene.

The main question which was argued before the learned judge and before us is whether the defendants committed a breach of any statutory duty which was imposed on them. In the statement of claim itself the plaintiff relied both on the Coal Mines Act, 1911, and on the Coal Mines (Support of Roof and Sides) General Regulations, 1947 (S.R. & O. 1947 No. 973), reg. 2 and reg. 6. Counsel for the plaintiff told us that he had referred to the regulations mainly because the defendants had themselves relied on reg. 28 of the General Regulations (Coal Mines), 1913 (S.R. & O. 1913 No. 748), in their defence. Neither in the court below nor before us were these regulations relied on by either side, nor was any argument addressed to us on them. The point, therefore, on statutory duty, and the only statutory duty which is relied on, is that which was imposed by s. 49 of the Coal Mines Act, 1911, which is as follows:

> " The roof and sides of every travelling road and working place shall be made secure, and a person shall not, unless appointed for the purpose of exploring or repairing, travel on or work in any travelling road or working place which is not so made secure."

It is convenient to refer now to two other sections of the Act. Section 75 provides:

> " Any person who contravenes or does not comply with any of the provisions of this Part of this Act [Part 2] . . . shall be guilty of an offence against this Act, and, in the event of any contravention of or non-compliance with any of the provisions of this Part of this Act . . . by any person whomsoever, the owner, agent, and manager of the mine shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means by publishing and to the best of his power enforcing those provisions to prevent that contravention or non-compliance."

Section 49 is in Part 2 of the Act. Finally, s. 102 (8) provides:

> " The owner of a mine shall not be liable to an action for damages as for breach of statutory duty in respect of any contravention of or non-compliance with any of the provisions of this Act if it is shown that it was not reasonably practicable to avoid or prevent the breach."

With regard to s. 49, the learned judge held that the plaintiff was at the time of his accident engaged on the task of making the roof safe. He said in his judgment:

> " What happened was this: as the attack on the coal proceeded so the party came along behind at a respectable distance pulling down the roof and building up, with the rings or arches . . . The task that they were engaged on was, of course, making the roof safe. When the coal is cut away the shots are fired, the debris comes down, it is cleared up, packed into the side walls and the overhead roof has to be dealt with from the safety angle, and that is the job which the plaintiff was engaged on when he met with this accident."

It might possibly be contended that a ripping roof such as that where the plaintiff was working did not constitute a roof or sides for the purposes of s. 49, but counsel for the defendants was content that for the purposes of this case the roof be so regarded and that the place where the plaintiff was working should be treated either as a travelling road or a working place within the meaning of those expressions as they appear in s. 49. On that footing the question is whether the defendants were in breach of s. 49 in permitting the plaintiff to work where he was working in circumstances which resulted in his accident. If the purpose of the plaintiff's work was exploring or repairing and if the plaintiff had been appointed to do that work, he cannot found an action for damages on s. 49, because under the second part of that section he was entitled to work, and the defendants were entitled to employ him, at the place where the accident befell him, even though it had not been made secure.

The first point to consider is whether the plaintiff, if the other necessary elements of the section had been satisfied, had been " appointed " for the purpose of exploring or repairing. It was conceded by counsel for the plaintiff that an appointment for the purpose of that section need not be in writing, and I cannot for my part see why it should be attended with any particular formality. Counsel for the plaintiff submitted, however, that there must be a sufficiently definite and certain method of conveying to the men in the mine who was the representative of the board for the purpose of exploring or repairing the travelling road and working places, that the plaintiff was merely working as a miner, and that the evidence did not disclose anything in the nature of an appointment for the purposes of s. 49. I cannot, for my part, accept that submission. What the plaintiff was told to do appears from his own evidence. He was asked by his counsel:

> " Q.—What instructions were you given by Mr. Golding? A.—I was just told to get on with the work. Q.—With what work? A.—Packing the stone on the left-hand side. I worked on the left-hand side. Q.—And did you start to do that? A.—Yes."

Then the learned judge asked:

> " Q.—You were told just to get on with the work; what was it? A.—To pack the stone that was blown down. Q.—What? A.—The coal dust and stuff that was all about the place we packed that into the pack hole. (Counsel for the plaintiff): What is that? A.—It is the space on each side where the coal has been excavated. (STABLE, J.): . . . I do not understand. A.—This was the stone that was blown down. Q.—I know, but I want to get a picture of the thing. When you arrived on the scene what had happened? A.—John Golding was boring the lip. After the firing there is a lot of coal dust in the lip and we first clear the space. As we had that done I helped John Golding."

It appears to me that, if in fact what the plaintiff was doing can be described as work of repair, then he was sufficiently appointed to do it. One must, therefore, I think, approach s. 49 of the Coal Mines Act, 1911, from that starting point.

The position of a man, not under this section, but under an analogous provision, who is engaged in the work of repair connected with safety, was considered by LORD ASQUITH OF BISHOPSTONE in *Stapley* v. *Gypsum Mines, Ltd.* (1) ([1953] 2 All E.R. 478). He was the only one of the Lords of Appeal who referred to this particular point because, on the view which the other Lords of Appeal took, the question did not arise. He was considering the language of the Metalliferous Mines General Regulations, 1938 (S.R. & O. 1938 No. 630), reg. 7 (3), which is in very much the same terms, for present purposes, as the section which we are considering in the present case. Regulation 7 (3) provides:

> " The roof and sides of every travelling road, outlet and working place shall be made secure, and no person, unless engaged in repairing or in investigating the safety of the workings shall travel on or work in any travelling road or working place which is not so made secure."

LORD ASQUITH said ([1953] 2 All E.R. at p. 488):

> " The respondents carried out their obligations under reg. 7 (3) to the letter, if the first line and a half of that regulation be read with the last two and a half lines. If the respondents detail X and Y to repair a defect in the walls or roof to restore safety, they cannot possibly, it seems to me, be told that they are breaking the regulation by permitting the repairers to work in a working place which, pending the completion of the repair, is insecure."

That, as I have already said, was an observation of LORD ASQUITH on a point which was not mentioned by the other Lords, but the observation has, in fact, been adopted and applied in two cases which have been brought to our attention, *Wraith* v. *National Coal Board* (2) ([1954] 1 All E.R. 231), a decision of GLYN-JONES, J., and *Turner* v. *National Coal Board* (3), which was decided by STREATFEILD, J., on Dec. 8, 1954. *Turner's* case (3) is unreported, but we were furnished with a note of the judgment.

A It appears to me, if I may respectfully say so, that the observation which LORD ASQUITH made was plainly right. In the illustration, however, which LORD ASQUITH gave, and in both the subsequent cases which I have mentioned, the men were doing actual work of repair which was necessary in order to restore safety. It has been said that LORD ASQUITH's principle does not of necessity apply to the present case, for the reason that the plaintiff, who undoubtedly was B not engaged on any work of exploration at the time when he met with his accident, was not engaged on work of repairing. I confess that that submission has caused me some little trouble. In a sense, of course, it may be said that the nature of the operation which was taking place, the blowing down of the roof, the collection and shovelling away of the debris and the filling up of the excavations which had been left after the coal had been dug out, amounted to work of tidying up, repair C and restoration, but I think, for my part, that that is a rather forced application of the word "repair" to the facts of the case. I agree with the submission of counsel for the plaintiff that, prima facie, one repairs something which has already been made and needs to be repaired; as, for example, in *Turner's* case (3), where there was a roof which had been built and had sagged. One could accurately say that the work of restoring that roof to its former condition was D the work of repair, but it is not a normal use of the word "repair" to apply it to the making of something which was not already there before, namely, the extension of a travelling road.

I do not find it necessary to express any concluded opinion on that point because, in my opinion, the plaintiff is outside the scope of s. 49 by an implication which I find quite irresistible which arises from the opening words of the section, E which I will read again: "The roof and sides of every travelling road and working place shall be made secure . . ." Those words impose, as has been held in earlier cases, notably in *Edwards* v. *National Coal Board* (4) ([1949] 1 All E.R. 743), an absolute obligation on the employer, namely, to make the roof and sides secure. The way the position strikes me is that, if a roof or sides require to be made secure, I do not know how this can be done unless men F are sent in to do it. If in a case like the present the employers commit an offence by sending men to make a roof secure, as distinct from repairing it, then they cannot perform the obligation which the first part of the section imposes on them and are thus in breach of it. If, on the other hand, they do send men in, then, on the contrary argument, they are in breach of the second part of the section. The result would be that, where a safe roof has to be pro- G vided and has to be made in an unsafe place, the employers cannot, in the absence of the implication to which I have referred, by any means avoid committing either one offence or the other. This would appear to be an impossible position, and accordingly, in my opinion, an inevitable inference arises that the employers may lawfully take the necessary step to perform the obligation which is laid on them and in the absence of which their statutory duty must in many cases H remain unperformed. I say "in many cases" because most often the work would be work of actual repair, and, therefore, men sent in to do the work could lawfully be there and the employers could lawfully send them under the express words of the second part of the section. In a case, however, such as the one with which we are dealing now, where there is no existing roof or sides which can properly be described as a roof or sides—because the whole point is to I provide a safe roof and sides—then unless the implication to which I have referred is accepted, the position must, in my judgment, be as I have indicated.

I think that that would appear to have been the view which the learned judge took, because I do not think that he decided that the plaintiff was engaged on work of repair; at all events, he makes no express finding about it. Having said that the plaintiff was engaged on work of safety, the learned judge referred to the first two lines of s. 49 and then said:

> "What that presupposes is this: that as the coal is cut and the stone

> and debris brought down, the roof and sides left like that are not secure, and the section imposes, in this case on the National Coal Board [the defendants], the absolute categorical duty of making that secure. That means that somebody has got to go through when the roof is not secure and carry out the necessary operation which does make it secure. When that operation has been done, then the men, one hopes, if it has been done properly, can work and move about up and down what I shall call a tunnel, but probably the correct phrase is a gate, without incurring any risk of the wall and roof collapsing."

Therefore, it appears to me that the plaintiff cannot rely on s. 49, possibly because he was in fact engaged on work of repair, but, even if he was not, then because by the necessary force of the obligation expressly imposed on the employers, he was there as being a man whom the employers were entitled and, indeed, bound to send there for the purpose of doing the work.

Counsel for the plaintiff met that point by saying that there was no reason to read any implication such as I have mentioned into s. 49; that the defendants were in breach of the section, on the assumption that the plaintiff was not doing the work of repair, by having the plaintiff there at the time; and that the remedy of protection which is afforded to the defendants is to be found in the provisions of s. 102 (8).* [HIS LORDSHIP read the sub-section, and continued:] Counsel for the plaintiff submitted that this was the section on which the defendants must rely, but they could not introduce an implication into s. 49 or read words into it which were not there. I do not think that the suggested protection to the defendants is in law sufficient or is in any way a substitution for the words which, I think, should be incorporated by implication in s. 49. As counsel for the defendants pointed out, s. 102 (8) in any case affords protection only against civil liability and would not afford protection against criminal prosecution for breach of statutory duty, and that point would not be at all satisfactorily met by s. 75. I think that that is true. In any case, it appears to me to be a curious result that s. 49 should be imposing an express obligation on an employer and at the same time saying: " You must not do it, but you will be all right if you can bring yourself within the language of s. 102 (8) ". As I have said, I do not think that s. 49 applies at all in this case, and on that view the other part of the case, which proceeded on the hypothesis that the defendants had committed a breach of statutory duty imposed by s. 49, does not arise.

I propose for my part to say only a word or two about it. I have already said that the duty imposed by s. 49 is an absolute duty, and that was laid down in, amongst other cases, *Edwards* v. *National Coal Board* (4). The plaintiff says that in the present case s. 102 (8) does not afford protection to the defendants because they have not shown, and the onus was on them to show, that it was not reasonably practicable to avoid or prevent the breach which, ex hypothesi, arose. The plaintiff says that, in the first place, the defendants, through the charge hand and other relevant employees, should not have left the stone there at all but should have brought it down, or, alternatively, if they did not bring it down, then they ought to have spragged it up in a more efficient manner than the manner in which they did sprag it up, and, therefore, they have not successfully shown that it was not reasonably practicable to have avoided this accident. With regard to the first suggestion, that the stone ought to have been taken down, it is quite clear on the evidence that not only was it in accordance with good mining practice to do what was done, namely, to leave it there and sprag it up, but also that, if they had brought it down, such an action would have been probably attended with very grave consequences. The only way of getting it down was to blow it down with explosives. All the witnesses whose evidence the learned judge accepted said that to adopt that course would have created considerable danger from the point of view of bringing the roof down. It may have been possible, and it may, on one view, have been practicable, to have brought the stone down, but on the evidence it cannot be said that it was reasonably practicable to have brought it down, having regard to the almost certain consequences, or, if that is putting it too high, the very probable consequences, which in the minds of these experts would have followed on such a course.

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* The terms of the sub-section are set out at p. 635, letter D, ante.

One must bear in mind, in approaching this, what was said by LORD REID, amongst other learned Lords who heard *Marshall* v. *Gotham Co., Ltd.* (5) ([1954] 1 All E.R. 937) where their Lordships were considering s. 23 of the Metalliferous Mines Regulation Act, 1872, and reg. 7 (3) of the Metalliferous Mines General Regulations, 1938. Section 23 provided:

> "The following general rules shall, so far as may be reasonably practicable, be observed in every mine to which this Act applies . . ."

[HIS LORDSHIP then read the provisions of reg. 7 (3),* and continued:] LORD REID said ([1954] 1 All E.R. at p. 942):

> "But, in my judgment, there may well be precautions which it is 'practicable' but not 'reasonably practicable' to take, and I think that that follows from the decision of the Court of Appeal in *Edwards* v. *National Coal Board* (4). I agree with what was said in that case by ASQUITH, L.J., and I do not find it helpful to consider whether this statutory duty is in every case the same as an employer's common law duty. I think it enough to say that, if a precaution is practicable, it must be taken unless, in the whole circumstances, that would be unreasonable."

The other learned Lords expressed similar views, but I think the matter is sufficiently crystallised by what LORD REID said.

It appears to me to be plain on the evidence that it would have been unreasonable, and therefore not reasonably practicable, to have put a charge of explosives in this boulder and brought it down. That being so, the only other step ever suggested by anybody which could have been taken to deal with the position which arose was to sprag it up, and that was done. The learned judge found as a fact that it was properly done, and he expressed his conclusions on the point as follows—he was referring to putting the sprag into position:

> "I am satisfied that, properly executed, this was the proper safety precaution to take. Was the job done properly ? It seems on the evidence that it was. Mr. Merriman, who actually did the work, told me how he had done it, and Mr. Fraser, the deputy, inspected the job after it had been done and passed it as a perfectly satisfactory job."

It appears to me, accordingly, that it is impossible for the plaintiff successfully to say that the second and only practicable alternative which was open to the defendants was not adequately and efficiently performed. It seems to me that what was done, as the learned judge found, was not only in accordance with ordinary mining practice, but it was efficiently and properly done and the doing of it constituted the only alternative that was reasonably open to the defendants to take. Accordingly, had the point become necessary for determination, I should have concluded, as the learned judge did, that the defendants were entitled to the protection of s. 102 (8). I would, accordingly, dismiss this appeal.

SIR RAYMOND EVERSHED, M.R.: I am of the same opinion. I add only a few observations on the main question which arises under the terms of the Coal Mines Act, 1911; and those few observations I add only out of respect to the argument and because the main question is, I think, not easy, as it is certainly not unimportant.

Section 49 of the Act, on its terms, plainly imposes an obligation which, so far as criminal liability is concerned, is plainly absolute. The absolute nature of the obligation, qualified only as to civil liability by s. 102, was the subject of the decision in *Edwards*' case (4). It would, indeed, be a manifest absurdity, if the statute were at one and the same time to impose an absolute obligation to make a place secure and couple it with an absolute prohibition against allowing anybody to make it secure. On these grounds, as ROMER, L.J., has pointed out, it is plain that one answer is to treat the making of the place secure as necessarily and impliedly excluded from the operations which otherwise cannot be allowed. If, however, that were not the right construction, I should for my part conclude that what the plaintiff here was engaged in doing was an operation of repairing. I agree with counsel for the plaintiff that the word " repair " in its ordinary context indicates the putting back into good condition of something that, having been in good condition, has fallen into bad condition. That is undoubtedly the ordinary sense of it when the word " repair " is applied to a travelling road. This, however, was not a travelling road, but a working place, and when the word " repair " is applied to a working place, it seems to me certainly no extravagant distortion of its meaning to say that it would include such an operation as was here being performed.

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* See p. 636, letter G, ante.

If then, as I hold and as the learned judge held, the plaintiff was not within the scope of s. 49, that is the end of the matter. If, however, he was within the scope of s. 49, then the absolute liability in this civil action may be qualified by s. 102 (8). Again I agree with the learned judge that, on the hypothesis which I am now considering, the defendants discharged the onus which that sub-section placed on them. I will assume that the obligation to do everything that was reasonably practicable may well be an obligation greater than that which the common law would impose. But the question whether that which was done was an excuse within s. 102 (8) has to be considered at the time when the decision had to be taken. This is not a case where the defendants did nothing and where they would have to show that it was not reasonably practicable to do anything. This was a case in which steps were taken to perform the obligation, that is, the obligation not to put or allow men to work in a place not made secure. On the evidence they could then do one of two things in order to comply. They could sprag the stone or they could dislodge it by the use of explosives. Those were the only two alternatives which presented themselves at the relevant time. They chose the former, which, on the evidence accepted by the learned judge, was, technically speaking, plainly preferable. If that is so, it would appear to me that, although to have blown out this stone might have been feasible, or, from an engineering point of view, practicable, it would have been unreasonable as being the less to be preferred method of meeting the situation. If the defendants established that that which they did not do was, though practicable, unreasonable, they should be taken to have established that that alternative was not reasonably practicable. I agree with ROMER, L.J., that this appeal should be dismissed.

BIRKETT, L.J.: I also agree and have nothing to add.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Bryan O'Connor & Co.* (for the plaintiff); *D. H. Haslam* (for the defendants).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

A

BUCKLE *v.* BUCKLE (otherwise WILLIAMS).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), June 30, November 7, 8, 1955.]

B *Nullity—Re-marriage—Former marriage dissolved by decree under Indian and Colonial Divorce Jurisdiction Acts,* 1926 *and* 1940*—Re-marriage of wife less than six months after decree—Earlier Indian statute prohibiting re-marriage for six months after decree—Indian Divorce Act,* 1869 (*Act No.* 4 *of* 1869), *s.* 57*—Indian and Colonial Divorce Jurisdiction Act,* 1926 (16 *&* 17 *Geo.* 5 *c.* 40), *s.* 1 (1), *proviso* (*b*).

C The wife married W. in December, 1934. W. was granted a decree nisi of divorce in November, 1943, by the Indian High Court under the Indian and Colonial Divorce Jurisdiction Acts, 1926 and 1940. The decree was made absolute on Mar. 31, 1944, and on Apr. 3, 1944, the wife was married to her present husband, the petitioner, in India. Subsequently she deserted him. She brought proceedings for nullity in the Indian High Court where the court found that the marriage of April, 1944, was null and void on the D ground that less than the six months required by s. 57 of the Indian Divorce Act, 1869* had elapsed after the decree absolute of March, 1944, before the re-marriage. The husband petitioned for divorce on the ground of the wife's desertion which was established. On the question whether the marriage of April, 1944, was invalid under the Indian Divorce Act, 1869, having regard to the fact that the Act of 1926, s. 1 (1), proviso (b)† E required the court in India exercising divorce jurisdiction conferred by the Act of 1926 to act on principles and rules as nearly as might be conformable to those on which the High Court in England acted,

Held: the marriage of the husband and the wife in April, 1944, was a valid marriage, because, after the decree absolute dissolving the wife's prior marriage had been made, she was free (in conformity with the principles F of law on which the High Court acted in England) to re-marry, and the provisions of the Indian Divorce Act, 1869, were not to be imported into the Indian and Colonial Divorce Jurisdiction Act, 1926, but rather were impliedly excluded by s. 1 (1), proviso (b), of that Act; accordingly, as the alleged desertion by the wife was established, a decree nisi would be granted.

Le Mesurier (*otherwise Gordon*) v. *Le Mesurier* (1930) (99 L.J.P. 33) G distinguished.

[Editorial Note. The Indian and Colonial Divorce Jurisdiction Acts, 1926 and 1940, no longer confer jurisdiction on the courts of India or of Pakistan (see Indian Independence Act, 1947, s. 17; 6 HALSBURY'S STATUTES (2nd Edn.) 425). Their application has, however, been extended by virtue of the H Colonial and Other Territories (Divorce Jurisdiction) Act, 1950 (29 HALSBURY'S STATUTES (2nd Edn.) 140) to certain protectorates and trust territories (see, for the orders in council, 4 HALSBURY'S STATUTORY INSTRUMENTS 269, 270 and SUPPLEMENT), and by s. 1 of the Act of 1950 the Acts of 1926 and 1940 are made applicable where the domicil of the persons married is in Northern I Ireland.

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* The Indian Divorce Act, 1869, s. 57, provides: "When six months after the date of an order of a High Court confirming the decree for a dissolution of marriage made by a district judge have expired, or when six months after the date of any decree of a High Court dissolving a marriage have expired, and no appeal has been presented against such decree to the High Court in its appellate jurisdiction, or when any such appeal has been dismissed, or when in the result of any such appeal any marriage is declared to be dissolved, but not sooner, it shall be lawful for the respective parties to the marriage to marry again, as if the prior marriage had been dissolved by death . . . "

† The terms of the proviso are printed at p. 644, letter G, post.

As to re-marriage after decree of divorce, see 12 HALSBURY'S LAWS (3rd Edn.) 410, para. 911 note (a); and for the Matrimonial Causes Act, 1950, s. 13 (1), see 29 HALSBURY'S STATUTES (2nd Edn.) 400.

As to foreign decree forbidding parties to re-marry until after the expiration of a certain period of time, see 7 HALSBURY'S LAWS (3rd Edn.) 116, para. 204 notes (g) and (h); and for cases on the subject, see 11 DIGEST (Repl.) 461, *951*, *952*.

For the Indian and Colonial Divorce Jurisdiction Act, 1926, s. 1, see 3 HALSBURY'S STATUTES (2nd Edn.) 1159.]

Cases referred to:

(1) *Keyes* v. *Keyes & Gray*, [1921] P. 204; 90 L.J.P. 242; 124 L.T. 797; 11 Digest (Repl.) 467, *1003*.

(2) *Warter* v. *Warter*, (1890), 15 P.D. 152; 59 L.J.P. 87; 63 L.T. 250; 54 J.P. 631; 11 Digest (Repl.) 461, *952*.

(3) *Le Mesurier* (*otherwise Gordon*) v. *Le Mesurier*, (1930), 99 L.J.P. 33; 142 L.T. 496; 27 Digest (Repl.) 554, *5046*.

Petition.

On Dec. 6, 1934, the wife married one Williams. On Nov. 29, 1943, Mr. Williams was granted a decree nisi of divorce in the High Court at Lahore on the ground of the wife's adultery with the co-respondent, the husband in the present proceedings. On Mar. 31, 1944, that decree was made absolute. On Apr. 3, 1944, the wife and the husband were married at Quetta, then in British India. Subsequently the wife left the husband and presented a petition for nullity under the Indian Divorce Act, 1869, on the ground that the purported marriage with the husband had taken place less than six months after the decree of divorce granted to Mr. Williams. The husband was not served with the petition and on Apr. 21, 1953, the wife was granted by the district judge at Delhi a decree nisi which was made absolute by the High Court at Simla on Dec. 21, 1953. The husband now petitioned for divorce on the ground of the wife's desertion, and, by amendment to his petition, prayed in the alternative for a decree of nullity on the ground that the marriage on Apr. 3, 1944, was invalid under the Indian Divorce Act, 1869, s. 57, since it had been entered into less than six months after the decree dissolving the wife's marriage with Mr. Williams. The suit was undefended and came before KARMINSKI, J., on June 30, 1955, who adjourned it for argument by the Queen's Proctor.

D. J. C. Ackner for the husband.
J. P. Comyn for the Queen's Proctor.

KARMINSKI, J., after reading s. 57 of the Indian Divorce Act, 1869, and stating the facts, continued: It is clear that the period of six months required by s. 57 of the Indian Divorce Act, 1869, had not elapsed between the decree absolute on Mar. 31, 1944, and the re-marriage on Apr. 3, 1944, but there had not even been six months between the granting of the decree nisi on Nov. 29, 1943, and the re-marriage. That being the case, if s. 57 of the Indian Divorce Act, 1869, were applicable, it is clear that the husband and the wife could not be and were not free to go through a legal ceremony of marriage in April, 1944. In those circumstances I have to consider whether the marriage entered into between the husband and the wife in 1944 was or was not valid and subsisting.

Counsel for the husband opened the case with his usual care and skill, and put the matter fairly before me indicating at once the points of difficulty. It occurred to me that the matter was of sufficient difficulty, and perhaps of sufficient importance, to warrant my asking once again for the assistance of the Queen's Proctor, this being a case in which the wife had not appeared and had taken no part in the proceedings, and I have had, as always, the greatest assistance from counsel for the Queen's Proctor in the presentation of his side of the case. The point which I have to decide arises from certain subsequent proceedings which were taken in India after the husband and the wife in the present case had separated.

That the wife is in desertion of the husband there can be no doubt, and, indeed, counsel for the Queen's Proctor, told me at once that after the usual inquiries had been made he was in the position to admit, without any reservations, that the desertion alleged by the husband had been proved—assuming always that there had been a valid marriage between the husband and the wife. The subsequent proceedings in India were initiated by the wife after she had left the husband in Hong Kong or Canton. I use the alternative deliberately because it is not clear from the evidence, which has been on affidavit, where the last cohabitation was. The wife brought proceedings in the courts at Delhi in which she apparently asserted that she was entitled to a decree of nullity against the husband under s. 18 of the Indian Divorce Act, 1869. The husband did not appear in those proceedings and, indeed, it is clear that the petition was not served on him, but an advertisement had been put in an Indian paper. I do not know why the petition was not served on the husband since he had, for many years, been serving with a well-known oil company and only quite recently had been in correspondence with the wife; indeed, it would appear that the husband's solicitors and the wife's solicitors were in communication at that time. At any rate, the petition was not served and the husband was not present, and the learned judge of the court at Delhi found that the marriage which these parties had purported to go through in 1944 was null and void, as it was before the expiry of the statutory period of six months from the date when the decree dissolving the marriage between the wife and Mr. Williams was made absolute.

The judgment proceeded to deal with the provisions of s. 57 of the Indian Divorce Act, 1869, and the cases decided thereunder and concluded with these words:

> "The [wife] claims Indian domicil; her parents were born in India and she last resided with the [husband] in Delhi."

In fact, the husband when he last resided with the wife was employed in China. I have no information as to the domicil of the wife and I am not able to make any decision about it. With regard to Mr. Williams I again have no information but I cannot exclude the possibility that his domicil was English and that he had never changed that. So far as the husband is concerned, it would appear that his domicil of origin was English and has always so remained. Regarding the suggestion that the husband was employed by a company in Delhi after the marriage, that appears to be incorrect because a good deal of his married life was spent in China with the wife. I must not be thought to be criticising that judgment, though it does appear to be based on some possible misapprehension of fact. What I am concerned with is this: notwithstanding that judgment by a court in India, is the marriage between the husband and the wife valid or not?

I turn now to the original decree obtained by Mr. Williams in 1943. That was expressed to be under the Indian and Colonial Divorce Jurisdiction Acts, 1926 and 1940, and nobody has queried the jurisdiction of the Indian court to make that decree. Counsel for the husband has argued that s. 57 of the Indian Divorce Act, 1869, is irrelevant to the present case because the decree dissolving the wife's previous marriage to Mr. Williams was granted under a different Act or Acts, namely, the Indian and Colonial Divorce Jurisdiction Acts, 1926 and 1940. It is important to look at the provisions of the Indian and Colonial Divorce Jurisdiction Act, 1926. That Act came into existence following the important decision in *Keyes* v. *Keyes & Gray* (1) ([1921] P. 204). Prior to that decision it had been thought apparently that the Indian courts had power to dissolve the marriages of British subjects domiciled in India under the Indian Divorce Act, 1869, and force was given to that view by a number of decisions of which it is only necessary to refer briefly to that given by Sir James Hannen, P., in *Warter* v. *Warter* (2) (1890) (15 P.D. 152), where precisely the same point arose, namely, that a marriage had taken place within the six months after the final decree. Sir James Hannen found that the lady who had obtained the divorce was subject to the Indian law of divorce and could only contract a valid second marriage by showing that the incapacity arising from her previous marriage had been effectually removed by the proceedings taken under the law. That decision appears to have assumed that the Indian courts had jurisdiction over persons resident in India but not domiciled there. In *Keyes* v. *Keyes & Gray* (1) SIR HENRY DUKE, P., had the advantage of having the matter very fully argued before him. It is interesting to note that in the course of the argument the Crown, which was represented by Sir Gordon Hewart, A.-G., and other counsel, expressed a different view from that of the Secretary of State for India, who was represented by Sir Erle Richards, K.C., but the learned President, having heard the arguments of both the Crown and of the Secretary of State for India, came to the conclusion that the divorce courts in India had no jurisdiction to decree a dissolution of marriage between parties not domiciled in India, even though the marriage had been celebrated in India and the parties were, in fact, resident there.

In the result two Acts were passed: namely, the Indian Divorces (Validity) Act, 1921, which was passed immediately to restore the position of those who had no doubt innocently obtained decrees under the Indian Divorce Act, 1869, and then re-married, and subsequently the Indian and Colonial Divorce Jurisdiction Act, 1926 which extended not only to India but virtually to the whole Commonwealth and Empire. That Act was entitled:

> "An Act to confer on courts in India and other parts of His Majesty's Dominions jurisdiction in certain cases with respect to the dissolution of marriages, the parties whereto are domiciled in England or Scotland, and to validate certain decrees granted for the dissolution of the marriage of persons so domiciled."

Section 1 (1) of the Act, as amended, reads:

> "Subject to the provisions of this Act, a High Court in British India . . . shall have jurisdiction to make a decree for the dissolution of a marriage . . . where the parties to the marriage are British subjects domiciled in England or in Scotland, in any case where a court in British India would have such jurisdiction if the parties to the marriage were domiciled in India: Provided that—(a) the grounds on which a decree for the dissolution of such a marriage may be granted by any such court shall be those on which such a decree might be granted by the High Court in England according to the law for the time being in force in England; and (b) any such court in exercising such jurisdiction shall act and give relief on principles and rules as nearly as may be conformable to those on which the High Court in England for the time being acts and gives relief; . . . and (d) any such court may refuse to entertain a petition in such a case if the petitioner is unable to show that by reason of official duty, poverty or any other sufficient cause, he or she is prevented from taking proceedings in the court of the country in which he or she is domiciled, and the court shall so refuse if it is not satisfied that in the interests of justice it is desirable that the suit should be determined in India."

It is clear, therefore, that by a special Act of the legislature the courts in India and, indeed, elsewhere, were empowered to deal with the matrimonial affairs of persons domiciled in this country and to grant them relief. It is of great importance to look at proviso (b).

So far as s. 57 of the Act of 1869 is concerned, there is no parallel provision in any English statute. The first divorce Act in this country, the Matrimonial Causes Act, 1857, expressly provided by s. 57 the contrary, since it indicated that when a marriage had been dissolved by a final decree either of the parties was free to re-marry forthwith. That provision of our law has remained unchanged until this day although the original enactment has been replaced.* At the time when the Act of 1926 was passed the applicable section relating to re-marriage of divorced parties was s. 184 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925. At the time of the passing of the Act of 1940, that was still the relevant provision although s. 12 of the Matrimonial Causes Act, 1937, had altered s. 184 (2) and (3) in relation to the duties of clergy in re-marrying divorced persons or of lending their churches or chapels for that purpose. It is not, in my view, necessary to examine the Indian and Colonial Divorce Jurisdiction Act, 1940, which was designed to deal with certain difficulties which had arisen under the Act of 1926; s. 1 of the Act of 1940 was expressed (in the marginal note to the section) to be for the

> "Removal of doubts as to effect of Matrimonial Causes Act, 1937, on divorce jurisdiction under Indian and Colonial Divorce Jurisdiction Act, 1926."

It was argued on behalf of the Queen's Proctor that the Indian and Colonial Divorce Jurisdiction Act, 1926, by implication brought into operation parts of the Act of 1869, including s. 57, and counsel rightly called my attention to *Warter* v. *Warter* (2), to which I have already briefly referred, and to *Le Mesurier* (*otherwise Gordon*) v. *Le Mesurier* (3) (1930) (99 L.J.P. 33), a decision of LORD MERRIVALE, P. The facts of that case were a good deal different from those of the present case. The High Court at Lahore had dissolved an earlier marriage there on Jan. 7, 1921; subsequently on Feb. 7 of the same year the petitioner in that case and the respondent went through a ceremony of marriage at Colombo in Ceylon. The position when the matter came before LORD MERRIVALE was that any doubts as to the validity of the Lahore decree had been removed already by the Indian Divorces (Validity) Act, 1921, and also by s. 3 of the Indian and Colonial Divorce Jurisdiction Act, 1926. So that, in spite of the difficulties which had been brought to light by his decision in *Keyes* v. *Keyes & Gray* (1) LORD MERRIVALE was dealing in *Le Mesurier's* case (3) with the position that there was an Indian decree under the Indian Divorce Act, 1869, which decree would have been invalid but for the validating provisions of the Indian Divorces (Validity) Act, 1921. LORD MERRIVALE found that, though the Lahore decree was valid, the subsequent marriage was invalid because the period of six months had not expired before the re-marriage and he accordingly pronounced a decree of nullity. In the present case, however, I am dealing with a decree which on the face of it is expressed to have been made by the Indian court under the Acts of 1926 and 1940 and, doing my best to construe the Act of 1926, I cannot bring into it the provisions of the Act of 1869. If the legislature had so desired, I do not doubt that they would have said so. I think that the Act says exactly the opposite because it says expressly in s. 1 (1), proviso (b), that the Indian court in exercising this jurisdiction

> "shall act and give relief on principles and rules as nearly as may be conformable to those on which the High Court in England for the time being acts and gives relief."

I have to look, of course, at the law exercised in this court as it stood in 1926 and I have no doubt that the law then, as now, allowed parties to re-marry as soon as a final decree has been pronounced. As counsel for the husband has argued with great force, the circumstances of the Act of 1926 make it essential for it to contain express words embodying the provisions of the Act of 1869, if that were its object. As he also pointed out, however, on the face of it s. 1 of the Act of 1926, expressly or by implication, excludes any of the provisions of the Act of 1869.

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* See, now, the Matrimonial Causes Act, 1950, s. 13 (1), 29 HALSBURY'S STATUTES (2nd Edn.) 400.

In my view, the marriage between the husband and the wife in the present case was perfectly valid. It was entered into after the decree nisi of a competent court dissolving the marriage had been made absolute and I think that the right course in the present case is to apply the English principles of law as they then stood and as they still stand, and to say that the parties were free to enter into marriage on Apr. 3, 1944. I, therefore, find that the marriage was valid. I also find that the wife has been guilty of desertion as alleged in the petition and I pronounce a decree nisi dissolving the marriage between the husband and the wife on the ground of such desertion.

Decree nisi.

Solicitors: *Stilgoes* (for the husband); *Queen's Proctor.*

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

PRACTICE DIRECTION.

WRIT OF POSSESSION

Application for leave to issue writ of possession under R.S.C., Ord. 47, *r.* 1.

Consequent on the decision of the Court of Appeal in *Barclays Bank, Ltd.* v. *Roberts* ([1954] 3 All E.R. 107), these further directions are given:—

Where the defendant or any other persons are in actual possession of the premises of which possession is sought, an affidavit applying for leave to issue a writ of possession must contain the following information in addition to that indicated by the form in the practice books:—

(a) whether the premises or any part thereof is a dwelling-house;
(b) if so (i) what is the rateable value of the dwelling-house;
    (ii) whether it is let furnished or unfurnished and, if furnished, what is the amount of furniture therein;
(c) any other matters which will assist the Master in determining whether any occupier is protected by the Rent Acts.

F. ARNOLD BAKER,
Senior Master.
November 14, 1955.

H.R.H. PRINCE ERNEST AUGUSTUS OF HANOVER *v.* ATTORNEY-GENERAL.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett and Romer, L.JJ.), October 21, 24, 25, November 16, 1955.]

Alien—British nationality—Lineal descendant of Electress Sophia—4 & 5 Anne c. 4 or c. 16—British Nationality Act, 1948 (11 *&* 12 *Geo.* 6 *c.* 56), *s.* 12.

Statute—Construction—Preamble—Acts in pari materia—Ex post facto inconvenience or absurdity—Whether clear enacting words restricted—4 & 5 Anne c. 4 or c. 16.

The statute 4 & 5 Anne c. 16*, intituled " An Act for the Naturalization of the most Excellent Princess Sophia Electress and Dutchess Dowager of Hanover and the Issue of her Body " by its preamble recited that ". . . to the End the said Princess . . . and the Issue of Her Body and all Persons lineally descending from Her may be encouraged to become acquainted with the Laws and Constitutions of this Realm it is just and highly reasonable that they in Your Majesties Life time . . . should be naturalized and be deemed taken and esteemed natural born Subjects of England . . ." The Act provided: ". . . the said Princess . . . and the Issue of Her Body and all Persons lineally descending from Her born or hereafter to be born be and shall be . . . deemed . . . natural born Subjects of this Kingdom . . ." The statute was repealed by the British Nationality Act, 1948, s. 34 (3), but by s. 12 a person who was a British subject immediately before the commencement of that Act (Jan. 1, 1949) became a citizen of the United Kingdom and Colonies. The plaintiff, who was born in 1914 in or near Hanover and was a member of the German army during the late war, was lineally descended from the Electress Sophia and claimed a declaration that he was a British subject. About four hundred lineal descendants of the Electress Sophia were living in November, 1955, and they included members of the royal families of most of the European countries.

Held: the plaintiff was a British subject by virtue of the statute 4 & 5 Anne c. 16 and s. 12 of the British Nationality Act, 1948, since the essential words in the enacting part of the Statute of Anne were clear and unambiguous and made all persons lineally descended from the Princess Sophia, whenever born, British subjects; the effect of these enacting words was not restricted either by the preamble, which gave only a doubtful indication of the intention of Parliament, or by consideration of earlier statutes in pari materia which gave no certain clue to that intention, or by considerations of inconvenience consequential on the enactment, because the inconvenience did not follow immediately on the passing of the statute but rather arose through the statute being left unrepealed for so long.

Yates v. *Regina* (1885) (14 Q.B.D. 648) distinguished.

Decision of VAISEY, J. ([1955] 1 All E.R. 746) reversed.

[**Editorial Note.** The statutes 4 & 5 Anne c. 16 and 4 & 5 Anne c. 14 are described for convenience in this report by the regnal year and chapter numbers which they bear in the STATUTES OF THE REALM and which accordingly they bear also in modern legislation concerning them, e.g., in the provisions which repealed them. The text of these statutes as printed subsequently in this report accords with the text in the STATUTES OF THE REALM, 1821, printed by command of His Majesty, King George the Third, subject to the modifications which are noted. Acts passed before the end of the reign of Queen Anne may bear alternative chapter numbers, e.g., 4 & 5 Anne c. 14 is in Ruffhead 4 & 5 Anne c. 1.

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* The chapter number given to the statute in the STATUTES OF THE REALM is c. 16; the statute is alternatively numbered 4 & 5 Anne c. 4. The note concerning this in the STATUTES OF THE REALM reads " This is Chapter IV in the common printed editions. The original Act is not amongst the Acts of this Year at the Parliament Office."

As to statutory rights not lapsing because of non-user, see 31 HALSBURY'S LAWS (2nd Edn.) 560, para. 757; and for cases on the subject, see 42 DIGEST 772, 773, *2004-2008*.

As to a preamble restraining enacting words, see 31 HALSBURY'S LAWS (2nd Edn.) 462, para. 558 note (i); and for cases on the subject, see 42 DIGEST 652-654, *599-629*.

For the British Nationality Act, 1948, s. 12, see 28 HALSBURY'S STATUTES (2nd Edn.) 146; and for the Act of Settlement (1700), see 4 HALSBURY'S STATUTES (2nd Edn.) 158.]

Cases referred to:

(1) *Powell* v. *Kempton Park Racecourse Co., Ltd.*, [1899] A.C. 143; 68 L.J.Q.B. 392; 80 L.T. 538; 63 J.P. 260; 42 Digest 652, *595*.

(2) *Halton* v. *Cove*, (1830), 1 B. & Ad. 538; 109 E.R. 887; sub nom. *Hatton* v. *Cove*, 9 L.J.O.S.K.B. 74; 42 Digest 651, *586*.

(3) *Sussex Peerage Case*, (1844), 11 Cl. & Fin. 85; 6 State Tr. N.S. 79; 3 L.T.O.S. 277; 8 E.R. 1034; 42 Digest 650, *569*.

(4) *R.* v. *Bateman*, (1857), 8 E. & B. 584; 27 L.J.M.C. 95; 30 L.T.O.S. 150; 120 E.R. 218; 16 Digest 12, *47*.

(5) *Yates* v. *Regina*, (1885), 14 Q.B.D. 648; 54 L.J.Q.B. 258; 52 L.T. 305; 49 J.P. 436; 32 Digest 202, *2521*.

(6) *R.* v. *Clarence*, (1888), 22 Q.B.D. 23; 58 L.J.M.C. 10; 59 L.T. 780; 53 J.P. 149; 42 Digest 630, *321*.

(7) *The India*, (1864), 33 L.J.P.M. & A. 193; 12 L.T. 316; 42 Digest 773, *2007*.

(8) *Salomon* v. *Salomon & Co., Salomon & Co.* v. *Salomon*, [1897] A.C. 22; 66 L.J.Ch. 35; 75 L.T. 426; 42 Digest 622, *225*.

(9) *Caledonian Ry. Co.* v. *North British Ry. Co.*, (1881), 6 App. Cas. 114; 42 Digest 638, *410*.

(10) *Brett* v. *Brett*, (1826), 3 Add. 210 (162 E.R. 456); *affd.* (1827), 3 Russ. 437n. (38 E.R. 640); 42 Digest 647, *529*.

(11) *Ryall* v. *Rowles*, (1749), 1 Ves. Sen. 348 (27 E.R. 1074); 1 Atk. 165 (26 E.R. 107); 42 Digest 645, *507*.

(12) *Grundt* v. *Great Boulder Proprietary Mines, Ltd.*, [1948] 1 All E.R. 21; [1948] Ch. 145; [1948] L.J.R. 1100; 2nd Digest Supp.

Appeal.

Appeal by the plaintiff from an order of VAISEY, J., dated Mar. 1, 1955, reported [1955] 1 All E.R. 746. The plaintiff claimed a declaration that immediately before the coming into force (on Jan. 1, 1949) of the British Nationality Act, 1948, he was a British subject, and that he was by virtue of that Act a British subject. The plaintiff based his claim on the statute 4 & 5 Anne c. 4, otherwise c. 16. The defendant denied that the plaintiff was a British subject immediately prior to the coming into force of the Act of 1948, and contended that the Act of Anne applied only to persons who, being lineally descended from the Princess Sophia, were born during the lifetime of her late Majesty Queen Anne. VAISEY, J., held that, although the enacting provision of the Statute of Anne was unqualified and plain in its meaning, yet its words, taken alone, were of such character and led to such consequences as showed that the legislature must have intended that some limitation should be put on their operation, that this limitation was supplied by the preamble which indicated that the purpose of the statute was to be effected in the lifetime of Queen Anne, and that, accordingly, the plaintiff was not a British subject.

K. Diplock, Q.C., R. O. Wilberforce, Q.C. and J. L. Knox for the plaintiff.

The Attorney-General (*Sir Reginald Manningham-Buller, Q.C.*) and *B. J. H. Clauson* for the defendant.

Cur. adv. vult.

Nov. 16. The following judgments were read.

SIR RAYMOND EVERSHED, M.R.: The statute 4 & 5 Anne c. 16, which this appeal requires us to construe, is short and should be set out in extenso. Its title is

> "An Act for the Naturalization of the most Excellent Princess Sophia Electress and Dutchess Dowager of Hanover and the Issue of her Body."

The terms of the statute, which I shall refer to as the Statute of Anne, are as follows:

> "Whereas the Imperial Crown and Dignity of the Realms of England France and Ireland and the Dominions thereto belonging after the Demise and Death of Your Majesty our most gracious Soveraign without issue of Your Body is limited by Act of Parliament to the most Excellent Princess Sophia Electress and Dutchess Dowager of Hanover Grandaughter of the late King James the First and the Heirs of Her Body being Protestants And whereas Your Majesty by your Royal Care and Concern for the Happiness of these Kingdoms reigns in the Hearts and Affections of all Your People to their great Comfort and Satisfaction and will be a glorious Example to Your Royal Successors in future Ages And to the End the said Princess Sophia Electress and Dutchess Dowager of Hanover and the Issue of Her Body and all Persons lineally descending from Her may be encouraged to become acquainted with the Laws and Constitutions of this Realm it is just and highly reasonable that they in Your Majesties Life time (whom God long preserve) should be naturalized and be deemed taken and esteemed natural born Subjects of England We Your Majesties most dutiful and loyal Subjects the Lords Spiritual [and Temporal]* and Commons in Parliament assembled do most humbly beseech Your Majesty that it may be enacted and therefore be it enacted by the Queen's most Excellent Majesty by and with the Advice and Consent of the Lords Spiritual and Temporal and the Commons in this present Parliament assembled and by the Authority of the same That the said Princess Sophia Electress and Dutchess Dowager of Hanover and the Issue of Her Body and all Persons lineally descending from Her born or hereafter to be born be and shall be to all Intents and Purposes whatsoever deemed taken and esteemed natural born Subjects of this Kingdom as if the said Princess and the Issue of Her Body and all Persons lineally descending from Her born or hereafter to be born had been born within this Realm of England Any Law Statute Matter or Thing whatsoever to the contrary notwithstanding
>
> Provided always and be it further enacted [and declared] by the Authority aforesaid That every Person and Persons who shall be naturalized by virtue of this Act of Parliament and shall become a Papist or profess the Popish Religion shall not enjoy any Benefit or Advantage of a natural born Subject of England but every such Person shall be adjudged and taken as an Alien born out of the Allegiance of the Queen of England to all Intents and Purposes whatsoever Any thing herein contained to the contrary notwithstanding."

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* The words "and temporal" appear in the Queen's Printer's copy.

The Statute of Anne was (among others) repealed by the British Nationality Act, 1948, s. 34 (3); but the repeal was subject to the provision of s. 12, that every person who was a British subject immediately before the repealing Act came into operation, should become a British citizen thereunder.

The plaintiff in the action claims that he is, by virtue of the Statute of Anne and the Act of 1948, a British citizen. It is not in doubt that he is in fact a lineal descendant of the Electress Sophia. It is also admitted on the part of the Attorney-General that if he is otherwise entitled to succeed, he is not disqualified by the terms of the proviso to the Statute of Anne. He was born in 1914 and the question in the action is whether, on its true interpretation, the Statute of Anne, which is of the year 1705, is such as to apply to a person coming into existence more than two hundred years after the date of its passing.

By the standards of the great majority of the Acts of Parliament which now fall to be considered by the courts, the Statute of Anne is old and, by the same standards, its form and language are archaic. There are now, as we were informed, some four hundred living persons who claim lineal descent from the Electress Sophia of Hanover named in the Act. In the two and a half centuries which separate the year 1955 from the year 1705 the structure of that which we call western civilisation has suffered many profound changes. The nations of 1955, the populations which they embrace and the obligations which they demand from their inhabitants, were no doubt in many respects undreamt of in the philosophy of 1705. Moreover, the nation with which the domains of the Electors of Hanover were absorbed has twice in the present century been at war with the United Kingdom, so that the plaintiff, like his father before him, has found himself arrayed in arms against the Sovereign to whom he has since his birth (if his claim is well founded) owed the allegiance of a British subject. The Attorney-General has, however, not relied on any defence to the plaintiff's claim based on the facts to which I have last referred, or on the circumstance that at the date of the coming into operation of the British Nationality Act, 1948, he was, as an enemy, disabled from having any access to the Queen's courts for the purpose of asserting that he was then a British subject. The Attorney-General also expressly disclaimed before us any argument to the effect that the Statute of Anne ought now, having regard to its antiquity and archaic form, to be so construed as to " whittle down " or minimise the effect which would otherwise flow from its terms.

The question, then, for our decision is one of the meaning which, according to the relevant rules for the interpretation of statutes, should now be given (and which would have been given in 1705) to the language which I have already recited. To the problem so simply posed the answer would, prima facie, appear undoubtedly to be in favour of the plaintiff; for the enacting language of the statute, " all Persons lineally descending from [the Princess Sophia] born or hereafter to be born ", ex facie covers clearly the case of a person admittedly so descended, and not otherwise disqualified. But it is the contention of the Attorney-General that the question, as I have posed (and answered) it, is an over-simplification of the problem; that the true scope and intention of Parliament, discerned from a consideration of certain earlier statutes in pari materia with the Statute of Anne and also (more especially) of the preamble to the Statute of Anne itself, require that the apparently wide signification of the general language used in the enactment should be substantially restricted; and that the right construction of the material words which I have just quoted from the Act is such as to limit the class of descendants, conformably with the Parliamentary intention expressed in the preamble, to those descendants born in the lifetime of Queen Anne. The Attorney-General additionally argued that general words in an enactment should be restricted in order to avoid what would otherwise be an absurd or highly inconvenient result: and the result which would, A in the present case, make the Statute of Anne comprehend an ever-increasing class of persons, from one generation to another, in course of time almost impossible of identification, would (it is contended) be not only highly inconvenient and absurd, but would exceed any object which the Act could sensibly have been designed to achieve.

B We were referred to numerous authorities illustrative of the principle to be applied in construing statutes. It has, I think, to be conceded that the numerous judicial pronouncements in the books on the significance of a preamble in interpreting the enacting provisions of a statute disclose at least some variation in emphasis. I take by way of example two citations from the case in the House of Lords of *Powell* v. *Kempton Park Racecourse Co., Ltd.* (1) ([1899] A.C. 143) where C the question (decided affirmatively by a majority of the House) was whether the apparently general words of the Betting Act, 1853, should be limited, in the light particularly of the Parliamentary intention as expressed in the preamble, so as to exclude the Act from applying to betting with bookmakers on the Kempton Park racecourse. LORD JAMES OF HEREFORD, who was of the majority, said (ibid., at p. 193) that he fully accepted the dictum of LORD TENTERDEN in D *Halton* v. *Cove* (2) (1830) (1 B. & Ad. at p. 558) which included the following sentence:

> " ' Yet on a sound construction of every Act of Parliament I take it the words in the enacting part must be confined to that which is the plain object and general intention of the legislature in passing the Act, and that the E preamble affords a good clue to discover what that object was '."

It will be noticed that the language of LORD TENTERDEN does not (at any rate in terms) appear to require the presence of any ambiguity in the enacting part of the statute before its ordinary meaning can in such a case be limited. On the other hand, LORD DAVEY, who dissented from the majority opinion, seems F plainly to indicate that words in the enacting part which are themselves clear cannot be restricted so as to accord with the apparent promise of the preamble. He said ([1899] A.C. at p. 185):

> " ' Undoubtedly '—I quote from CHITTY, L.J.'s judgment words with which I cordially agree—' it is a settled rule that the preamble cannot G be made use of to control the enactments themselves where they are expressed in clear and unambiguous terms.' But the preamble is a key to the statute, and affords a clue to the scope of the statute when the words construed by themselves without the aid of the preamble are fairly capable of more than one meaning. There is, however, another rule or warning which cannot be too often repeated, that you must not create or imagine H an ambiguity in order to bring in the aid of the preamble or recital."

I do not find it necessary to attempt for my own part any fresh formulation of the rule proper to be applied. I will assume (as I think counsel for the plaintiff was himself content to assume) that if the scope and purpose of an Act is made plain by reference to other relevant statutes and other admissible matters of I context, or by reference to its preamble—or both—then, words prima facie of general import in the enacting provisions may be cut down so as to make the Act in its effect correspond with its purpose. As is stated in the first sentence of p. 1 of MAXWELL ON THE INTERPRETATION OF STATUTES (10th Edn.), with a reference to the *Sussex Peerage Case* (3) (1844) (11 Cl. & Fin. at p. 143):

> " . . . the fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded ' according to the intent of them that made it '."

The difficulty in cases of this kind is that although a preamble may, in LORD TENTERDEN'S words, provide a " good clue " to what is to follow, Parliament must at least be assumed also to intend what it expressly enacts.

I turn, first, to the other relevant statutes to which we were referred and which provide the context or background for the Statute of Anne. The accession to the throne of the Prince and Princess of Orange as King William 3 and Queen Mary 2 was followed by the passing in 1688 (1 Will. & Mar. Sess. 2 c. 2) of " An act for declaring the rights and liberties of the subject, and settling the succession of the Crown ", later known by its short title of " the Bill of Rights "*. By this Act, after reciting that

> " . . . the late King James the Second, by the assistance of divers evil counsellors, judges, and ministers employed by him, did endeavour to subvert and extirpate the protestant religion, and the laws and liberties of this kingdom ",

it was provided that the " crown and regal government " should be and continue to Their Majesties, King William and Queen Mary, and the survivor of them during their lives and the life of the survivor, and that after their deceases the Crown should be and remain to the heirs of the body of Her Majesty (Queen Mary), and for default of such issue to Her Royal Highness the Princess Anne of Denmark and the heirs of her body, and for default of such issue to the heirs of the body of King William. The first section also contained a provision excluding altogether from the succession every person who should be reconciled to or hold communion with the See or Church of Rome or should profess the Popish religion or marry a papist. The death of Queen Mary without issue, and the death, also, of Prince William Duke of Gloucester, the only surviving issue of Princess Anne of Denmark, called for further provision for the settlement of the Crown after the death of the survivor of King William and Princess Anne. There was accordingly passed in 1700 (12 & 13 Will. 3 c. 2), " An Act for the further Limitation of the Crown and better securing the Rights and Liberties of the Subject ", now known as " The Act of Settlement."* Section 1 of this Act provided that the Princess Sophia, Electress and Duchess Dowager of Hanover, and the heirs of her body being Protestants should succeed to the Crown after the King and Princess Anne and in default of issue of either of them. At the date of the passing of this Act there were living three sons of the Electress Sophia and also three grandchildren. All of them were, however, living, and had always lived, out of England. It will be seen, as the Attorney-General observed, that sufficient provision had been made for the settlement of the Crown after the deaths of King William and Princess Anne. But, assuming, as no doubt seemed virtually certain, that the Princess Anne would not leave issue, the person to succeed, according to the Hanoverian succession of the Crown, would be or would be likely to be a stranger to these shores and subject, therefore, to the taunt of being a foreigner. In the course of opening the appeal, Mr. Wilberforce, for the plaintiff, stated that at the time of the passing of the Act which we have to construe, lively fears were entertained of an attempted restoration on the part of the Jacobite party. The Attorney-General was not prepared so to concede: but however that may be, it is to my mind plain enough that the object of the Statute of Anne was to provide in advance against the alien taunt, and also, no doubt, as the preamble to the Act states in terms, to encourage the family of the Electress Sophia to a better acquaintance with our laws and constitutions. In this situation Parliament proceeded accordingly to make provision for the naturalisation as English subjects of those persons among whom would be found the successor to the throne on the death, without issue, of Princess Anne.

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* This short title was given to the Act by the Short Titles Act, 1896.

There was on the statute book an Act of King James 1 (7 Jac. 1 c. 2) which prevented the exhibition of a bill for the naturalisation of any person of the age of eighteen years or over, unless that person had previously complied with certain conditions as to taking the sacrament, and also taking the oaths of supremacy and allegiance. It was obvious that some modification of the Act of James was necessary. No doubt the required modification might have taken the form of a partial repeal of that Act in the proposed Act of Naturalisation itself. In fact, Parliament proceeded by two steps of which the first, being the prelude to the Statute of Anne, was an Act, 4 & 5 Anne c. 14* in the same session, entitled

> "An Act for exhibiting a Bill in this present Parliament for naturalizing the most Excellent Princess Sophia Electress and Dutchess Dowager of Hanover and the Issue of Her Body."

As this Act is also short and was much relied on by the Attorney-General, it should also be set out at length:

> "Whereas the most Excellent Princess Sophia Electress and Dutchess Dowager of Hannover and the Issue of Her Body are to be naturalized and by reason of Their being beyond the Seas They cannot qualifie Themselves in order thereto according to the Act made in the seventh Year of the Reign of King James the First which requires every Person to receive the Sacrament of the Lords Supper within† One Month before any Bill for Naturalization be exhibited and also take the Oaths of Supremacy and Allegiance in the Parliament House before his or her Bill be Twice read Be it enacted . . . That a Bill for the Naturalization of the said most Excellent Princess Sophia Electress and Dutchess Dowager of Hannover and the Issue of Her Body shall and may be exhibited and brought into this present Parliament and Twice Read Any Law Statute Matter or Thing whatsoever to the contrary notwithstanding."

The Attorney-General has fastened on the words in the preamble, " . . . and by reason of Their being beyond the Seas They " (that is, the Electress and the heirs of her body) " cannot qualifie . . .". The presence of these words, he argues, is the clue to the scope and intention of the Act and shows that the general words, " the Issue of Her Body ", in the title of the Act and in its enacting part, must be restricted to those " Issue " then living; and thence he proceeds to the conclusion that the general words in the later Act, the Statute of Anne, which constituted the fulfilment of the promise in 4 & 5 Anne c. 14, must likewise be restricted; for otherwise the later Act would extend to an area greater than the ground prepared for it and would, to the extent of the excess, be at variance with the Statute of James 1. To this argument, however, the terms of the last-mentioned Act themselves provide, in my judgment, a formidable objection. The conditions thereby imposed on naturalisation applied in fact (as reference to the Act shows) only to persons of the age of eighteen years or over. It was not and could not be suggested as a matter of construction that the effect of the statute, 4 & 5 Anne c. 14, was therefore limited to the heirs of the body of the Electress who were then eighteen years old or more. If such had been the intention, it is inconceivable that the reference to the age of eighteen years in the Statute of James would have been omitted in its recital in the statute 4 & 5 Anne c. 14. (Though the matter of fact was not precisely gone into, one of her grandchildren was then under the age of eighteen.) If this is right, it appears clearly to follow that the preamble in this case is not a clue for a limited interpretation of the enactment. In other words, if the class of persons whose later naturalisation was forecast is not, on any view, to be limited to those specifically affected by the Statute of James, then there seems no compelling reason against giving to the words " the Issue of Her Body " their natural effect; treating the preamble as no more than a reference to the justification of the statute—for the reason that some of the class of persons intended to be naturalised were or might be affected by the conditions of the earlier statute.

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* Repealed by the S.L.R. Act, 1867. The text of 4 & 5 Anne c. 14 is printed as in the STATUTES OF THE REALM, 1821.

† The roll is torn through much of the words from " every person " to " within ", and the authority of the text rests on the Queen's Printer's copy; see STATUTES OF THE REALM, Vol. VIII, 4 & 5 Anne c. 14.

There is to my mind a further, and by no means negligible, objection to the Attorney-General's argument. If his view of the limited scope of the statute 4 & 5 Anne c. 14 be accepted, still, on his own argument, the scope of the Statute of Anne (the second statute) extends further; for it covers not only the issue of the Electress living at the time but all further issue thereafter to be born in the lifetime of Queen Anne, a period that might have extended for thirty or forty years. To that not unsubstantial extent, therefore, the statute would present an apparent inconsistency with the Statute of James. I add, too, on this objection (though I am somewhat anticipating my view of the question of absurdity) that the argument for limiting the category of persons to be naturalised loses, to my mind, much of its attractiveness to common sense when the class ceases to be limited to the known and certain number of the living and becomes one liable to increase during an uncertain and perhaps prolonged period of time.

I have, therefore, come to the conclusion that reference to the historical context of the Statute of Anne and to the earlier statutes does not discover or require a restriction of its scope—nor, indeed, provide any clue to the intention of Parliament as expressed in the Act itself. Nor do I think that these earlier statutes can materially influence the important question to which I must now come, of the effect on the enacting provisions of the Act of the terms of the preamble and particularly of the words therein, " in your Majesties Life time."

It was the plaintiff's case that these words meant no more than " now "; and served merely to indicate that, in the view of Parliament in 1705, provision should then be made (i.e., in Queen Anne's lifetime) for the naturalisation of the Electress and her descendants. On the other side it was said that, had such been the purpose of the words, they would have appeared earlier in the recital—which would have read " It is just and reasonable *in Your Majesties Life time* that they . . . ". By their position, in fact, the words must (as the Attorney-General argued) be related grammatically to the words " should be naturalized "; and that since no person could be naturalised in the lifetime of the Queen unless he or she was then in existence, the import of the words was inevitably to restrict the purpose of the Act, as stated by its preamble, to the naturalisation of those members of the class of the lineal descendants of the Electress who should come into being before Queen Anne's death. For myself, I should feel no hesitation in preferring, as a matter of grammar, the construction suggested by the Attorney-General, if the matter rested as I have stated it; but it does not so rest. The preamble, after the words " be naturalized ", continues " and be deemed taken and esteemed natural born Subjects of England ". If grammatically the words " in your Majesties Life time " are properly related to the words " be naturalized ", they should no less, in my judgment, be related to the words which immediately follow, " and be deemed . . . " It is here that, to my mind, the difficulty arises. For whatever else may be said of the scope and meaning of the Act, it is quite certain that its intention cannot have been to limit the effect of the " naturalisation " of the persons designated to the period of Queen Anne's life—a result which would quite plainly have defeated its whole object. Notwithstanding, therefore, its grammatical inelegance (as I think), it seems to me impossible to assert that counsel for the plaintiff's construction is not a possibly legitimate interpretation of the effect of the vital words. I have felt myself accordingly compelled, in spite of my strong first impression of the natural sense and import of the vital words " in your Majesties Life time ", to agree with VAISEY, J., that the preamble points, at best with an uncertain finger, to the scope and intent of the Act. I further agree with him that the essential words in the enacting part, descriptive of the class of persons affected, are on their face clear and unambiguous. Though in the title of the Statute of Anne the class is referred to (as it had been described in the earlier statute of the same session) as " the Issue of her Body " (a general formula capable, at any rate, of being limited to issue in one degree only), the description was expanded in the last sentence of the preamble to " the Issue of Her Body and all Persons lineally descending from Her " (a formula clearly not capable of such limitation). In the enacting provision the description is (not once only but twice) carried a further stage in emphasis by the addition of the significant words " born or hereafter to be born ". The necessary extension of the class to issue of every degree, without limit, is further reinforced, in my judgment (if such reinforcement be necessary) by the reference to " future Ages " in the preamble itself.

Agreeing, therefore, with the learned judge on both essential premises, I am compelled by the rules for the interpretation of statutes to which I have earlier referred, to a different conclusion from that at which the learned judge arrived. For, as counsel for the plaintiff contended, the present is, on these premises, the converse of the case in which words of merely general import can be controlled by a preamble clearly pointing to a specifically restricted Parliamentary intention. For reasons which I have given, the words of the preamble necessarily and exclusively relied on by the Attorney-General admit, at least, of doubt. On the other hand, the vital language of the enacting provision is not only, on the face of it, unambiguous but, as I think, cannot be fairly described as that of a merely general formula. On the contrary, it appears to me to be as precise and emphatic as any form of words could be which was apt to describe a class of persons not presently ascertainable. I conclude, therefore, that, as a matter of construction of the Statute of Anne, there is nothing in the preamble—and, as I have already said, nothing in the preamble interpreted in the light of the earlier relevant statutes—capable of controlling and limiting the plain and ordinary meaning of the material words in the enacting provision. In other words, the class of lineal descendants of the Electress " born or hereafter to be born ", designated in the enacting provision, means the class of such descendants in all degrees and without any limit as to time. I add that such an interpretation, together with a similarly unlimited interpretation of the earlier Act 4 & 5 Anne c. 14, not only avoids any conflict in scope between the two Acts, but also disposes of any resultant inconsistency between their effect and the continuing provisions of the Statute of James 1.

I am disposed to think that if the matter had rested solely on the construction of the Statute of Anne, VAISEY, J., would have been of the same opinion. But I think that the learned judge's mind was in some degree influenced by consideration of the antiquity of the statute and by the fact that for a great number of years the rights which it purported (on this view) to confer do not appear ever to have been asserted. He said ([1955] 1 All E.R. at p. 749):

> " . . . as usage is a good interpreter of law, so non-usage lays an antiquated Act open to any construction weakening or even nullifying its effect."

What I might call the " dead letter " argument is undoubtedly attractive; but I have already observed that the Attorney-General expressly disclaimed, before us, any reliance on it. VAISEY, J., was also, as I think, considerably impressed by the second of the arguments presented by the Attorney-General, to which I must now turn, i.e., that founded on inconvenience and absurdity. He said (ibid., at p. 751):

> " Now I think that if the generality of the enacting clause in the Act of Anne is not restrained, it would lead to a conclusion which would certainly

> be inconvenient and also, I think, absurd, seeing that an appreciable part of the inhabitants of Europe would be invested without their consent and for the most part without their knowledge with British citizenship."

Though I venture to think, if I may say so, that the description of the class of persons now constituting the lineal descendants of the Electress Sophia as " an appreciable part of the inhabitants of Europe " may be something of an overstatement, it is undoubtedly true that a strict ascertainment of all the persons who could now claim the privilege which the Act purported to confer, would be an inconvenient matter—particularly having regard to the disqualification imposed by the proviso. Equally it appears, at the least, to be incongruous that persons who are nationals of a country that has twice been engaged in the bitterest conflict with this country in the present century, should claim to be, and to have been since birth, citizens of the United Kingdom. But this inconvenience and this incongruity seem to me rather to arise from the effect of the passage of a long period of time on an Act that was allowed to remain unrepealed than from the effect of the Act itself when it came into operation. As counsel for the plaintiff observed, it was always open to Parliament to prevent or restrict the inconvenience and the absurdity by the repeal of the Act—as in fact it did in 1948. I think, in other words, that the force of the argument ab inconvenienti becomes, on analysis, but an oblique restatement of the " dead letter " argument which the Attorney-General has disclaimed.

The examples which Vaisey, J., derived from Professor Goodhart indicate at least that the notion of conferring citizenship on a particular individual and his descendants in all degrees, is not so absurd as to have found no parallel in other countries. And if, as the Attorney-General's argument must concede, the conferment of citizenship on a class of descendants liable to increase during a substantial period of time is not open to challenge on the grounds of inconvenience or absurdity, it seems to me illogical to contend that an indefinite prolongation of the period necessarily renders such a provision ineffective on those grounds. True it is, no doubt, that the object to be achieved could with reasonable certainty have been assured without an indefinite prolongation of the period. But it appeared during the argument that, without indulging in extravagant hypotheses, the succession might have devolved on an alien if the terms of the statute were limited so as to comprehend only descendants of the Electress born in the Queen's lifetime.

In support of this part of his case, the Attorney-General cited to us three decisions, *R.* v. *Bateman* (4) (1857) (27 L.J.M.C. 95), *Yates* v. *Regina* (5) (1885) (14 Q.B.D. 648), and *R.* v. *Clarence* (6) (1888) (22 Q.B.D. 23). In my judgment the present case falls far short of the principle which those cases illustrate. Of the three cases, neither the first nor the third is, in my judgment, authoritative on the present question. *Yates* v. *Regina* (5), however, which was a decision of this court, is much more in point. The question there decided was that the general term, prima facie unequivocal, " criminal prosecutions ", was not to be construed in the Newspaper Libel and Registration Act, 1881, as including prosecutions by way of criminal information. By the terms of the Act the institution of a " criminal prosecution " of the character comprehended by the Act required the fiat of the Director of Public Prosecutions. If, therefore, criminal informations were covered by the Act, it would follow that the Director of Public Prosecutions would be brought into competition with, if he was not enabled to override, the Attorney-General and even the Queen's Bench Division itself. Such a result would, in the words of Sir William Brett, M.R., involve " an indecent absurdity " for the avoidance of which the court felt able so to restrict the meaning of " criminal prosecutions " as to exclude criminal informations. It is to be observed that the absurdity in *Yates* v. *Regina* (5) became manifest immediately on the coming into operation of the Act. The general words, " criminal prosecutions ", if effective according to their ordinary meaning, gave rise necessarily and at once to the conflict. COTTON, L.J., used this language in the course of his judgment (14 Q.B.D. at p. 660):

> " . . . if one sees that by applying the language to something which is not within the mischief contemplated by the Act, it will produce manifest absurdity or inconvenience, then according to the rule of construction which is well known, and for which it is unnecessary to refer to any authority, it is the duty of the court so to construe the general term as not to apply it to that which will have such a result."

The learned lord justice was clearly not contemplating some inconvenience or absurdity which a prophet might forecast as capable of arising in two hundred years' time. I read this language as meaning clearly that the inconvenience or absurdity is one which must necessarily and immediately arise from the fact of the Act extending to some subject-matter apparently within the broad scope of the generic terms used, though not within the mischief contemplated by Parliament. It is in this essential respect that, in my judgment, the present case differs from *Yates*' case (5); for if the general words in the Statute of Anne be given the wide significance which prima facie they bear, no absurdity or inconvenience thereby became manifest on the Act coming into operation. No anomaly, no conflict of interest or authority, no difficulty of application arose or could arise on the Act taking effect. The inconvenience or absurdity (if there be such) arose only from the impact of a long course of events on a statute permitted to remain on the statute book for more than two centuries. In my judgment, nothing in any of the cited cases justifies the restriction of plain and unambiguous language in a statute, years after its passing, on account of inconvenience or incongruity discovered ex post facto. It is, in truth, to my mind, no more than the " dead letter " argument once again in another guise. In my judgment, accordingly, the argument of the Attorney-General on this head cannot be sustained; nor does it get any greater vigour by being added to the arguments with which I have already dealt based on the earlier legislation or on the preamble to the statute.

I have come, accordingly, to the conclusion that the plaintiff was entitled to the declaration which he sought, and that his appeal ought to be allowed.

BIRKETT, L.J.: I have come to the same conclusion. I think that the plaintiff was entitled to the declaration he sought before VAISEY, J., and that by reason of the Statute of Anne (4 & 5 Anne c. 16) of 1705, which has already been read in full by SIR RAYMOND EVERSHED, M.R., and by the provisions of the British Nationality Act, 1948, the plaintiff's claim to be a British subject succeeds, and this appeal must accordingly be allowed.

It might be thought that the question to be answered in this appeal could be stated quite simply, although it is notoriously difficult sometimes to answer a simple question. When all is said and done on one side and the other the question is: Do the provisions of the Statute of Anne apply to the plaintiff ? But immediately further questions of some complexity arise, which have already been the subject of acute controversy, and of judicial pronouncement. What *are* the provisions of the statute ? How are the words of the statute to be interpreted? Undoubtedly intended to naturalise somebody, were they ever intended by the Parliament of 1705 to naturalise a person in the position of the plaintiff in this action ? Can the plaintiff, born some two hundred years after the passing of the Act, claim to be a British subject by reason of its provisions in 1955, two and a half centuries after its appearance on the statute book ? Were the words of the statute intended to naturalise only those descendants of the Electress Sophia living in the lifetime of Queen Anne ? Does not any other conclusion lead to absurd results, which Parliament could never have intended or even contemplated ? Must not the enacting words of the statute be modified by other statutes affecting the position of the Electress Sophia and her descendants, and do not certain words in the preamble to the statute limit the application of the enacting words ?

These are some of the questions raised in this appeal from the judgment of Vaisey, J. The learned judge was clearly troubled by the antiquity of the Statute of Anne and by the attempt to apply its provisions to the plaintiff in 1955. Two passages from his judgment may perhaps be cited on this point, for they show the way in which the learned judge approached the problem before him. The first passage reads ([1955] 1 All E.R. at p. 748):

> " Now it is, of course, plain that a statute is not impliedly repealed merely by becoming obsolete or by mere non-user, however long the time may have been since it was known to have been actually put into force; see per Dr. Lushington in *The India* (7) (1864) (33 L.J.P.M. & A. at p. 193). But this principle must, in my judgment, be applied with due regard to the circumstances of the case, and although the word ' obsolete ' cannot in strictness be applied to any Act of Parliament remaining on the statute book, there are undoubtedly statutes still to be found there which would seem only to have been permitted to remain there because their existence has been overlooked."

The second passage reads ([1955] 1 All E.R. at p. 749):

> " Many examples of statutes effete or forgotten, though remaining on the statute book, are to be found in the text-books. For instance, trial by battle was still in force in 1819 and drawing and quartering was still part of the sentence for treason until 1870. And, as usage is a good interpreter of law, so non-usage lays an antiquated Act open to any construction weakening or even nullifying its effect. Such considerations as these cannot be excluded in connection with the Act of Anne."

The claim of the plaintiff, if valid, rested on the legal effect to be given to the words of a statute, passed some two and a half centuries ago, when Parliament was concerned to naturalise those persons who might succeed to the throne on the death of the Princess Anne without issue, a state of affairs which then seemed virtually certain, the position of the King as a widower, who would not re-marry, appearing to be taken for granted. When the Statute of Anne was passed, there were seven persons then living who were affected by its provisions; the Electress Sophia herself; her son George, afterwards George 1, who was then forty-five years old; his two brothers, one aged thirty-nine and the other thirty-one; and three grandchildren, one George Augustus, afterwards George 2, then twenty-two years of age; Sophia Dorothea aged twenty; and Frederick William aged seventeen.

The Statute of Anne was not repealed until the passing of the British Nationality Act, 1948, s. 34 (3), and then it was provided by s. 12 that all those who were British subjects immediately before the passing of the Act of 1948 should become British citizens. In my opinion, the historical setting of the Statute of Anne is extremely important, when considering what effect must be given to the actual words of the statute. It has been described in the judgment of Sir Raymond Evershed, M.R., and need not be repeated in detail. But in the twelve years that had passed since the Bill of Rights in 1688 had sought to settle the succession of the Crown, the situation had again become precarious, because of the death of Queen Mary without issue, and the death of the only son of Princess Anne of Denmark. In 1700, therefore, in the Act of Settlement, Parliament further provided for the succession by enacting that the Electress Sophia and the heirs of her body, being Protestants, should succeed after the death of William and Princess Anne without issue. But now that the succession had been dealt with in that particular way, it became necessary to deal with the situation that would arise if a foreigner were to succeed to the throne. The statute 4 & 5 Anne c. 14 and the Statute of Anne (i.e., c. 16) therefore dealt with the question of naturalisation. The Statute of James 1, which laid down certain conditions which had to be complied with before a bill could be presented to Parliament, was dealt with by 4 & 5 Anne c. 14, and the Statute of Anne (i.e., c. 16) is the statute with which this appeal is immediately concerned.

The argument of the Attorney-General based on 4 & 5 Anne c. 14 does not seem to have been dealt with by Vaisey, J., at all. That argument was that the words in the preamble to 4 & 5 Anne c. 14:

> " Whereas the most Excellent Princess Sophia Electress and Dutchess Dowager of Hannover, and the Issue of Her Body are to be naturalized and by reason of Their being beyond the Seas They cannot qualifie Themselves in order thereto according to the Act . . . of King James the First . . . ",

must be read as meaning that only those persons who were then living were intended to be naturalised, and the plaintiff is therefore excluded, because the Statute of Anne (4 & 5 Anne c. 16) must be similarly confined to persons then living.

Sir Raymond Evershed, M.R., has pointed out that the conditions laid down in the Statute of James 1 only applied to persons of the age of eighteen and upwards, and could have no application, for example, to Frederick William, who was the son of a deceased daughter of the Electress Sophia and was born in 1688, and in 1705, therefore, was only seventeen years of age. It seems to me to be plain that 4 & 5 Anne c. 14 lends no support to the view that the persons it was intended to naturalise were to be confined to persons then living, as the Attorney-General contended; and 4 & 5 Anne c. 14 was intended merely to overcome the manifest difficulties created by the Statute of James 1, which affected some, but not all, of the persons intended to be naturalised by the later enactment, the Statute of Anne (4 & 5 Anne c. 16). The Attorney-General placed great reliance on the wording of the preamble to the Statute of Anne:

> "And to the End the said Princess Sophia Electress and Dutchess Dowager of Hanover and the Issue of Her Body and all Persons lineally descending from Her may be encouraged to become acquainted with the Laws and Constitutions of this Realm it is just and highly reasonable that they in Your Majesties Life time (whom God long preserved) should be naturalized and be deemed taken and esteemed natural born Subjects of England."

He said that these words, particularly the words "in your Majesties Life time", had the effect of restricting the meaning of the words in the enacting words of the statute to persons living in the lifetime of Queen Anne. I cannot agree with this view. The enacting words of the statute are in my opinion perfectly plain and unambiguous. They do not need to be modified or explained by the preamble, for, in my view, the preamble is merely saying that what it is intended should be done, as set out in the enacting words, should be done in her Majesty's lifetime.

Vaisey, J., came to the conclusion that the enacting words ([1955] 1 All E.R. at p. 751)

> " . . . though unqualified and plain in their meaning when standing alone, are nevertheless of such a character and produce inevitably such consequences that the legislature must have intended to put some limit on their operation. When once this conclusion is reached, the question arises: what limit ? And then one turns to the preamble and one finds (though only I agree, by implication) that the purpose of the enactment was a purpose to be effected not indefinitely at some future time or times but in the lifetime of Queen Anne herself, and in consequence I think that the plaintiff is not entitled to the relief for which he seeks."

It is agreed that the cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention of the Parliament that passed them. The language of the enacting words is clear, and the learned judge found it to be so by his use of the words " unqualified and plain in their meaning." In these circumstances I should have thought that, according to the rules for the construction of statutes, the preamble ought to be disregarded. But it was the consequence of giving the words their plain meaning which made the learned judge turn to the preamble, because he said that the legislature must have intended to put some limit on their operation. With great respect, I cannot think that this was applying the recognised rules of construction, for if the meaning of the words is plain, the consequences are to be disregarded. A B

In the *Sussex Peerage Case* (3) (11 Cl. & Fin. 85), TINDAL, C.J., giving the considered advice of the judges to the House of Lords, said (ibid., at p. 143): C

> " My Lords, the only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the legislature, it has always been held a safe means of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to DYER, C.J.,* is—' a key to open the minds of the makers of the Act, and the mischiefs which they intended to redress '." D E

VAISEY, J., said that the words of the statute were such that the legislature must have intended to put some limit on their operation. In *Salomon* v. *Salomon & Co.* (8) ([1897] A.C. 22) LORD WATSON said (ibid., at p. 38):

> " ' Intention of the legislature ' is a common but very slippery phrase, which, properly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the legislature probably would have meant, although there has been an omission to enact it. In a court of law or equity, what the legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication." F G

The consequences of applying the plain meaning of the words may produce results in 1955 that are strange and may possibly be inconvenient. In his book entitled FOR LAWYERS AND OTHERS, published in 1936, the late THEOBALD MATHEW concluded his chapter on ROYALTY AND THE LAW, by quoting this very section of the Statute of Anne with which this appeal is concerned, and asking the question " How many people are aware that the German ex-Emperor is a British subject ? " He does not appear to have been troubled by any doubts as to the interpretation or effect of the Act, but was concerned to exhibit one of its curious consequences. It would be a little strange if, after the passage of two and a half centuries, some curious situations did not arise when applying a statute of such age to a state of affairs in 1955; but in my opinion nothing has arisen to cast doubt on the intention of Parliament in 1705. It has never been disputed that the plaintiff is a lineal descendant of the Electress Sophia, and that he is in no way disqualified by reason of s. 2 of the Act; and in my opinion he plainly comes within the enacting words of the statute, and at the passing of the British Nationality Act, 1948, he was a British subject, and is therefore entitled to the declaration for which he asked in the court below and for which he asks here. I would allow the appeal. H I

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* In *Stowel* v. *Lord Zouch* (1569), 1 Plowd. 353.

ROMER, L.J.: It appears to me that it is of fundamental importance to bear in mind that the proper construction to place on the Statute of Anne (4 & 5 Anne c. 16) is precisely the same now as that which would have been attributed to it by a court of construction immediately after it passed into law. The function of the court is to ascertain the intention of Parliament from the language in which that intention was expressed. Due regard must, of course, be had to all relevant circumstances which existed at the time when the Act was passed, but it is no more permissible, in my judgment, in construing a statute than it is in construing a deed, a will or any other written instrument, to arrive at a conclusion as to the meaning of the language used in the light of events which happened afterwards. Foreseeability of probable results may be attributed to the author of any document having regard to circumstances which existed when it was executed, and which were known, or presumably known, to him at the time; but the fact that those results did subsequently occur cannot be accepted as relevant to the interpretation of the language used.

I have ventured to emphasise this point, for if the construction of the Act for which the plaintiff contends is the right one, it would follow that the German Kaiser Wilhelm 2 was a British subject and that there are some four hundred persons scattered about Europe now who are entitled to British nationality by virtue of this statute; and it is a little tempting, perhaps, to assume that a construction which leads to such results cannot be the right one. As I have already intimated, however, if the language of the Act requires a certain construction to be placed on it, that construction can in no way be affected by consequences such as those to which I have referred. The question whether such consequences could have reasonably been foreseen by the legislature in 1705 and the bearing which such question should have on the construction of the Act are matters relevant to the alleged absurdity of the enacting clause, if read literally, which I consider hereafter.

I will not re-read the statute, which has already been stated in full in the judgment which SIR RAYMOND EVERSHED, M.R., has delivered. It is enough to say that the enacting part of the Act brings within its scope, as clearly and plainly as any language could convey, all Protestants, either then already born or who might be born at any time thereafter, who could show that they were lineally descended from the Princess Sophia. Why then should effect not be given to this clear expression of Parliamentary intention ? The answer which the Attorney-General has given to the question may be summarised in brief as follows: The enacting part of the statute, if taken by itself, would not only go beyond the purpose which Parliament presumably had in mind, but would lead to an absurdity which the legislature cannot have intended; that this not only justifies but compels the court to seek the true intention from material other than the enacting clause itself; that such material is afforded by the preamble, which shows with clarity what Parliament really intended to do; and that, accordingly, the enacting clause should be controlled by the preamble and made to conform to the intention which is therein disclosed.

It appears to me that the Attorney-General's case, as thus formulated, is open to more than one serious objection. The first objection (and it is a formidable one) which stands in his way is to be found in the general proposition that if the enacting words of the statute are clear and unambiguous, they cannot be restricted by the preamble. This proposition is supported by high authority and was expounded with precision in some of the speeches which were delivered in *Powell* v. *Kempton Park Racecourse Co., Ltd.* (1) ([1899] A.C. 143). The EARL OF HALSBURY, L.C., said (ibid., at p. 157):

> " Two propositions are quite clear—one that a preamble may afford useful light as to what a statute intends to reach, and another that, if an enactment is itself clear and unambiguous, no preamble can qualify or cut down the enactment . . . "

Lord Davey said ([1899] A.C. at p. 185):

> " 'Undoubtedly '—I quote from Chitty, L.J.'s judgment words with which I cordially agree—' it is a settled rule that the preamble cannot be made use of to control the enactments themselves where they are expressed in clear and unambiguous terms '."

The Attorney-General suggested that the views so expressed are inconsistent with opinions which had earlier been pronounced in the House in *Caledonian Ry. Co.* v. *North British Ry. Co.* (9) (1881) (6 App. Cas. 114). In my judgment this criticism is not well founded, for it appears to me that the views which were expressed in that case do no more than support the proposition which appears in Craies on Statute Law (5th Edn.), p. 189, viz., that if the language of an enactment is not clear, resort may be had to the preamble. It must, however, be conceded that it is not altogether easy to reconcile the principle as enunciated by Lord Halsbury, L.C., and Lord Davey in *Powell's* case (1) with other judicial observations of great authority and weight (compare, e.g., Lord James of Hereford's speech in the same case, [1899] A.C. at p. 193); nor does it appear to be in accord with such decisions as that of Sir John Nicholl in *Brett* v. *Brett* (10) (1826) (3 Add. 210).

In these circumstances, although I believe the general principle to be as I have already stated it, I hesitate to say that it is so rigid and of such universal application as to destroy the argument of the Attorney-General, which I have summarised, in limine; and I proceed, therefore, to consider the other reasons why, in my opinion, the argument cannot be accepted. First, as to the purpose which Parliament had in mind, current surrounding circumstances may, as I have already said, legitimately be taken into account; but, subject thereto, the purpose can be ascertained only from the language of the Act itself. The only extraneous circumstance which was suggested as having any direct bearing on the matter was the preliminary statute 4 & 5 Anne c. 14. Sir Raymond Evershed, M.R., has already considered this Act in his judgment, which I have had the advantage of reading. I respectfully agree with what he has said with regard to it, and I only desire to say for myself that as, on any view, the legislature departed in the second Act from the very limited scope which was envisaged by the recital in the first, the only question, as it seems to me, is as to the extent of such departure. I, therefore, find no assistance, in construing the second Act, from the language of the first. Then as to the suggested absurdity of the enactment clause if taken by itself, it appears to me to be a dangerous doctrine that the courts, when confronted by plain and unambiguous legislative language, should reject it as absurd. It is true that its power so to do is supported by authority: see *Yates* v. *Regina* (5); see also per Sir Thomas Parker, C.B., and Lord Hardwicke, L.C., in *Ryall* v. *Rowles* (11) (1749) (1 Atk. at pp. 174 and 182 respectively); and per Lord Coleridge, C.J., in *R.* v. *Clarence* (6) (22 Q.B.D. at p. 65). I cannot but think, however, that if such power in fact be vested in the courts, it should only be exercised in cases that imperatively demand its application; for, apart from the fact that its exercise comes perilously close to legislating, that which seems absurd to one mind may not appear so to another—as was pointed out by Lord Greene, M.R., in *Grundt* v. *Great Boulder Proprietary Mines, Ltd.* (12) ([1948] 1 All E.R. at p. 30). In any event, however, I see nothing necessarily or inherently absurd in the conception that Parliament was intending to provide in 1705 that all those on whom the British Crown might subsequently devolve by virtue of the Act of Settlement should become British citizens at birth; and Parliament was presumably alive to the fact that if the class of persons affected by the Act should become eventually too large, it could be closed by subsequent legislation. It appears to me that a far greater degree of absurdity than that which has been suggested in this case is required to justify the court in departing from clear enacting language, assuming that absurdity does, in itself, afford ground for any such departure.

The next consideration which arises is as to what the relevant recital in the preamble really means, and whether it demonstrates beyond any reasonable doubt an intention which is inconsistent with the enacting clause; for the Attorney-General rightly conceded that the preamble cannot be resorted to for the purpose of controlling the enactment itself, unless a definite and unambiguous expression of intention can be collected from its terms. In my opinion, such cannot be said of the recital on which reliance is placed. It seems to me that the words "in your Majesties Life time" may have been introduced into the preamble for either of two quite different purposes. The object of their introduction may have been to ensure that only those descendants of the Princess Sophia who were already born or should subsequently be born in the lifetime of Queen Anne should come into the operation of the Act. On the other hand, the purpose of the words may have been intended merely to point to the occasion of the Act. I cannot but think, for myself, that if the first of these two purposes was the real one, the draftsman of the Act would have taken the obvious course of inserting after "and all Persons lineally descending from Her" the words "and born in your Majesties Life time". Had this been done the recital would, as VAISEY, J., pointed out, have demonstrated an unmistakable intention to confine the naturalisation of Princess Sophia's issue within the limits for which the Attorney-General is now contending; and the fact that this very apparent method of conveying this intention was not adopted raises a considerable doubt in my mind, to put it at its lowest, whether any such intention was present at all.

The matter, however, by no means rests there. If one thing is clear beyond question it is that, whatever the class might be who were to be affected by the Act, the naturalisation which was to be thereby conferred was not to be conterminous only with Queen Anne's lifetime, but was to continue operative after her death; and yet, on the recital as it stands, if the words "in your Majesties Life time" limit the period for conferment of naturalisation so also they limit its duration. In order, therefore, to impute to the recital the effect for which the Attorney-General contends, it would in any case be necessary to introduce such words as "for ever after" between "and" and "be deemed". I am by no means prepared either to supply, or to transpose, words in the recital merely in order to derive an intention which can then be said to be clearly inconsistent with the enacting part of the Act. On the language of the recital itself there is much to be said, in my opinion, for the view that it was introduced for the second of the purposes to which I have earlier referred; and, therefore, the fact that there may also be much to be said in favour of the first of these purposes can be of no sufficient avail to the Attorney-General on this point; for ambiguity in the recital is fatal to him.

For the reasons which I have stated, I am unable to attribute to this Act the construction and effect which commended itself to the learned judge, and I agree with my brethren that the appeal should be allowed.

Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Farrer & Co.* (for the plaintiff); *Treasury Solicitor.*

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

BURFORD *v.* BURFORD.

[COURT OF APPEAL (Denning, Hodson and Morris, L.JJ.), November 14, 1955.]

Divorce—Discretion—Refusal to exercise—Refusal without finding on petitioner's charge of desertion—Respondent refused leave to amend answer so as to cross-charge adultery disclosed by petitioner in evidence—New trial—Matrimonial Causes Act, 1950 (14 *Geo.* 6 *c.* 25), *s.* 4 (2).

A husband petitioning for divorce on the ground of desertion gave evidence in the course of which he disclosed that he had committed adultery with two women. The wife thereupon asked leave to amend in order to cross-charge adultery and herself to pray for divorce. The commissioner refused her leave to amend. Without finding whether or not the wife had been guilty of the desertion alleged, the commissioner decided that he would not exercise his discretion under the proviso to s. 4 (2) of the Matrimonial Causes Act, 1950, in favour of the husband and dismissed the petition. The wife then instituted proceedings for divorce based on the husband's admitted adultery with one of the two women. On appeal by the husband,

Held: it was not open to the commissioner to refuse to exercise his discretion under the proviso before deciding whether or not desertion had been proved; on the facts there was no good reason for having refused the wife leave to amend, and in the circumstances a new trial would be ordered, since only by enabling both parties to have their cases heard could justice be done.

Appeal allowed.

[As to the exercise of the discretion in cases of divorce, see 12 HALSBURY'S LAWS (3rd Edn.) 311, para. 623; and as to appeal against the court's exercise of the discretion, see ibid., p. 313, para. 626.

For the Matrimonial Causes Act, 1950, s. 4 (2), see 29 HALSBURY'S STATUTES (2nd Edn.) 394.]

Appeal.

The husband appealed against an order of Mr. Commissioner EDGEDALE made on June 28, 1955, dismissing the husband's petition for divorce. The petition was based on alleged desertion by the wife. The suit was not defended by the wife at the hearing. The commissioner made no finding in respect of the alleged desertion, but, finding that since the celebration of the marriage the petitioner had been guilty of adultery, refused to exercise the court's discretion in favour of the husband having regard to his evidence of his own adultery. The commissioner also refused the wife leave to amend the answer, which she had filed, by cross-charging adultery. On appeal the husband contended that the commissioner was bound to give a decision on the wife's desertion before deciding whether or not to exercise his discretion.

J. E. S. Simon, Q.C., and *C. J. T. Pensotti* for the husband.
Ifor Lloyd, Q.C., and *J. C. Mortimer* for the wife.

DENNING, L.J.: I will ask HODSON, L.J., to deliver the first judgment.

HODSON, L.J.: This is an appeal from an order of Mr. Commissioner EDGEDALE dated June 28, 1955. The order reads:

> "The commissioner having taken the oral evidence of the petitioner and of the witness produced on his behalf in support of the petition . . . the respondent having filed answer . . . but not defending the suit at the hearing, pronounced . . . that he made no finding in respect of the matters alleged in the said petition and that since the celebration of the marriage between the parties the petitioner had been guilty of adultery and refused to the

> A petitioner the exercise of the discretion conferred upon the court by s. 4 of the Matrimonial Causes Act, 1950, and refused to the respondent leave to amend her said answer by alleging the adultery admitted by the petitioner and dismissed the said petition."

The petition was a petition for divorce on the ground of desertion presented
B by the husband who is the appellant here. The desertion which he set up ran from May 7, 1951, when his wife refused to live with him. She maintained that refusal thereafter. He wrote to her more than one letter, one in May and one in August, making plain that he wanted her to come back and live with him, but she never did. After the three years had elapsed, on Aug. 24, 1954, he presented his petition for divorce.

C The wife denied desertion in the answer, and she set up various matters in her defence which she did not pursue, but she indicated that, during the period when the desertion was supposed to be running against her, she and her husband had had sexual intercourse on a number of occasions. The husband's evidence was that, as the wife said, they had had intercourse on a number of occasions during the period of desertion, but he said that those were occasions when he was
D trying to get his wife to come back and set up home with him again and so certainly would not prevent the desertion running in his favour. The commissioner refused to make any finding on the husband's case of desertion, because he was shocked by the circumstances of the husband's own adultery.

Having regard to the course which I think must be taken here, I do not propose to say anything about the husband's adultery. It seems to me that, the
E adultery having been admitted, it was not open to the commissioner to take the course he took, viz., to refuse to exercise his discretion without coming to a conclusion whether or not desertion had been proved. Section 4 of the Matrimonial Causes Act, 1950, provides for the duty which the court has to perform on the hearing of a petition for divorce, and sub-s. (2) provides that, if the court is satisfied on the evidence that the case for the petition has been proved, the
F court shall pronounce a decree of divorce, but if the court is not satisfied it shall dismiss the petition.

In my judgment, it is only in cases where the court is satisfied on the evidence that the case has been proved that the following proviso comes into operation:

> "Provided that the court shall not be bound to pronounce a decree of divorce and may dismiss the petition if it finds that the petitioner has during
> G the marriage been guilty of adultery . . ."

That was this case. The commissioner was not in a position to consider the question of discretion without deciding the matter of desertion first. Not only is that right according to the plain reading of the statute, but also it makes good sense, because, in order to determine whether or not the discretion of the court
H ought to be exercised in the petitioner's favour, the court ought at the same time to make up its mind regarding the circumstances in which the parties separated, and whether or not (as counsel for the husband rightly put it) it was indeed the wife who was to blame for breaking up the home. That task the commissioner did not perform and the question, therefore, arises what ought to be done.

When the husband went into the witness-box and disclosed that he had
I committed adultery with two women—one of them being an American woman, who was probably abroad, and the other a woman whose name was given and who was said to be living in this country—counsel for the wife asked for leave to amend, in order to cross-charge adultery with the women and ask for a divorce herself. That application for leave to amend was refused. It is in the discretion of the court to decide whether or not leave to amend should be given, but, so far as appears, no good reason was given in this case for refusing such leave. The first reason put forward by the commissioner in an interlocutory observation was that he could not do it unless the other side consented. That was not a good

reason. The second reason, suggested to him by counsel for the husband and, A presumably, accepted by him, was that it would not be a very good thing from the point of view of the woman, who would have to be named and who would not like it. That does not seem to be a very good reason.

In all the circumstances, the husband being anxious to have the finding to which he claims to be entitled on the issue of desertion, I think that the only course open to this court is to order a new trial. Counsel for the husband has B urged that his case on desertion is clearly proved and that we ought to substitute our finding for the absent finding below and put the matter right. The difficulty is that we should be asked to exercise our discretion in addition and as the matter now stands that might produce injustice to the wife. It looks very much as if she should have had leave to amend below and then the court which had to consider the question of discretion would have had before it both issues, viz., C on the one hand, the wife's desertion and, on the other hand, the husband's adultery. It would then have been open to the court to grant a decree to one or other, or to both, or to neither. Having regard to the way in which this case has gone, this court cannot really put the matter right. It now appears that, faced by the refusal of leave to amend and having succeeded in getting the husband's petition dismissed, the wife could not appeal against that decision D because she had been successful in the case, and she has herself presented a petition for divorce based on her husband's admitted adultery with the second woman referred to by him in his evidence.

The effect of ordering a new trial will be that the husband's case can come on with the wife's case. In my view, the only way of producing a just result is that both parties should have the opportunity of having their cases heard. The E order of Mr. Commissioner EDGEDALE must be set aside and a new trial ordered.

DENNING, L.J.: I agree.

MORRIS, L.J.: I agree.

Appeal allowed. Order for a new trial. F

Solicitors: *Hall, Brydon, Egerton & Nicholas* (for the husband); *Savory, Pryor & Blagden* (for the wife).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

Re ELLENBOROUGH PARK. Re DAVIES (*deceased*). POWELL AND OTHERS *v.* MADDISON AND ANOTHER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett and Romer, L.JJ.), October 10, 11, 12, 13, 14, November 15, 1955.]

Easement—Right to enjoy pleasure ground—Jus spatiandi—Enjoyment in common by owners of adjoining property.

In 1855 and subsequent years land surrounding Ellenborough Park, part of the White Cross Estate at Weston-super-Mare, was sold in plots for building purposes. By a typical conveyance of a plot, dated in December, 1864, the plot was conveyed in fee simple to the purchaser together with certain easements for the use of roads and footpaths and of drains made on the estate " and also the full enjoyment . . . at all times hereafter in common with the other persons to whom such easements may be granted of the pleasure ground set out and made in front of the said plot of land . . . in the centre of the square called Ellenborough Park . . . subject to the payment of a fair and just proportion of the costs charges and expenses of keeping in good order and condition the said pleasure ground ". The conveyance contained covenants by the vendors for themselves and their heirs executors administrators and assigns to keep the park as an ornamental pleasure ground and not to build on it, and covenants by the purchaser to build on the plot conveyed to him and to pay a fair proportion of the expenses of keeping the pleasure ground in good order and well stocked with plants. In 1879, by which time most of the plots fronting the park had been sold and many similar conveyances of plots had been executed, the park and the other parts of the original estate were conveyed to a purchaser, subject, as regards the park, to the rights still subsisting of all persons to whom the use and enjoyment of the park had been granted. Ellenborough Park was a rectangular area measuring about 350 yards from east to west and one hundred yards from north to south. The western boundary faced the sea. A road surrounded three sides of the park and the plots sold adjoined the road and fronted on the park, but in addition nine or ten plots to whose purchasers similar rights were granted were separated from the road by the plots adjoining it and thus did not front on the park. In 1880 the purchaser of the park died and the park and other land vested in his trustees. On the question whether the owners of the plots had any enforceable rights over the park,

Held: (i) assuming that the right to use Ellenborough Park conferred by any one of the conveyances was a jus spatiandi, such a right could subsist as a private right, viz., an easement appurtenant to a defined hereditament (see p. 686, letter I, p. 687, letter A, post).

Reasoning in *Duncan* v. *Louch* (1845) (6 Q.B. 904) approved.

Dicta of FARWELL, J., in *International Tea Stores Co.* v. *Hobbs* ([1903] 2 Ch. at p. 172) and *A.-G.* v. *Antrobus* ([1905] 2 Ch. at p. 198) disapproved in relation to private rights.

(ii) the conveyances on their true construction were intended to confer on the purchasers and their successors in title rights to the communal enjoyment of Ellenborough Park as a garden, viz., garden rights analogous to rights of way or of drainage, and the rights so conferred were valid legal easements enuring for the benefit of the purchasers and their successors in title as owners of dominant tenements and binding the owners of the park for the time being as owners of the servient tenement, since

(a) the garden rights accommodated the dominant tenements because the rights related to the normal enjoyment of the houses as residences and had sufficient connection with the dominant tenements notwithstanding that some of them did not front on the park (see pp. 677, letter G, 679, letter G, 680, letter I to 681, letter B, post), and

(b) the garden rights were capable of forming the subject-matter of a grant because their nature was well defined and well understood and they were a beneficial attribute of residence and were not lacking in the requisite element of utility or benefit (see pp. 681, letters F to I, 682, letter H, 683, letter F.

Dictum of Willes, J., in *Bailey* v. *Stephens* (1862) (12 C.B.N.S. at p. 111) explained.

Observations of Martin, B., in *Mounsey* v. *Ismay* (1865) (3 H. & C. at p. 498) distinguished.

Per Curiam: there is no doubt that *A.-G.* v. *Antrobus* ([1905] 2 Ch. 188) was rightly decided, for no right can be granted (otherwise than by statute) to the public at large to wander at will over an undefined open space nor can the public acquire such a right by prescription (see p. 686, letter G, post).

Decision of Danckwerts, J. ([1955] 2 All E.R. 38) affirmed.

[**Editorial Note.** The four characteristics of an easement stated in the Modern Law of Real Property (7th Edn.), pp. 456-459, by Dr. Cheshire, are adopted in the present case (see p. 673, letter H, post); these are (i) there must be a dominant tenement and a servient tenement, (ii) an easement must accommodate the dominant tenement, (iii) dominant and servient owners must be different persons, and (iv) a right over land cannot amount to an easement unless it is capable of being the subject-matter of a grant. In the present case only (ii) and (iv) were in issue and the rationes decidendi stated at (a) and (b) of para. (ii) of the headnote above show the reasoning applied by the Court of Appeal to resolve these issues.

As to the definition and characteristics of an easement, see 12 Halsbury's Laws (3rd Edn.) 519, para. 1123, p. 527, para. 1143, p. 533, para. 1157; and for cases on the subject, see 19 Digest 9-11, *6-15*.]

Cases referred to:

(1) *Duncan* v. *Louch*, (1845), 6 Q.B. 904; 14 L.J.Q.B. 185; 4 L.T.O.S. 356; 115 E.R. 341; 19 Digest 115, *759*.

(2) *Keith* v. *Twentieth Century Club, Ltd.*, (1904), 73 L.J.Ch. 545; 90 L.T. 775; 40 Digest 327, *2759*.

(3) *International Tea Stores Co.* v. *Hobbs*, [1903] 2 Ch. 165; 72 L.J.Ch. 543; 88 L.T. 725; 19 Digest 37, *193*.

(4) *A.-G.* v. *Antrobus*, [1905] 2 Ch. 188; 74 L.J.Ch. 599; 92 L.T. 790; 69 J.P. 141; 19 Digest 61, *347*.

(5) *Ackroyd* v. *Smith*, (1850), 10 C.B. 164; 19 L.J.C.P. 315; 15 L.T.O.S. 395; 138 E.R. 68; 19 Digest 12, *20*.

(6) *Bailey* v. *Stephens*, (1862), 12 C.B.N.S. 91; 31 L.J.C.P. 226; 6 L.T. 356; 142 E.R. 1077; 19 Digest 201, *1528*.

(7) *Muskett* v. *Hill*, (1839), 5 Bing. N.C. 694; 9 L.J.C.P. 201; 132 E.R. 1267; 19 Digest 197, *1500*.

(8) *A.-G.* v. *Horner* (*No. 2*), [1913] 2 Ch. 140; 82 L.J.Ch. 339; 108 L.T. 609; 77 J.P. 257; 33 Digest 533, *103*.

(9) *Todrick* v. *Western National Omnibus Co., Ltd.*, [1934] Ch. 561; 103 L.J.Ch. 224; 151 L.T. 163; Digest Supp.

(10) *Hill* v. *Tupper*, (1863), 2 H. & C. 121; 32 L.J.Ex. 217; 8 L.T. 792; 159 E.R. 51; 19 Digest 23, *91*.

(11) *Copeland* v. *Greenhalf*, [1952] 1 All E.R. 809; [1952] Ch. 488; 3rd Digest Supp.

(12) *Mounsey* v. *Ismay*, (1865), 3 H. & C. 486; 34 L.J.Ex. 52; 12 L.T. 26; 159 E.R. 621; 19 Digest 7, *3*.

(13) *Solomon* v. *Vintners' Co.*, (1859), 4 H. & N. 585; 28 L.J.Ex. 370; 33 L.T.O.S. 224; 23 J.P. 424; 157 E.R. 970; 19 Digest 57, *326*.

(14) *Dyce* v. *Hay* (*Lady*), (1852), 1 Macq. 305; 19 Digest 16, *42*.

A (15) *Dempster* v. *Cleghorn*, (1813), 2 Dow. 40; 3 E.R. 780; 19 Digest 182, *p.*
(16) *Burrows* v. *Lang*, [1901] 2 Ch. 502; 70 L.J.Ch. 607; 84 L.T. 623; 19 Digest 36, *189*.

Appeal.

Appeal by the first defendant, one of the persons beneficially interested in the B proceeds of sale of Ellenborough Park, from an order of DANCKWERTS, J., dated Mar. 17, 1955, and reported [1955] 2 All E.R. 38.

Ellenborough Park, Weston-super-Mare, was an open rectangular piece of land, measuring 350 yards from east to west and one hundred yards from north to south, whose western boundary faced the sea. It was surrounded on the three other sides by roads. Houses fronted on the roads. In 1855 the park and C surrounding land formed part of the White Cross Estate belonging to Henry Davies and Joseph Whereat in equal moieties. The surrounding land was sold off in plots for building purposes. The conveyances were substantially in the same form and by the conveyance of plot number twenty-one in Ellenborough Crescent, dated Dec. 23, 1864, Henry Davies and Joseph Whereat conveyed the plot to John Porter in fee simple together with easements, in common with D others, over roads and drains on the estate. The following right was also granted

> " and also the full enjoyment . . . at all times hereafter in common with the other persons to whom such easements may be granted of the pleasure ground set out and made in front of the said plot of land intended to be hereby granted in the centre of the square called Ellenborough Park . . . but subject to the payment of a fair and just proportion of the costs charges E and expenses of keeping in good order and condition the said pleasure ground."

John Porter entered into covenants for the completion by him of the dwelling-house and buildings in course of erection on the plot, and he also covenanted jointly with all other persons to whom the right of enjoyment of the pleasure F ground thereinbefore mentioned might be granted to pay a fair proportion of the expenses of making and at all times keeping in good order and condition and well stocked with plants and shrubs the pleasure ground thereinbefore referred to; and each of them, Henry Davies and Joseph Whereat, for himself, his executors, administrators and assigns, covenanted with John Porter, his heirs, executors, administrators and assigns at the expense of John Porter, his heirs, executors, G administrators or assigns and all other persons to whom the right of enjoyment of the pleasure ground thereinbefore mentioned might be granted at all times thereafter to keep as an ornamental pleasure ground the plot of land thereinbefore referred to and situate in front of and partly encircled by the said Ellenborough Crescent. There was a further covenant that Henry Davies and Joseph Whereat their heirs and assigns would not at any time thereafter erect or permit H to be erected any dwelling-house or other building (except any grotto, bower, summer-house, flower-stand, fountain, music-stand or other ornamental erection) within or on any part of the said pleasure ground in the centre of the square or space called Ellenborough Park, but that the same should at all times remain as an ornamental garden or pleasure ground.

By 1879, most of the plots fronting on the park had been sold and houses I erected thereon. William Henry Davies purchased from the personal representatives of Henry Davies and Joseph Whereat (who were both then dead) Ellenborough Park and such other portion of the White Cross Estate as remained unsold. This was conveyed to him in fee simple by a conveyance dated May 21, 1879, subject, as to the piece of land forming the pleasure ground called Ellenborough Park, to the rights still subsisting of all persons to whom the use and enjoyment of the said pleasure ground had been granted, and the vendors constituted and appointed William Henry Davies, his heirs and assigns, to be the true and lawful attorney and attorneys of the vendors to commence, carry on and prosecute any actions or other proceedings whatsoever for compelling the observance and performance on the part of all and any such persons and every such person as were or might be liable to the observance and performance of all and any the covenants and every the covenant the benefits or benefit of which were by virtue of the conveyance assigned to or otherwise vested in William Henry Davies his heirs and assigns or expressed and intended so to be.

William Henry Davies died on May 11, 1880, having, by his will dated Jan. 16, 1868, given his real and personal estate to his executors on trust for sale and conversion and having declared beneficial trusts of the proceeds of sale. The trustees of his will applied by originating summons for the determination of the following questions: (i) whether in the events which had happened the owners of property fronting on a square called Ellenborough Park, Weston-super-Mare, had an enforceable right to the use of Ellenborough Park on payment of a contribution towards the expenses of the upkeep thereof as a private open space; and (ii) whether in the accounts of the plaintiffs in respect of the receipts and payments for the maintenance and preservation of the said park there should be credited to the sum contributed by the said owners towards such expense any, and if so, what part of the rent of £150 per annum received from the War Office in respect of the occupation of the said part by Her Majesty's Forces during the recent war to compensate for any loss by them of the amenity during such period; and also whether in such accounts there should also be so credited any, and if so, what part of the compensation received from the War Office for dilapidations during military occupation. DANCKWERTS, J., declared in answer to question (i) that the owners of the properties fronting on the park or their lessees or under-lessees had easements conferring on them enforceable rights to use the park subject to payment of their proper contributions towards the expenses; and in answer to question (ii) that the moneys received from the War Office in settlement of the claim for dilapidations should, in so far as they had not been so applied, be applied by the plaintiffs in restoration of the park as a private pleasure ground, and that the balance of the compensation rental should be apportioned between the plaintiffs as estate owners and the owners of the houses, and for that purpose inquiries were ordered.

The first defendant appealed against the whole order, but the parties settled the question of the application of the moneys received from the War Office in the following manner which was approved by the Court of Appeal: (i) costs of all parties in the Court of Appeal and in the court below to be paid out of the rental compensation moneys so far as they would extend; (ii) any balance of costs to be paid out of the testator's estate; (iii) balance of capital compensation moneys to be applied in restoring park; (iv) any balance of rental compensation moneys after payment of costs to be applied as to one-half thereof in restoring the park and as to the other half thereof to go to the testator's estate.

Evidence was filed for the purposes of the appeal showing the approximate measurements of Ellenborough Park. The rights over Ellenborough Park were granted not only to purchasers of plots whose houses faced the park but also in respect of some nine or ten other plots not facing the park and separated from the road surrounding the park by the houses facing the park.

Geoffrey Cross, Q.C., and *N. S. S. Warren* for the first defendant, one of the persons beneficially interested in the proceeds of sale of Ellenborough Park.

T. A. C. Burgess for the plaintiffs, the trustees.

R. W. Goff, Q.C., and *A. F. M. Berkeley* for the second defendant, representing the owners of the houses on the plots round Ellenborough Park.

Cur. adv. vult.

Nov. 15. **SIR RAYMOND EVERSHED, M.R.**: The judgment I am about to read is the judgment of the court.

The substantial question raised in this appeal is whether the respondent, or those whom he has been appointed to represent, being the owners of certain

A houses fronting on, or, in some few cases, adjacent to, the garden or park known as Ellenborough Park in Weston-super-Mare, have any right known to the law, and now enforceable by them against the owners of the park, to the use and enjoyment of the park to the extent and in the manner later more precisely defined. Both the premises now belonging to the respondent, or to the owners for whom he acts as champion, [who will be referred as the "owners of the
B houses"] and also the park itself, were originally part of an estate known as the White Cross Estate. The houses in question were built and the park laid out in the middle of the last century. None of the owners of the houses is an original grantee from the proprietors of the White Cross Estate. Similarly, the present owners of the park are the successors in title of the original grantors of the premises of the house owners. A second question is also raised in the appeal.
C It is, on the basis that the owners of the houses have an enforceable right in law against the owners of the park, in what proportions between the owners of the houses on the one side, and the owners of the park on the other, should certain sums of money be divided, which have been paid to the latter by the War Office, in respect of the occupation of the park under requisition by the military authorities during the war? DANCKWERTS, J., who came to a conclusion on the main
D question in favour of the owners of the houses, also made an order as to part of these compensation moneys: but as to the rest directed an inquiry of a somewhat complicated character, for the purpose of ascertaining how the remainder of such moneys should be divided between the owners of the park, on the one hand, and the owners of the houses, on the other hand. Although the payment of the compensation moneys was the circumstance which gave rise, in fact, to the
E present substantial question in the case, this court has been absolved from any determination of the question of their division: for, with a view to avoiding the considerable costs of the inquiry which has been directed, the parties before us have agreed on a compromise of that question which the court is prepared to approve: and the compromise also extends to the application of those moneys in the alternative event of this court arriving at a different view from that of
F DANCKWERTS, J., on the main question.

The plaintiffs in the action are the present owners of the garden or park; but they hold the property as trustees on certain trusts under which the first defendant, Mrs. Maddison, is one of the beneficiaries. She has accordingly been the appellant in this court. The second defendant, Mr. Fred Allen, who is the respondent to this appeal, was appointed by DANCKWERTS, J., to represent for
G the purposes of the proceedings "all persons claiming to have any rights of user of the . . . property known as Ellenborough Park as a private open space." In the course of the hearing before us it appeared that Mr. Allen is in fact not the owner of any of the relevant premises, but is a tenant of one of the houses which belongs to a limited company. It was agreed by learned counsel before us that the limited company should be added as a defendant to the proceedings,
H and its name added to the brief of Mr. Goff, who appeared for the respondent and who informed us that he had been sufficiently instructed by the company. The appeal proceeded before us accordingly on the basis that an owner of one of the houses was before the court, and the order which will be drawn up must provide for the necessary amendment of the proceedings.

The substantial question in the case, which we have briefly indicated, is one of
I considerable interest and importance. It is clear from our brief recital of the facts that if the owners of the houses are now entitled to an enforceable right in respect of the use and enjoyment of Ellenborough Park, that right must have the character and quality of an easement as understood by, and known to, our law. It has, therefore, been necessary for us to consider carefully the qualities and characteristics of easements, and for such purpose to look back into the history of that category of incorporeal rights in the development of English real property law. It may be fairly assumed that in *Duncan* v. *Louch* (1) (1845) (6 Q.B. 904)

the Court of Queen's Bench in 1845, and particularly LORD DENMAN, C.J., A who delivered the first judgment in the court, was of opinion that such a right as the owners of the houses claim was capable of fulfilling the qualifying conditions of an easement. BUCKLEY, J., in 1904 in *Keith* v. *Twentieth Century Club, Ltd.* (2) (90 L.T. 775) answered certain questions which BYRNE, J., had ordered to be set down to be argued before the court, themselves depending on the assumption that such a right could exist in law. On the other hand, FARWELL, J., a judge B peculiarly experienced and learned in real property law, on two occasions, namely, in 1903 in *International Tea Stores Co.* v. *Hobbs* (3) ([1903] 2 Ch. 165) and in 1905 in *A.-G.* v. *Antrobus* (4) ([1905] 2 Ch. 188) used language appearing to treat as axiomatic the proposition that a right which should properly be described as a jus spatiandi was a right excluded by English law, as by Roman law, from the company of servitudes. The four cases which we have mentioned C must be considered hereafter at greater length. But it can be said at once that, with the possible exception of the first, none of them constitutes or involves a direct decision on the question now before us: and although the existence of gardens surrounded by houses, the owners or occupiers of which enjoy in practice the amenities of the gardens, is a well-known feature of town development throughout the country, no other case appears to have come before the courts in D which the validity of the rights in fact enjoyed in the gardens has ever been tested.

A full statement of the facts of the present case was contained in the judgment of DANCKWERTS, J. That judgment is reported ([1955] 2 All E.R. 38), and a statement of the facts is set out at the beginning of his judgment.* Save in two respects, therefore, we do not think it useful or necessary to set the facts out E again in this judgment. Having regard, however, particularly to certain of the arguments by way of analogy put before us by counsel for the first defendant, it is necessary to decide what precisely was the nature of the rights which, under the original conveyances, the owners of the estate purported to grant to the purchasers of the relevant plots of land; and what corresponding obligations the vendors undertook. We shall therefore have to examine closely the exact form F of the conveyances, one of which has been before the court, and has been accepted by counsel as typical of all the relevant conveyances. Second, by reason of the more general argument of counsel for the first defendant, based on the alleged absence of the required connection between the rights to enjoy the garden and the premises themselves (as distinct from the persons of their owners), which are said to constitute the dominant tenements, we must also state precisely, by reference G to further evidence filed before us and by our leave, where these premises are situated.

Before we proceed to those matters of fact, it will be proper as a foundation for all that follows in this judgment to attempt a brief account of the emergence in the course of the history of our law, of the rights known to us as "easements", and thereafter, so far as relevant for present purposes, to formulate what can H now be taken to be the essential qualities of those rights. For the former purpose we cannot do better than cite a considerable passage from the late SIR WILLIAM HOLDSWORTH'S HISTORICAL INTRODUCTION TO THE LAND LAW (Clarendon Press 1927), at p. 265, where the learned author states:

> "Both the term 'easement' and the thing itself were known to the medieval common law. At the latter part of the sixteenth century it was I described in KITCHIN'S book on courts, and defined in the later editions of the 'TERMES DE LA LEY'."

After stating the definition and observing its obvious defects from the point of view of modern law SIR WILLIAM proceeds:

> "But these defects in the definition are instructive because they indicate

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* This is summarised at p. 669, letter C, to 670, letter B, ante.

> that the law as to easements was as yet rudimentary. It was still rudimentary when Blackstone wrote. In fact, right down to the beginning of the nineteenth century there was but little authority on many parts of this subject. Gale, writing in 1839, said: 'the difficulties which arise from the abstruseness and refinements incident to the subject have been increased by the comparatively small number of decided cases affording matter for defining and systematizing this branch of the law. Upon some points, indeed, there is no authority at all in English law.' The industrial revolution, which caused the growth of large towns and manufacturing industries, naturally brought into prominence such easements as ways, watercourses, light and support; and so Gale's book became the starting point of the modern law, which rests largely upon comparatively recent decisions. But, though the law of easements is comparatively modern, some of its rules have ancient roots. There is a basis of Roman rules introduced into English law by Bracton and acclimatized by Coke . . . The law, as thus developed, sufficed for the needs of the country in the eighteenth century. But, as it was no longer sufficient for the new economic needs of the nineteenth century, an expansion and an elaboration of this branch of the law became necessary. It was expanded and elaborated partly on the basis of the old rules, which had been evolved by the working of the assize of nuisance, and its successor, the action on the case; partly by the help of Bracton's Roman rules; and partly, as Gale's book shows, by the help of the Roman rules taken from the Digest, which he frequently and continuously uses to illustrate and to supplement the existing rules of law."

The reference to Lord Coke we take to be a reference to Coke upon Littleton, citations from which and criticisms of which will be found, for example, in Gale on Easements (12th Edn.), at p. 305.

The passage which we have read from Sir William Holdsworth sufficiently serves to explain the appearance and the prominence of Roman dicta in the English law of easements, commonly called, indeed, by the Latin name of "servitudes": and it may well be possible that Farwell, J.'s rejection of the jus spatiandi as a legal right by English law, was derived in part from its similar rejection by the law of Rome. Thus, according to the Roman jurist, Paulus (quoted by Gale, ibid., p. 19), "*ut spatiari et ut coenare in aliena possimus, servitus imponi non potest*": nevertheless, apart from the opinion of Farwell, J., there has been, as we have already observed, no judicial authority for adopting the Roman view in this respect into the English law. Moreover, the exact characteristics of the jus spatiandi mentioned by the Roman lawyers have to be considered. It by no means follows that the kind of right which is here in question, arising out of a method of urban development that would not have been known to Roman lawyers, can in any case be said to fall within its scope. In any event, its validity must depend, in our judgment, on a consideration of the qualities which must now be attributed to all easements by the law relating to easements as it has now developed in England.

For the purposes of the argument before us counsel were content to adopt, as correct, the four characteristics formulated in Dr. Cheshire's Modern Real Property (7th Edn.), p. 456 et seq. They are (i) There must be a dominant and a servient tenement: (ii) an easement must accommodate the dominant tenement: (iii) dominant and servient owners must be different persons: and (iv) a right over land cannot amount to an easement unless it is capable of forming the subject-matter of a grant.

The four characteristics stated by Dr. Cheshire correspond with the qualities discussed by Gale in his second chapter, sections 2, 5, 3, and 6 and 8 respectively. Two of the four may be disregarded for present purposes, viz., the first and the third. If the garden or park is, as it is alleged to be, the servient tenement in the present case, then it is undoubtedly distinct from the alleged dominant tenements, viz., the freeholds of the several houses whose owners claim to exercise the rights. It is equally clear that if these lands respectively constitute the servient and dominant tenements, then they are owned by different persons. The argument in the case is found accordingly to turn on the meaning and application to the circumstances of the present case of the second and fourth conditions; i.e., first, whether the alleged easement can be said in truth to " accommodate " the dominant tenement, in other words, whether there exists the required " connection " between the one and the other; and, second, whether the right alleged is " capable of forming the subject-matter of a grant ". The exact significance of this fourth and last condition is, at first sight perhaps, not entirely clear. As between the original parties to the " grant " it is not in doubt that rights of this kind would be capable of taking effect by way of contract or licence. But for the purposes of the present case, as the arguments made clear, the cognate questions involved under this condition are: whether the rights purported to be given are expressed in terms of too wide and vague a character; whether, if and so far as effective, such rights would amount to rights of joint occupation or would substantially deprive the owners of the park of proprietorship or legal possession; whether, if and so far as effective, such rights constitute mere rights of recreation, possessing no quality of utility or benefit; and on such grounds cannot qualify as easements.

It will now be convenient for us to state the terms of the conveyance dated Dec. 23, 1864, and made between Henry Davies and Joseph Whereat of the one part and John Porter of the other part which, as we have said, has been taken for the purposes of the case as typical of all the conveyances. After a recital of their title to the land to be conveyed, being " part of a certain estate called ' The White Cross Estate ' ", the vendors granted and conveyed unto John Porter and his heirs

> " All that plot . . . of land part of the said White Cross Estate and situate in the parish of Weston-super-Mare."

There followed an exact description of the land with precise measurements. The description showed that the land fronted on a road called " Crescent Road " and backed on another road, and that it adjoined another plot belonging to the purchaser, being No. 20 Ellenborough Crescent. The parcels continued:

> " Together with the messuage or dwelling-house outbuildings and premises which are now in course of erection by the said John Porter on the said plot of land . . . which are intended . . . to form No. 21 of the said row called Ellenborough Crescent . . . Together with all ways paths passages easements rights and appurtenances to the said plot of land . . . belonging or appertaining And particularly the use and enjoyment at all times hereafter in common with the other persons to whom such easements may be granted of the roads called the ' Crescent Road ' and the ' Walliscote Road ' and of all other roads ways and footpaths and of all drains . . . which shall be made on the said White Cross Estate . . . And also the full enjoyment . . . at all times hereafter in common with the other persons to whom such easements may be granted of the pleasure ground set out and made in front of the said plot of land . . . in the centre of the square called Ellenborough Park which said pleasure ground is divided by the said Walliscote Road but subject to the payment of a fair and just proportion of the costs charges and expenses of keeping in good order and condition the said pleasure ground And all the estate right title . . ."

After the habendum and certain immaterial provisions the said John Porter covenanted with the vendors to complete the building of the messuage on the plot conveyed and to do so in accordance with certain specifications and plans

> " similar in every respect externally and in a uniform manner with the messuage or dwelling-house numbered 1 in the same crescent."

The covenant in that respect condescended to considerable detail as regards materials and as regards a dwarf wall and iron palisading and was followed by covenants against alteration of the external elevation or structure and against user for trade or commercial purposes (with certain very limited exceptions) without the consent of the vendors or their successors in title. The purchaser further covenanted to pay a fair proportion of the expense of maintaining the said roads

> " And also will jointly with all other persons to whom the right of enjoyment of the pleasure ground . . . may be granted pay a fair proportion of the expenses of making and at all times keeping in good order and condition and well stocked with plants and shrubs the pleasure ground . . ."

Finally, each of the vendors for himself and his successors in title covenanted with the purchaser and his successors in title

> " and all other persons to whom the right of enjoyment of the pleasure ground . . . may be granted at all times hereafter [to] keep as an ornamental pleasure ground the plot of ground hereinbefore referred to and situate in front of and partly encircled by the said Ellenborough Crescent and also that they would not at any time thereafter erect or permit to be erected any dwelling-house and other building (except any grotto bower summer-house flower-stand fountain music-stand or other ornamental erection) within or on any part of the said pleasure ground . . . but that the same shall at all times remain as an ornamental garden or pleasure ground."

Before we state our view of the meaning and effect of the deed, we will deal with the second matter of fact which we have mentioned, viz., the position of the houses to the grantees of which, according to the fresh evidence filed, the right of user of the pleasure ground or park was given. The exact area of " the White Cross Estate " was not proved: but Ellenborough Park (that is the pleasure ground) and the road round it (Ellenborough Crescent or Crescent Road) is a rectangular area measuring about 350 yards from east to west and about one hundred yards from north to south, its western boundary facing the sea. The right was granted to the purchasers of each of the plots of land the houses on which face inwards round the Crescent Road into the park; but it was also granted in respect of some nine or ten other plots not actually facing into the park but separated from the Crescent Road only by houses so fronting. There appear to be no private ways from the houses built on these other plots direct to the Crescent Road and the park. Access in these cases to the park has to be obtained by the short distance over the ordinary roads in no case more than about 150 or 200 yards. It does not appear what, if any, special obligations were imposed on the original purchasers of these last few houses as regards the character of the houses and the like.

Omitting, for the moment, these last-mentioned few houses, it is clear from the deed from which we have quoted, and from the other deeds in like form made (as must be assumed) in respect of the remaining premises in Ellenborough Crescent, that the original common vendors were engaged on a scheme of development of this part of the White Cross Estate designed to produce a result of common experience; namely, a row of uniform houses facing inwards on a park or garden which was intended to form, and formed in fact, an essential characteristic belonging, and properly speaking " appurtenant ", to all and each of them. In substance, instead of each house being confined to its own small or moderate garden, each was to enjoy in common, but in common exclusively with the other houses in the crescent, a single large " private " garden. In our judgment, the substance of the matter is not in this respect affected by the fact that some few houses in the immediate proximity of, but not actually fronting on, the park were also entitled to share the privilege. This extension of the privilege may no doubt be unusual and (at first sight at any rate) out of line with the conception of the square and its surrounding houses as a symmetrical unit. It has, therefore, a bearing on the question of the " connection " between the right enjoyed and the premises of the relevant house owners; and must be discussed under the head of DR. CHESHIRE's first condition. In our judgment, the language of the deed of 1864 is clear to the effect that the right of enjoyment of the garden was intended to be annexed to the premises sold, rather than given as a privilege personal to their purchaser. The enjoyment was not exclusive to those premises alone; it was to be held in common with the like rights annexed to the other houses in (and in some few cases in close proximity to) the square or crescent. But it was not contemplated that like rights should be otherwise extended so as to belong in any sense to premises not forming part of (or at least closely connected with) the square or their owners. The position of the grant in the deed and its language show that, in the respects we have mentioned, the right granted was intended and treated as in pari materia with the rights of way and drainage similarly conferred. The relevant part of the deed opens with the general formula " Together with all ways . . . easements rights and appurtenances to the said plot of land . . . appertaining." The rights of way (admittedly easements properly so called) follow immediately the general formula, being linked to it by the words " and particularly ". The next two words are " And also ", which, in turn, introduce the garden rights now in question in language which repeats the phrase used in relation to the rights of way—" in common with the other persons to whom such easements may be granted." In our judgment, if the construction of this part of the deed does not tend to the conclusion that the garden rights, like the rights of way, were particular examples of the general grant of easements and rights appurtenant to the plot conveyed, it is at least made clear that the garden rights were (so far of course as they properly could be) of the same character quoad the land conveyed as the rights of way and drainage. It was conceded that the rights, if effectual and enforceable, were conditional, that is, on the house owners making their appropriate contributions to the cost of upkeep. In this respect, again, they were analogous, by the terms of the deed, to the rights of way over Crescent and Walliscote Roads. As a complement to the rights of enjoyment of the garden, subject to the condition of contribution, was the covenant by the vendors against building on the park and to the effect that the park should at all times remain as an ornamental garden. Counsel for the owners of the park did not seriously challenge the contentions of counsel for the owners of the houses that in their context the words of the covenant to which we have last referred could fairly be construed as implying a negative covenant on the vendors' part against any user by them of the park otherwise than as a garden. There is clear authority that, if such be the substantial effect of the covenant, its benefit and burden will run with the land. The last consideration appreciably reinforces the view which we take of the meaning and intention of the deed to attach the garden rights in all respects like the rights of way and drainage to the land conveyed.

It remains to interpret the actual terms of the grant itself—" the full enjoyment of the pleasure ground set out and made . . ." Counsel for the owners of the park fastened on the presence of the word " full ", and the absence of any indication of the way in which the pleasure ground was to be used—or of any limitations on its use—and contended that the right or privilege given was a jus spatiandi in its strict sense, that is, a right to go or wander on the park and every part of it and enjoy its amenities (and even its produce) without stint. We do not so construe the words in their context. Although we are now anticipating to some extent the question which arises under the fourth of DR. CHESHIRE's conditions, it seems to us, as a matter of construction, that the use contemplated and granted was the use of the park as a garden, the proprietorship of which (and of the produce of which) remained vested in the vendors and their successors. The enjoyment contemplated was the enjoyment of the vendors' ornamental garden in its physical state as such—the right, that is to say, of walking on or over those parts provided for such purpose, that is, pathways and (subject to restrictions in the ordinary course in the interest of the grass) the lawns; to rest in or on the seats or other places provided; and, if certain parts were set apart for particular recreations such as tennis or bowls, to use those parts for those purposes, subject again, in the ordinary course, to the provisions made for their regulation; but not to trample at will all over the park, to cut or pluck the flowers or shrubs, or to interfere in the laying out or upkeep of the park. Such use or enjoyment is, we think, a common and clearly understood conception, analogous to the use and enjoyment conferred on members of the public, when they are open to the public, of parks or gardens such as St. James's Park, Kew Gardens or the gardens of Lincoln's Inn Fields. In our judgment, the use of the word "full" does not import some wider, less well understood or definable privilege. The adjective does not in fact again appear when the enjoyment of the garden is later referred to. It means no more than that to each plot was annexed the right of enjoyment of the park as a whole—notwithstanding that it was divided by Walliscote Road. Nor does any difficulty arise out of the condition as to contribution, and counsel for the owners of the park did not, indeed, so suggest. The obligation being a condition of the enjoyment, each house would be bound to contribute its due (that is, proportionate) share of the reasonable cost of upkeep. We do not forget that, as was proved in the evidence, an arrangement was made in 1924 between the then owners of the park and the owners of the houses concerned for regulating, in a mutually convenient way, the future management and upkeep of the garden, and for meeting its cost. Whether such arrangement had or still has any, and, if so, what legal effect, is a question that has not been considered before us, and on which we express no view. We have been concerned with the proper interpretation of the original deeds of grant. If these were effective on their true construction (as must now be considered) to confer legal and enforceable rights capable of passing to the hands of the owners of the houses, and being available against the owners of the park, it is not suggested that these rights have since been varied or lost by virtue of the 1924 arrangement or any other act of the persons at any time interested in such rights.

We pass accordingly to a consideration of the first of DR. CHESHIRE's conditions—that of the accommodation of the alleged dominant tenements by the rights as we have interpreted them. For it was one of the main submissions by counsel for the owners of the park that the right of full enjoyment of the park granted to the purchaser by the conveyance of Dec. 23, 1864, was insufficiently connected with the enjoyment of the property conveyed in that it did not subserve some use which was to be made of that property; and that such a right accordingly could not exist in law as an easement. In this part of his argument, counsel was invoking a principle which is, in our judgment, of unchallengeable authority, expounded, in somewhat varying language, in many judicial utterances, of which the judgments in *Ackroyd* v. *Smith* (5) (1850) (10 C.B. 164) are, perhaps, most commonly cited. We think it unnecessary to review the authorities in which the principle has been applied; for the effect of the decisions is stated with accuracy in DR. CHESHIRE's book at p. 457. After pointing out that

> "one of the fundamental principles concerning easements is that they must be not only appurtenant to a dominant tenement, but also connected with the normal enjoyment of the dominant tenement",

and referring to certain citations in support of that proposition the learned author proceeded:

> "We may expand the statement of the principle thus: a right enjoyed by

> one over the land of another does not possess the status of an easement unless it accommodates and serves the dominant tenement, and is reasonably necessary for the better enjoyment of that tenement, for if it has no necessary connection therewith, although it confers an advantage upon the owner and renders his ownership of the land more valuable, it is not an easement at all, but a mere contractual right personal to and only enforceable between the two contracting parties."

In the course of the argument before us it was suggested that the principle thus formulated lacked completeness having regard to the judgment of Willes, J., in *Bailey* v. *Stephens* (6) (1862) (12 C.B.N.S. 91). The effect of the decision of the Court of Common Pleas in that case is sufficiently stated in the sidenote, which is as follows:

> "A claim of a prescriptive right in the owners or occupiers of close A to enter close B (belonging to a third person), and to cut down and carry away and convert to their own use all the trees and wood growing and being thereon, 'as to the said close A appertaining' is void, as being too large."

In the course of his judgment Willes, J., after referring to *Muskett* v. *Hill* (7) (1839) (5 Bing. N.C. 694), said that a grant to a man to carry away for his own use trees on another's land, which he had been licensed to cut down, constituted an interest which was assignable, but that such a grant could only be made in gross. The learned judge then proceeded as follows (12 C.B.N.S. at p. 111):

> "They [such grants] convey an interest to the grantees, which grantees, if they wish to convey, must convey by the ordinary conveyances known to the law: and it is not because the grantee may happen to be the owner of the close at the time at which the grant is made to him, that such a conveyance may be dispensed with in favour of the person who may from time to time thereafter become the owner of the freehold of the close, or take the licence of the owner of the freehold in the close. And the reason is a simple one, and it will be found in that class of cases now not often referred to, because the law depends principally on the statute of Henry 8. I mean the case of a conveyance by which a certain incident is granted which, though beneficial to the grantee of the land so long as he remains the owner of it, and beneficial in respect of his ownership of the land, can be of no benefit to any other person. And the authorities are to this effect that, at common law, a benefit of that description went into whosoever hands the land might pass . . . But, in order to enable the assignee of the land to take advantage of such a benefit, it must be a benefit falling within the definition I have given,—a definition frequently given with reference to the question whether a covenant runs with a reservation in cases arising under the statute of Henry 8, whether it was beneficial to the land and beneficial in respect of the ownership of the land, and not beneficial to any other person."

It will be observed that in this judgment Willes, J., twice incorporated, in his definition of incidents which run with the land, that they were not (or could not be) of benefit to persons other than the grantees thereof; and counsel submitted that the learned judge was intending to indicate that this isolation of benefit constitutes an essential ingredient of every right granted to a purchaser over the vendor's land, if it is to qualify as an easement which the law will recognise. If Willes, J., did in fact intend to introduce this qualification, and if he were right in doing so, the owners of the park would be much assisted in the present case; for it is clear that a right to use and enjoy the amenities of Ellenborough Park would be appreciated and could benefit many inhabitants of Weston-super-Mare besides the persons to whom in fact the right was granted. We do not think, however, that Willes, J., was intending to say that the right

A of a man to use another person's property for the purposes of his own estate cannot amount to an easement, unless it is incapable of being in fact enjoyed by anyone other than the grantee of the right. He began his judgment by expressing his concurrence in the judgment which ERLE, C.J., had just delivered and the chief justice had made no reference to this element at all. The chief justice had, however, drawn a distinction between, on the one hand, a claim appurtenant to B land to go on another's estate and take the produce without reference to the needs and requirements of the claimant's own land and, on the other hand, the claim by an owner of an estate to go on adjoining land and take certain of the profits to be used at the house and in the tenement of the claimant; and the chief justice had said that the first of these claims would not be sustained in law as an easement whereas the second of them would be. In our judgment C WILLES, J., in expressing himself as he did, had a similar distinction in mind and was merely emphasising that an easement must be appurtenant to an estate for the benefit of that estate and its owner and that it cannot at the same time lawfully be enjoyed by any other person. If, however, the learned judge was intimating that, if a right be of such a character that it can factually (as distinct from lawfully) be of benefit to persons other than the owner of the estate to whom D the right is granted, it is incapable of legal recognition as an easement, the learned judge was enunciating a principle which, so far as we are aware, has no other authority to support it. It is true that the observations of WILLES, J., were quoted without disapproval by HAMILTON, L.J., in *A.-G.* v. *Horner* (*No. 2*) (8) ([1913] 2 Ch. at p. 196), but there is no reason to suppose that the particular point which we are now considering, received his attention, for the point was as E unnecessary for the determination of the case which was before him as it was, in fact, for the determination of *Bailey* v. *Stephens* (6) itself. WILLES, J.'s judgment was also briefly referred to by LORD HANWORTH, M.R., in *Todrick* v. *Western National Omnibus Co., Ltd.* (9) ([1934] Ch. at p. 573); but as to this it is to be observed that if he or ROMER, L.J., and MAUGHAM, L.J., who sat with him, had regarded the language of WILLES, J., as establishing the principle now F in question, it is difficult to imagine why they expressed no view on it; for it would have been directly relevant to the decision of the court. The effect of that decision, so far as material to present purposes, was that a right to use a way as appurtenant to land can exist as an easement even though the dominant tenement is not one of the termini of the way. It is clear that such a way is G capable of benefiting any passer-by, wholly unconnected with the dominant tenement, who chooses to use it as a short cut; nevertheless this court held that a way of this kind could constitute an easement. In our judgment, accordingly, the statement of the law in DR. CHESHIRE'S book, to which we have referred, is unaffected by the judgment of WILLES, J., in *Bailey* v. *Stephens* (6).

Can it be said, then, of the right of full enjoyment of the park in question H which was granted by the conveyance of Dec. 23, 1864, and which, for reasons already given, was, in our view, intended to be annexed to the property conveyed to Mr. Porter, that it accommodated and served that property? It is clear that the right did, in some degree, enhance the value of the property and this consideration cannot be dismissed as wholly irrelevant. It is, of course, a point to be noted; but we agree with the submission of counsel for the owners of the I park that it is in no way decisive of the problem; it is not sufficient to show that the right increased the value of the property conveyed unless it is also shown that it was connected with the normal enjoyment of that property. It appears to us that the question whether or not this connection exists, is primarily one of fact, and depends largely on the nature of the alleged dominant tenement and the nature of the right granted. As to the former, it was in the contemplation of the parties to the conveyance of 1864 that the property conveyed should be used for residential and not commercial purposes. That appears from the conveyance itself, and the covenant by the purchaser already quoted, that the dwelling-house, etc., which he bound himself to build should not

> " be occupied or used as an open or exposed shop or for any purpose of trade or commerce other than a lodging house or private school or seminary "

without the vendor's written consent. Since it is stated in para. 4 of Mr. Rendell's affidavit in support of the summons and has been conceded that all the conveyances of plots for building purposes fronting or near Ellenborough Park were as regards (inter alia) user substantially the same as the conveyance of 1864, the inevitable inference is that the houses which were to be built on the plots were to constitute a residential estate. As appears from the map which is exhibit " G " to Mr. Rendell's further affidavit of Oct. 13, 1955, the houses which were built on the plots around and near to Ellenborough Park varied in size, some being large detached houses and others smaller and either semi-detached or in a row. We have already stated that the purchasers of all the plots which actually abutted on the park were granted the right to enjoy the use of it as were also the purchasers of some of the plots which, although not fronting on the park, were only a short distance away from it. As to the nature of the right granted, the conveyance of 1864 shows that the park was to be kept and maintained as a pleasure ground or ornamental garden, and that it was contemplated that it should at all times be kept in good order and condition and well stocked with plants and shrubs; and the vendors covenanted that they would not at any time thereafter erect or permit to be erected any dwelling-house or other building (except a grotto, bower, summer-house, flower-stand, fountain, music-stand or other ornamental erection) within or on any part of the pleasure ground. On these facts counsel for the owners of the park submitted that the requisite connection between the right to use the park and the normal enjoyment of the houses which were built around it or near it had not been established. He likened the position to a right granted to the purchaser of a house to use the zoological gardens free of charge or to attend Lord's cricket ground without payment. Such a right would undoubtedly, he said, increase the value of the property conveyed, but could not run with it at law as an easement, because there was no sufficient nexus between the enjoyment of the right and the use of the house. It is probably true, we think, that in neither of counsel's illustrations would the supposed right constitute an easement, for it would be wholly extraneous to, and independent of, the use of a house *as a house*, i.e., as a place in which the householder and his family live and make their home; and it is for this reason that the analogy which counsel sought to establish between his illustrations and the present case cannot, in our opinion, be supported. A much closer analogy, as it seems to us, is the case of a man selling the freehold of part of his house and granting to the purchaser, his heirs and assigns, the right, appurtenant to such part, to use the garden in common with the vendor and his assigns. In such a case the test of connection, or accommodation, would be amply satisfied; for just as the use of a garden undoubtedly enhances, and is connected with, the normal enjoyment of the house to which it belongs, so also would the right granted, in the case supposed, be closely connected with the use and enjoyment of the part of the premises sold. Such, we think, is in substance the position in the present case. The park became a communal garden for the benefit and enjoyment of those whose houses adjoined it or were in its close proximity. Its flower beds, lawns and walks were calculated to afford all the amenities which it is the purpose of the garden of a house to provide; and apart from the fact that these amenities extended to a number of householders instead of being confined to one (which on this aspect of the case is immaterial) we can see no difference in principle between Ellenborough Park and a garden in the ordinary signification of that word. It is the collective garden of the neighbouring houses to whose use it was dedicated by the owners of the estate and as such amply satisfied, in our judgment, the requirement of connection with the dominant tenements to which it is appurtenant. The result is not affected by the circumstance that the right to the park is in this case enjoyed by some few houses which are not immediately fronting on the park. The test for present purposes, no doubt, is that the park should constitute in a real and intelligible sense the garden (albeit the communal garden) of the houses to which the enjoyment is annexed. But we think that the test is satisfied as regards these few neighbouring, though not adjacent, houses. We think that the extension of the right of enjoyment to these few houses does not negative the presence of the necessary "nexus" between the subject-matter enjoyed and the premises to which the enjoyment is expressed to belong.

Counsel for the owners of the park referred us to, and to some extent relied on, *Hill* v. *Tupper* (10) (1863) (2 H. & C. 121), but in our opinion there is nothing in that case contrary to the view which we have expressed. In that case the owner of land adjoining a canal was granted the exclusive right to let boats out for hire on the canal. He did so and then sought to restrain a similar activity by a neighbouring landowner. He sought to establish that his grant constituted an easement but failed. As Pollock, C.B., said in his judgment (2 H. & C. at p. 126):

> ". . . it is not competent to create rights unconnected with the use and enjoyment of land, and annex them to it so as to constitute a property in the grantee."

It is clear that what the plaintiff was trying to do was to set up, under the guise of an easement, a monopoly which had no normal connection with the ordinary use of his land, but which was merely an independent business enterprise. So far from the right claimed sub-serving or accommodating the land, the land was but a convenient incident to the exercise of the right. For the reasons which we have stated we are unable to accept the contention that the right to the full enjoyment of Ellenborough Park fails in limine to qualify as a legal easement for want of the necessary connection between its enjoyment and the use of the properties comprised in the conveyance of 1864 and in the other relevant conveyances.

We turn next to Dr. Cheshire's fourth condition for an easement—that the right must be capable of forming the subject-matter of a grant. As we have earlier stated, satisfaction of the condition in the present case depends on a consideration of the questions, whether the right conferred is too wide and vague, whether it is inconsistent with the proprietorship or possession of the alleged servient owners, and whether it is a mere right of recreation without utility or benefit.

To the first of these questions the interpretation which we have given to the typical deed provides, in our judgment, the answer; for we have construed the right conferred as being both well defined and commonly understood. In these essential respects the right may be said to be distinct from the indefinite and unregulated privilege which, we think, would ordinarily be understood by the Latin term "jus spatiandi", a privilege of wandering at will over all and every part of another's field or park, and which, though easily intelligible as the subject-matter of a personal licence, is something substantially different from the subject-matter of the grant in question, viz., the provision for a limited number of houses in a uniform crescent of one single large but private garden. Our interpretation of the deed also provides, we think, the answer to the second question; for the right conferred no more amounts to a joint occupation of the park with its owners, no more excludes the proprietorship or possession of the latter, than a right of way granted through a passage or than the use by the public of the gardens of Lincoln's Inn Fields (to take one of our former examples) amount to joint occupation of that garden with the London County Council, or involve an inconsistency with the possession or proprietorship of the council as lessees.

It is conceded that in any event the owners of the park are entitled to cut the timber growing on the park and to retain its proceeds. We have said that in our judgment, under the deed, the flowers and shrubs grown in the garden are equally the property of the owners of the park. We see nothing repugnant to a man's proprietorship or possession of a piece of land that he should decide to make of it and maintain it as an ornamental garden, and should grant rights to a limited number of other persons to come into it for the enjoyment of its amenities.

Counsel for the owners of the park relied, on this part of his case, on the recent decision of *Copeland* v. *Greenhalf* (11) ([1952] 1 All E.R. 809) and the ratio of the judgment of UPJOHN, J. The relevant facts were that a claim was made to a prescriptive right to deposit, and leave for an indefinite time, vehicles on an undefined part of a strip of land which was subject to a right of way. It appeared that the claimant was by trade a wagon repairer, and that the vehicles were deposited by him on the land in the course of his business and while awaiting repairs. It further appeared that wagons were commonly repaired while remaining so deposited. On these facts the learned judge—very justifiably (if we may say so)—found that the claimant was occupying and seeking the right to occupy an unspecified part of the land for the purpose of his business, and carrying on such business on the land so occupied. The learned judge said (ibid., at p. 812):

> " . . . in my judgment the right claimed here goes wholly outside any normal idea of an easement, that is, the right of the occupier of a dominant tenement over a servient tenement. This claim really amounts to a claim to a joint user of the land by the defendant. Practically he is claiming the whole beneficial user of the strip of land on the south-east side of the track so that he can leave there as many or as few lorries as he likes for any time that he likes and enter on it by himself, his servants and agents, to do repair work. In my judgment, that is not a claim which can be established as an easement. It is virtually a claim to possession, if necessary to the exclusion of the owner, or, at any rate, to a joint user, and no authority has been cited to me which would justify me in coming to the conclusion that a right of this wide and undefined nature can be the proper subject-matter of an easement. It seems to me that for this claim to succeed it must really amount to a right of possession by long adverse possession. I say nothing, of course, as to the creation of such rights by grant or by covenant. I am dealing solely with the question of a claim arising by prescription."

We do not think that the facts of *Copeland* v. *Greenhalf* (11) bear any real relation to the present case, and the judgment of UPJOHN, J., constitutes no authority relevant to our decision.

The third of the questions embraced in DR. CHESHIRE'S fourth condition rests primarily on a proposition stated in THEOBALD'S THE LAW OF LAND (1929), at p. 263, where it is said that an easement " must be a right of utility and benefit and not one of mere recreation and amusement." It does not appear that a proposition in similar terms is stated by GALE. The passage in THEOBALD is justified by reference to two cases: *Mounsey* v. *Ismay* (12) (1865) (3 H. & C. at p. 498), and *Solomon* v. *Vintners' Co.* (13) (1859) (4 H. & N. at p. 593). The second of these cases was concerned with a right of support, and appears to be relevant for present purposes only on account of an intervention in the course of the argument on the part of POLLOCK, C.B., and BRAMWELL, B. (ibid., at p. 593), in which it was suggested that one who had for a long period played rackets against the wall of a neighbour would have a right not to have the wall pulled down. We were also referred in argument to the Scottish case in the House of Lords of *Dyce* v. *Lady Hay* (14) (1852) (1 Macq. 305), and to the earlier case before LORD ELDON, L.C., therein referred to of *Dempster* v. *Cleghorn* (15) (1813) (2 Dow. 40). The former of these two cases was concerned with a claim on the part of the inhabitants of Aberdeen to roam at will over a piece of land bordering on the River Don, and for such purpose to use every part of the land to the practical exclusion of any right of user on the part of the owner. The case was therefore one involving what could strictly be called a claim by a large and ill-defined number of people to a jus spatiandi. In *Dempster* v. *Cleghorn* (15) (in which the only decision was to refer the matter back to the Court of Session) the dispute was between certain persons, inhabitants of the City of St. Andrews and others, claiming the right of playing golf on the St. Andrews' Golf Links, and a tenant whose rabbits were said to be interfering with the proper maintenance of the golf course. Lord Eldon, L.C., observed that the case had excited great warmth of feeling—which indeed may sufficiently appear from the allegation that some of the rabbits on the course were English rabbits. Neither that case nor *Dyce* v. *Lady Hay* (14) appear to us to lend real support to the proposition stated by Theobald, at least in its application to such a case as the present. But the observations of Martin, B., who delivered the judgment of the court in *Mounsey* v. *Ismay* (12) (the first case mentioned in Theobald) are much more to the point. The case concerned a claim under the Prescription Act, 1832, for the freemen and citizens of a town on a certain day to enter on a close for the purpose of holding horse races thereon. The opinion of the court was that the right claimed failed in any event to qualify as an easement by reason of the absence of a dominant tenement. Martin, B., considered, without deciding, the question whether an easement of the kind claimed could in any case exist as an easement in gross: and proceeded as follows (3 H. & C. at p. 498):

> "But, however this may be, we are of opinion that to bring the right within the term 'easement' in s. 2 [of the Prescription Act, 1832] it must be one analogous to that of a right of way which precedes it and a right of watercourse which follows it, and must be a right of utility and benefit, and not one of mere recreation and amusement."

The words which we have quoted were used in reference to a claim for a right to conduct horse races and, in our judgment, the formula adopted by Theobald should be read in the light of that circumstance. In any case, if the proposition be well-founded, we do not think that the right to use a garden of the character with which we are concerned in this case can be called one of mere recreation and amusement, as those words were used by Martin, B. No doubt a garden is a pleasure, and on high authority it is the purest of pleasures; but, in our judgment, it is not a right having no quality either of utility or benefit as those words should be understood. The right here in suit is, for reasons already given, one appurtenant to the surrounding houses as such, and constitutes a beneficial attribute of residence in a house as ordinarily understood. Its use for the purposes, not only of exercise and rest but also for such normal domestic purposes as were suggested in argument—for example, for taking out small children in perambulators or otherwise—is not fairly to be described as one of mere recreation or amusement, and is clearly beneficial to the premises to which it is attached. If Martin, B.'s test is applied, the right in suit is, in point of utility, fairly analogous to a right of way passing over fields to, say, the railway station, which would be none the less a good right, even though it provided a longer route to the objective. We think, therefore, that the statement of Martin, B., must at least be confined to the exclusion of rights to indulge in such recreations as were in question in the case before him, horse racing or perhaps playing games, and has no application to the facts of the present case.

As appears from what has been stated earlier the right to the full enjoyment of Ellenborough Park, which was granted by the conveyance of 1864 and other relevant conveyances, was in substance no more than a right to use the park as a garden in the way in which gardens are commonly used. In a sense, no doubt, such a right includes something of a jus spatiandi inasmuch as it involves the principle of wandering at will round each and every part of the garden except, of course, such parts as comprise flower beds, or are laid out for some other purpose, which renders walking impossible or unsuitable. We doubt, nevertheless, whether the right to use and enjoy a garden in this manner can with accuracy be said to constitute a mere jus spatiandi. Wandering at large is of the essence of such a right and constitutes the main purpose for which it exists. A private garden, on the other hand, is an attribute of the ordinary enjoyment of the residence to which it is attached, and the right of wandering in it is but one method of enjoying it. On the assumption, however, that the right now in question does constitute a jus spatiandi, or that it is analogous thereto, it becomes necessary to consider whether the right which is in question in these proceedings is, for that reason, incapable of ranking in law as an easement.

FARWELL, J., twice indicated that in his opinion the jus spatiandi is an interest which is not known to our law; and we think it is true to say that this principle has been widely accepted in the profession without sufficient regard being had, perhaps, to the exact language in which FARWELL, J., expressed himself or the circumstances in which his view of the matter was propounded. The first of the two cases in which he intimated that a jus spatiandi is not known to the law was *International Tea Stores Co.* v. *Hobbs* (3). The actual decision in that case had nothing to do with a jus spatiandi, nor did the facts which were before the learned judge require of themselves any pronouncement by him on that subject. The question which was in issue was whether the right or privilege of using a way by a lessee over the land of his lessor passed under the Conveyancing Act, 1881, s. 6, on a subsequent conveyance to the lessee of the demised property, notwithstanding that the enjoyment of the way had been wholly permissive and precarious. That being the issue it is not surprising that the arguments of counsel on both sides, as reported in the Law Reports, did not travel outside it. It appears, however, from FARWELL, J.'s judgment that, in the course of Lord Coleridge's submission on behalf of the defendant that the user by the lessees of the way had been merely permissive and precarious and was, therefore, outside the scope of s. 6, he had introduced a right of user of a park and gardens as an illustration of the argument which he was presenting. FARWELL, J., in his judgment described and dealt with the illustration as follows ([1903] 2 Ch. at p. 171):

> " But then Lord Coleridge says that such use was wholly permissive . . . In all these cases the right of way must be either licensed or unlicensed. If it is unlicensed it would be at least as cogent an argument to say ' True you went there, but it was precarious, because I could have sent a man to stop you or stopped you myself any day.' If it is by licence, it is precarious of course in the sense that the licence, being ex hypothesi revocable, might be revoked at any time; but if there be degrees of precariousness, the latter is less precarious than the former. But, in my opinion, precariousness has nothing to do with this sort of case, where a privilege which is by its nature known to the law—namely, a right of way—has been in fact enjoyed. Lord Coleridge's argument was founded upon a misconception of a judgment of mine in *Burrows* v. *Lang* (16) ([1901] 2 Ch. 502), where I was using the argument of precariousness to show that the right which was desired to be enjoyed there was one which was unknown to the law—namely, to take water if and whenever the defendant chose to put water into a particular pond; such a right does not exist at law; but a right of way is well known to the law. The instance suggested by Lord Coleridge in his argument illustrates my meaning: he put the case of a man living in a house at his landlord's park gate, and having leave to use and using the drive as a means of access to church or town, and to use and using the gardens and park for his enjoyment, and asked, Would such a man on buying the house with the rights given by s. 6 of the Conveyancing Act acquire a right of way over the

> A drive, and a right to use the gardens and park? My answer is 'Yes' to the first, and 'No' to the second question, because the first is a right the existence of which is known to the law, and the latter, being a mere jus spatiandi, is not so known."

FARWELL, J., was a judge of great learning and all his judicial utterances merit and are accorded more than ordinary respect, but in his, as in all, judgments B more weight should be attached to that which was necessary for the decision of the case than to that which was merely obiter. It is plain that FARWELL, J.'s reference, in the passage quoted, to the jus spatiandi formed no necessary part of his judgment and it is to be noted that he did not refer to any authority in support of it. It must, nevertheless, be conceded that in the view of a very learned judge the right of a man to use, as appurtenant to his own property, the C gardens and park of another is a right the existence of which is not known to the law, even though that right be expressly granted.

The second of the two cases in which the jus spatiandi was considered by FARWELL, J., was *A.-G.* v. *Antrobus* (4). That was an action which was brought by the Attorney-General at the relation of the chairman of the local parish council and certain gentlemen interested in the preservation of public rights in D open spaces and footpaths against the then owner of the land on which Stonehenge stands, for an order for the removal of certain fences which the defendant had erected round Stonehenge. It will be seen accordingly that the object of the action was to establish public, as distinct from private, rights; and the public rights, as so asserted, were to have free access to Stonehenge by means of roads running up and through the same, such rights being founded on an alleged E trust, created by a lost grant or declaration or by lost statute, for the free user by the public of Stonehenge as a place of resort and for the free access of the public thereto by means of the said roads. At the trial, as appears from the judgment of FARWELL, J., the plaintiffs produced no evidence that Stonehenge was subject to a trust for its free user by the public, but asked the court to presume a lost grant or statute because for many years past the public had been F in the habit of visiting the place. This the learned judge declined to do. He found as a fact ([1905] 2 Ch. at p. 201) that there had, for many years past, been a large amount of traffic to Stonehenge as the end and object of the journey; that the journeys had been made for the purpose of visiting the stones and of staying there for such period as each visitor might find pleasant for the purposes of inspection, instruction and general enjoyment. In refusing to presume a G lost grant or statute conferring on the public the right of free user of Stonehenge the learned judge said ([1905] 2 Ch. at p. 198):

> "It is impossible for the court . . . to make any such presumption as is suggested. The public as such cannot prescribe, nor is jus spatiandi known to our law as a possible subject-matter of grant or prescription: 'and for H such things as can have no lawful beginning, nor be created at this day by any manner of grant, or reservation, or deed that can be supposed, no prescription is good.' "*

He also said (ibid., at p. 199):

> ". . . the right of walking around and inspecting the stones is not one which could be the subject-matter of a grant . . ."

I Later in his judgment, when considering whether certain of the tracks which led to Stonehenge were public highways, he said (ibid., at p. 205):

> "The whole object of the journeys was to see the stones, and as there can be no legal right of visiting, walking about, and inspecting the stones in the public, these visits must be deemed to have been by the permission of the owner . . ."

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* Quoted by LORD SELBORNE in *Dalton* v. *Angus* (1881) (6 App. Cas. at p. 795), from *Potter* v. *North* (1669) (1 Vent. 387).

He also said ([1905] 2 Ch. at p. 206):

> " Further, the tracks which lead into the circle cease there and do not cross, and the public have no jus spatiandi or manendi within the circle. The claim, therefore, is to use tracks which in fact lead nowhere."

Now it is quite true that in this judgment Farwell, J., said that the jus spatiandi is not " known to our law as a possible subject-matter of grant or prescription " and that this formula is on its face wide enough to exclude the purported grant in express terms of such a right to a purchaser as appurtenant to his property. But no such grant was in question in the case, which was solely concerned with the alleged rights of the public as a whole; and in our judgment the learned judge was addressing his mind to those rights and to those alone, and he held that as they could not be the subject-matter of a grant he was unable to presume a lost grant which purported to create them. He held also that a jus spatiandi cannot be acquired by public user as an easement and this is clearly so if only for the reason that there can be no dominant tenement to which the easement could be said to be appurtenant. It does not necessarily follow from this, however, that no such jus could be acquired by individuals by prescription and still less does it follow (which is the material point for present purposes) that no such jus could be created in favour of an individual for the better enjoyment of his property by a grant which was express in its terms. As in *International Tea Stores Co. v. Hobbs* (3) so in *A.-G.* v. *Antrobus* (4) Farwell, J., refrained from citing authority in support of his observations with regard to the jus spatiandi.

It will be noted that in both of these cases the learned judge said that a jus spatiandi is " not known to our law " and the question arises what precisely he meant by using that phrase. He may have meant (a) that it was unknown to our law because it found no place in the Roman law of servitudes; (b) that it was repugnant to the ownership of land that other persons should have rights of user over the whole of it; (c) that the law will not recognise rights to use a servient tenement for the purposes of mere recreation and pleasure, or (d) that such rights are too vague and uncertain to be capable of definition. Which of these meanings the learned judge had in mind it is difficult to know; and, indeed, he may have had some other meaning. If, however, one attributes to the phrase " not known to the law " its ordinary signification, i.e., that it was a right which our law had refused to recognise, it is clear, we think, that he would at least have expressed himself in less general terms had his attention been drawn to *Duncan* v. *Louch* (1). That case was not, however, cited to him in either *International Tea Stores Co. v. Hobbs* (3) or in *A.-G.* v. *Antrobus* (4) for the sufficient reason that it was not relevant to any issue that was before the learned judge on the questions which arose for decision. There is no doubt, in our judgment, but that *A.-G.* v. *Antrobus* (4) was rightly decided; for no right can be granted (otherwise than by statute) to the public at large to wander at will over an undefined open space nor can the public acquire such a right by prescription. We doubt very much whether Farwell, J., had in mind, notwithstanding the apparent generality of his language, a so-called jus spatiandi granted as properly appurtenant to an estate; for the whole of his judgment was devoted to a consideration of public rights, and although this cannot be said of his observations as to the gardens and park in *International Tea Stores Co.* v. *Hobbs* (3) the view which he there expressed was entirely obiter on a point which was irrelevant to the case and had not been argued. Inasmuch, therefore, as this observation is unsupported by any principle or any authority that are binding on us, and is in conflict with the decision in *Duncan* v. *Louch* (1) we are unable to accept its accuracy as an exhaustive statement of the law and, in reference, at least, to a case such as that now before the court, it cannot, in our judgment, be regarded hereafter as authoritative.

Duncan v. *Louch* (1), on the other hand, decided more than a hundred years ago but not, as we have observed, quoted to Farwell, J., in either of the two cases which we have cited, is authoritative in favour of the recognition by our law as an easement of a right closely comparable to that now in question which, if it involves in some sense a " jus spatiandi ", is nevertheless properly annexed and appurtenant to a defined hereditament. *Duncan* v. *Louch* (1) was an action brought by the plaintiff as owner of premises, No. 15 Buckingham Gate, Adelphi, London, on account of obstruction by the defendant of what the plaintiff alleged to be a right of way from Buckingham Gate over or across Terrace Walk to a watergate on the Thames River. On the trial before Wightman, J., it was objected on the defendant's part that, though the plaintiff had alleged a right of way from terminus to terminus, the right which he had in fact proved under his documents of title was a right to use Terrace Walk for the purposes of pleasure, that is, to pass and repass over every part of the close. The objection was overruled by the trial judge. The plaintiff showed cause before the Queen's Bench why the rule nisi obtained by the defendant for a verdict in his favour should be discharged; and the matter, as so often was the case in like circumstances, strictly turned on the narrow question whether the alleged variance between the allegation and the proof was fatal to the plaintiff's case. The decision in the plaintiff's favour was to the effect that, although the right proved exceeded the allegation, nevertheless the former necessarily embraced the latter. The argument on the defendant's part thus appears from the report (6 Q.B. at p. 910):

> " If this be a right of way, it is a right only of using the way for the purpose of passing from terminus to terminus, and not of walking for pleasure between the intermediate points. But the right is in fact one of a kind altogether different. It is like the privilege which the builder of a square, who reserves the centre for a garden common to all the houses, grants to the owners and tenants of the houses of walking about the garden, on condition of keeping it in order."

Whether Mr. Peacock's argument assumed that such a right as he had cited by way of analogy was one recognised by the law, Lord Denman, C.J., in his judgment, in terms, so held. He said (ibid., at p. 913):

> " I think there is no doubt in this case. Taking the right, as Mr. Peacock suggests, to be like the right of the inhabitants of a square to walk in the square for their pleasure . . . I cannot doubt that, if a stranger were to put a padlock on the gate and exclude one of the inhabitants, he might complain of the obstruction . . . "

Similarly, Patteson, J. (ibid.):

> " I do not understand the distinction that has been contended for between a right to walk, pass and repass forwards and backwards over every part of a close, and a right of way from one part of the close to another. What is a right of way but a right to go forwards and backwards from one place to another ? "

And Coleridge, J., in his judgment, described the right proved as an " easement ". The reasoning of the decision and the circumstances of the case, no less than the language used, particularly by Lord Denman, C.J., involve acceptance as an easement of a right such as that with which, according to our interpretation of the effect of the relevant deeds, we are here concerned.

The remaining one of the four cases mentioned at the beginning of this judgment, *Keith* v. *Twentieth Century Club, Ltd.* (2), is, however, in our view, of much less assistance. There, the plaintiffs were owners and occupiers of two rows of houses in London and claimed the right to use the garden between these rows. The plaintiffs sought in the action an injunction to restrain the defendants (who were owners of certain other houses in one of the rows and carried on the business there of a proprietary ladies' club) from authorising members of the club to use the garden: and the questions formulated by Byrne, J., in an order made by consent were (briefly) whether certain classes of the club members were, during membership, and having regard to the terms of the defendants' title deeds, entitled as of right to use the garden or could be authorised by the defendants so to do. The original grant to the defendants' predecessor in title purported to grant to the purchaser

> " his heirs executors administrators and assigns and his and their lessees and sub-lessees or tenants (being occupiers for the time being) of the . . ."

premises in question the use of the garden or pleasure ground. The argument before BUCKLEY, J., turned, according to the report, on the question whether the members or particular categories of the members were " tenants " or mere licensees for the purposes of the deed, and the learned judge decided in favour of the latter view. As BUCKLEY, J., observed at the beginning of the judgment, the freehold owner of the garden, that is of the alleged servient tenement, was never before the court at all. He said (90 L.T. at p. 777):

> " The garden ground in question belongs to a freeholder, who is the common grantor of both the plaintiffs and defendants, but he is not a party to this action. The plaintiffs are asking for an injunction to restrain the defendants from going behind what the plaintiffs say is the grant which is made to them; and they are doing that in the absence of the common grantor, who might have granted, so far as I see, rights to people other than those who are here before me. But I am not trying this action; and the question whether it is complete as to parties is not necessary for my determination, for this reason, that I am only proceeding under an order made by BYRNE, J., by which by consent it was ordered that certain points of law raised by the pleadings be set down to be argued."

The whole of the rest of the judgment was devoted to consideration of the question whether the members were tenants or licensees. It is no doubt true, as counsel for the owners of the houses contended, that if any right of the nature of a jus spatiandi is incapable of being an easement under our law, the questions submitted to and determined by BUCKLEY, J., were open to a simple and conclusive answer—or were, at best, questions of merely academic interest. On the other hand, as counsel for the owners of the park observed, the questions had been formulated by another judge of the Chancery Division, BYRNE, J., under the Rules of the Supreme Court for the court to answer: and they had moreover been submitted in an action to which the owner of the " servient tenement " was not a party. *International Tea Stores Co.* v. *Hobbs* (3) had been before the Chancery Court in the immediately preceding year, and it seems at the least unlikely that BUCKLEY, J. (and all the experienced counsel before him) were wholly unaware of FARWELL, J.'s views. It appears more reasonable to us to assume that BUCKLEY, J., felt it his duty to determine the questions which had been properly submitted to him under the rules without questioning the basis on which they had been or might have been formulated. In the circumstances, therefore, we cannot regard *Keith's* case (2) as having authoritative force. On the other hand, we agree with DANCKWERTS, J., in regarding *Duncan* v. *Louch* (1) as being a direct authority in favour of the owners of the houses. It has never, so far as we are aware, been since questioned, and we think it should, in the present case, be followed.

For the reasons which we have stated, DANCKWERTS, J., came, in our judgment, to a right conclusion in this case and accordingly the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Robins, Hay & Waters*, agents for *Burges, Salmon & Co.*, Bristol (for the first defendant); *Waterhouse & Co.*, agents for *John Hodge & Co.*, Weston-super-Mare (for the plaintiffs); *Robbins, Olivey & Lake*, agents for *Griggs & Collett*, Weston-super-Mare (for the second defendant).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

Re YOUNG'S WILL TRUSTS.
WESTMINSTER BANK, LTD. *v.* STERLING AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), November 18, 1955.]

Charity—Relief of poverty—Requirement of public element—Bequest for the assistance of fellow members of the testator's club who might fall on evil days—Analogy of poor relations cases.

By his will the testator gave his residuary estate, subject to certain life interests therein, to the trustees of the benevolent fund of the Savage Club, of which he was a member, " upon trust to be used by them as they shall in their absolute discretion think fit for the assistance of any of my fellow members by way of pensions or grants who may fall on evil days ". In the event of the club ceasing to exist at any time, there was a gift over of the residue subject to any pensions which had been granted and secured thereon. On the question whether the trusts of residue were valid charitable trusts,

Held: (i) the gift of the testator's residuary estate created valid charitable trusts, since it was for the relief of poverty and within the exception, established in the line of cases known as the " poor relations " cases, from the general rule that a trust was not charitable unless it was directed to the public benefit.

Gibson v. *South American Stores (Gath & Chaves), Ltd.* ([1949] 2 All E.R. 985) applied.

Re Compton ([1945] 1 All E.R. 198) considered.

(ii) the benefit of the gift extended, on the true construction of the will, to such members of the Savage Club from time to time throughout its existence as might have fallen on evil days.

[**Editorial Note.** The " poor relations " cases are accepted, in the present case, as an exceptional class of cases in that they exemplify trusts which are charitable but which lack the element of public benefit. That they are binding both on the High Court and the Court of Appeal is shown by the judgment of SIR RAYMOND EVERSHED, M.R., in *Re Scarisbrick's Will Trusts* ([1951] 1 All E.R. at p. 829, letter D), where he also cites a dictum of LORD SIMONDS in *Oppenheim* v. *Tobacco Securities Trust Co., Ltd.* ([1951] 1 All E.R. at p. 35, letter E) as indicating that the House of Lords might be disinclined to question now the validity of this line of authority.

As to public benefit being a requisite of a charitable trust, see 4 HALSBURY'S LAWS (3rd Edn.) 209, para. 488; and for cases on the subject, see 8 DIGEST (Repl.) 313, 314, *3-6*.

As to the relief of the poor being a charitable purpose, see 4 HALSBURY'S LAWS (3rd Edn.) 213-218, paras. 492-495, and, in particular, for "poor relations", see ibid., p. 216, para. 494; and for cases on the subject, see 8 DIGEST (Repl.) 316-319, *13-48*.]

Cases referred to:

(1) *Re Compton,* [1945] 1 All E.R. 198; [1945] Ch. 123; 114 L.J.Ch. 99; 172 L.T. 158; 8 Digest (Repl.) 330, *123*.

(2) *Gibson* v. *South American Stores (Gath & Chaves), Ltd.,* [1949] 2 All E.R. 985; [1950] Ch. 177; 8 Digest (Repl.) 320, *51*.

Adjourned Summons.

The plaintiff, Westminster Bank, Ltd., as the executor and trustee of the will of the testator, Ernest Young deceased, applied to the court by originating summons for the determination of the questions (i) whether the gift of the residuary estate of the testator to the first three defendants as the trustees for the time being of the benevolent fund of the Savage Club was a good and valid gift, or was in whole or part invalid; and (ii) whether the testator died intestate as to his residuary estate or some part thereof.

W. F. Waite for the plaintiff, the executor and trustee of the will.

W. J. Mowbray for the first, second and third defendants, the present trustees of the benevolent fund of the Savage Club.

R. J. S. Thompson for the fourth and fifth defendants, the legal personal representatives of the testator's sister (interested in the event of an intestacy).

DANCKWERTS, J.: The testator, Mr. Ernest Young, who was a member of the Savage Club, made his will on Aug. 19, 1946, and died on Feb. 10, 1952. He gave the income of his residuary estate to his brother William John Young, who pre-deceased him, and to his sister Kathleen Hilda Young, who died a few months after the testator, " in equal moieties for their respective lives and the life of the survivor ". Then, in cl. 7, after stating that he had revoked certain gifts in a previous will, he declared:

> " . . . in substitution thereof I give my residuary estate subject to the life interests therein of my said brother and sister to the trustees of the benevolent fund of the Savage Club, 1, Carlton House Terrace, London, S.W.1. upon trust to be used by them as they shall in their absolute discretion think fit for the assistance of any of my fellow members by way of pensions or grants who may fall on evil days."

He then said, in cl. 8:

> " In the event of the Savage Club at the time of my death not being in existence or ceasing to exist at any time after my death subject to the life interests of my said brother and sister I give my residuary estate subject to any pensions which may have been granted by the Savage Club and secured thereon to the trustees of the pensions fund of the Incorporated Society of Authors, Playwrights and Composers of 84 Drayton Gardens, London, S.W.10."

It was contended on behalf of those who claim that there is an intestacy that the gift to the trustees of the benevolent fund of the Savage Club fails because it is not a valid charitable trust in view of the fact that the members of the Savage Club are not to be regarded as a part of the public so as to make the trust a public charitable trust.

It is well known that in *Re Compton* (1) ([1945] 1 All E.R. 198) the Court of Appeal treated the line of cases known as the " poor relations " cases as an exception from the general rule that charitable trusts, to be valid, must confer benefits on the public or a portion thereof. In the " poor relations " cases, which were decided some time ago*, a gift by a testator in favour of his poor relations was held to be good notwithstanding that general proposition which I have mentioned. The Court of Appeal suggested, however, that it was not a matter which should be extended. Notwithstanding what was said in the Court of Appeal in *Re Compton* (1), in *Gibson* v. *South American Stores (Gath & Chaves), Ltd.* (2) ([1949] 2 All E.R. 985), the Court of Appeal held as perfectly valid a gift for the relief of poverty in respect of the employees of a limited company. I am unable to see what distinction there is in principle between the employees of a limited company and the members of a club. It is a members' club and it seems to me that it is a class bound together by the same principles, as much in the one case as in the other. As the words " for the assistance of any of my fellow members by way of pensions or grants who may fall on evil days " are plainly for the relief of poverty, it seems to me that this is a valid charitable trust within that limited exception to which I have referred.

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*See, for example, *Isaac* v. *Defriez* (1754) (Amb. 595), *White* v. *White* (1802) (7 Ves. 423), and *A.-G.* v. *Price* (1810) (17 Ves. 371), cited in *Re Compton* (1).

As regards the meaning of the words " of my fellow members ", it is true that to give those words their narrowest meaning would confine the benefit of the bequest to the members of the Savage Club who were members of the club either at the date of the testator's will or, possibly, at the date of his death; but I think that the testator was using these words, not in that limited sense, but in the broader sense, namely, that of members who are members of the club " to which I belong ". It seems to me that that is clearly indicated in cl. 8, where the gift over is not on the final demise of the survivors of the members who were members when the testator died, or anything of that sort, but is on the Savage Club itself ceasing to exist. Consequently, it seems to me that what the testator had in mind was a fluctuating class of persons, the members from time to time of the Savage Club throughout its existence. Accordingly, there is a good and valid charitable trust to be applied by way of pensions or grants to members of the Savage Club from time to time as they fall on evil days.

Order accordingly.

Solicitors: *Bentley Taylor & Stevens* (for the plaintiffs); *Rubinstein, Nash & Co.* (for the first, second and third defendants); *Doyle, Devonshire & Co.*, agents for *Molineux, McKeag & Cooper*, Newcastle-upon-Tyne (for the fourth and fifth defendants).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

Re VAN LESSEN (*deceased*). NATIONAL PROVINCIAL BANK, LTD. *v.* BEAMONT AND ANOTHER.

[CHANCERY DIVISION (Wynn-Parry, J.), November 10, 1955.]

Will—Gift of stamps of " Great Britain and . . . the British Colonies "—" British Colonials "—Meaning attributed by philatelists—What stamps included in gift.

By a bequest contained in paragraph B of clause 3 of his will dated in October, 1939, a testator, who was an experienced philatelist and had an extensive collection of stamps, gave his " collection of stamps of Great Britain and of such of the British Colonies except Malta . . ." as might be in his collections to the first defendant. On a summons to determine what stamps were included in the gift, evidence was given that a phrase " British Colonials " was in general use among philatelists and that this phrase included stamps of all countries in the British Commonwealth and mandated territories and even the Republic of Eire, Egypt and the Sudan.

Held: in the bequest the testator was using the language of philatelists and the phrase " stamps of Great Britain and . . . of the British Colonies " was equivalent to the phrase " British Colonials " in use among philatelists; accordingly, the gift in the will was effective to dispose of all those categories of stamps to which the question in the summons related.

Re Maryon-Wilson's Estate ([1912] 1 Ch. 55) considered.

[**Editorial Note.** Although words in wills are given their ordinary meaning for the purpose of ascertaining the testator's expressed intentions, yet a bequest may be considered in the context of the will as a whole and thus the will itself may be a dictionary showing the sense which should be attributed to particular words with, possibly, the help of extrinsic evidence where that is admissible; see, for the general principle, 34 HALSBURY'S LAWS (2nd Edn.) 190, para. 242, p. 194, para. 247, and for cases, see 44 DIGEST 579, 580, *3984-4014*.

As to the meaning of colony, see 5 HALSBURY'S LAWS (3rd Edn.) 432, para. 985.]

Cases referred to:

(1) *Re Maryon-Wilson's Estate,* [1912] 1 Ch. 55; 81 L.J.Ch. 73; 105 L.T. 692; 43 Digest 935, *3729.*

(2) *Re Brassey's Settlement,* [1955] 1 All E.R. 577.

Adjourned Summons.

The plaintiff, National Provincial Bank, Ltd., as the executor and trustee of the will of Ryko Rentjo Van Lessen deceased, applied to the court by originating summons for the determination of the question whether, on the true construction of the will, the bequest of the testator's collection of the stamps of Great Britain and of such British Colonies except Malta as might be in his collections included categories of stamps mentioned in the summons.

By his will dated Oct. 10, 1939, the testator disposed of his stamp collections, and in particular, by paragraph B of clause 3, he declared: " I give my collection of stamps of Great Britain and of such of the British Colonies except Malta as may be in my collections to Roland Beamont . . ." After other specific bequests of stamps, the testator gave the " residue of my stamp collection " to his nephew, Michael Derick Van Lessen.

The testator, who died on Nov. 13, 1951, was an experienced philatelist and his collections included both British and foreign stamps. A dispute arose as to the true interpretation of clause 3B, and especially whether the gift included stamps of British Dominions, the Empire of India, Palestine, British Post Offices in Morocco and in the Levant, the Irish Free State and Ireland, Egypt, and the Sudan.

Evidence of experienced stamp dealers and collectors was before the court as to the meaning which philatelists would attribute to the terms used in clause 3B. References were made to magazines and other journals of 1939 (when the will was made) and of 1951 (when the testator died), and to auction catalogues, in which the term " British Colonials " was used. Evidence was given that philatelists would understand the term " collection of British Colonies " as including all those countries listed in the Stanley Gibbons British Empire Catalogue. It also appeared that while all the stamps in dispute would fall within the Stanley Gibbons British Empire Catalogue (the " red Gibbons ") for 1939, those of Egypt issued after 1922 were not included in the 1950 and 1951 editions of that catalogue.

P. W. E. Taylor for the plaintiff bank.
J. Monckton for the first defendant.
Owen Swingland for the second defendant.

WYNN-PARRY, J.: The question with which I have to deal on this summons arises on the language of paragraph B of clause 3 of the will. By clause 3 the testator, who was a philatelist of considerable experience and had what would appear to be a very extensive collection of postage stamps, was designing to dispose of the whole of that collection. He divides the collection into classes; by paragraph A of clause 3 he deals with what he calls

> " my collection of stamps of Holland and of the Dutch Colonies of Curacao Dutch East Indies and Suriname."

In paragraph B of clause 3 he deals with the stamps with which I am concerned in these words:

> " I give my collection of stamps of Great Britain and of such of the British Colonies except Malta as may be in my collections to Roland Beamont [the first defendant] . . ."

In paragraph C of clause 3 he disposes of the excepted stamps, the stamps of Malta, by giving them to Sydney Wallace Bradley. In paragraph D of clause 3 he disposes of his collection of stamps of France, Belgium, Luxembourg and such of the French Colonies as might be in his collection. Finally, in paragraph E of clause 3, he provides:

> "I give the residue of my stamp collection to my nephew Michael Derrick Van Lessen [the second defendant]."

The difficulty is created by the use of the phrase

> "stamps of Great Britain and of such of the British Colonies except Malta."

The word "colonies" is a word which has received no exhaustive definition either in the statutes or by the courts. It is quite clear from the review which counsel for the first defendant made of a number of statutes and the definition clauses therein that the word "colony" can be and is given either a limited or a very extended meaning according to the purposes of the Act. So far as the courts are concerned, their attitude can best be indicated by the observations of the Court of Appeal in *Re Maryon-Wilson's Estate* (1). COZENS-HARDY, M.R., said ([1912] 1 Ch. at p. 62):

> "The word 'colony' is defined in various Acts of Parliament to which our attention has been called, but only for the purposes of those Acts. The definitions are not uniform, and I doubt whether much assistance can be derived from them. The Interpretation Act, 1889, contains a definition of the word 'colony' in any subsequent Act of Parliament unless the contrary appears. That definition is against the appellant, and would not include the provinces of Canada. But of course the definition has no direct application to a will."

He adds that the dictionaries to which attention had been called did not help. FLETCHER MOULTON, L.J., said (ibid., at p. 63):

> "It is impossible to doubt that the phrase 'British colony or dependency' is one of very uncertain meaning."

FARWELL, L.J., said (ibid., at p. 66):

> "'Colony' has no definite technical meaning in a deed or will, and it is unnecessary to attempt to find one for the purposes of this case . . ."

In view of that, it becomes necessary to consider the background of the testator and of those whom he designed to benefit by this clause. He was, as I have said, a philatelist of considerable experience. The evidence further shows that it was he who had first roused the interest of the legatee under paragraph B of clause 3, in stamp collecting. Having regard to the circumstance that the word "colony" is a word of doubtful meaning that at once raises the question whether or not the testator in this clause was using the language of a philatelist. It was pointed out quite rightly by counsel for the second defendant that there was later in the will an investment clause, clause 8, in which occurred the words

> "or otherwise in the United Kingdom or India or any colony or dependency of the United Kingdom and any foreign country."

It is also true that, having regard to the recent decision of DANCKWERTS, J., in *Re Brassey's Settlement* (2) ([1955] 1 All E.R. 577), it would not be possible to construe the word "colony" in that clause otherwise than in such a narrow sense as to exclude any part of the British Commonwealth having Dominion status. Counsel submitted that that showed that the testator had made his own dictionary, that I ought to give the same narrow meaning to the word "colony" in paragraph B of clause 3 and that, therefore, no extrinsic evidence as to the use of such a phrase as "British Colonies" by philatelists was admissible. That, of course, would provide a short answer to the whole problem, but in my view it would be wrong to treat paragraph B of clause 3 as governed by the language of clause 8. In my judgment, the correct view is that the testator was using the language of philatelists in paragraph B of clause 3.

It becomes necessary, therefore, shortly to examine the admissible evidence to see whether that throws any light on this phrase

> " my collection of the stamps of Great Britain and of such of the British Colonies except Malta."

A number of experts has been consulted on the matter, but I do not propose to traverse their evidence in detail. I observe that a Mr. Yates, who is a Fellow of the Royal Philatelic Society of London and a Member of the City of London Philatelic Society, and who has been a collector and exhibitor of stamps for a period of approximately forty years expresses in his affidavit the view that the term " British Colonies " (in the language of philatelists)

> " includes all those stamps which are listed in Stanley Gibbons British Empire Catalogue."

Messrs. Stanley Gibbons were in fact consulted and, in a letter dated June 5, 1953, they wrote:

> " When a stamp collector refers to a collection of British Colonies he undoubtedly refers to all those countries which are listed in our British Empire Catalogue."

The testator made his will in October, 1939, and the whole of the stamps in dispute would have been found in that British Empire Catalogue current at that date. Moreover, by an arrangement between the parties, a number of catalogues and publications relating to stamp collecting were referred to. Among them were a number of periodicals published in the autumn of 1939 and some as recently as 1951. What stands out from a perusal of the relevant entries in those publications is that there is in use among philatelists a convenient phrase, " British Colonials ", and that phrase is taken by philatelists to include the stamps of all countries in the British Commonwealth and mandated territories and even such countries as those which are now the Republic of Eire, Egypt and the Sudan. The phrase is clearly wide enough to cover the whole of the stamps in dispute in this matter.

Then arises the question whether I can treat the phrase

> " my collection of stamps of Great Britain and of such of the British Colonies except Malta "

as, with that exception, being equivalent to what philatelists conveniently refer to as " British Colonials " ? In my judgment, on consideration, the phrase " the stamps of Great Britain and . . . of the British Colonies " is a paraphrase and equivalent to the phrase " British Colonials " as used by philatelists. Therefore in this case I propose to give that meaning to the phrase " British Colonies " in paragraph B of clause 3 of the will.

Declaration accordingly.

Solicitors: *Benham, Synnott & Wade* (for the plaintiff); *Vanderpump & Sykes* (for the first defendant); *Wood, Nash & Co.* (for the second defendant).

[*Reported by* Philippa Price, *Barrister-at-Law.*]

RAMSAY-FAIRFAX (otherwise SCOTT-GIBSON) *v.* RAMSAY-FAIRFAX.

[COURT OF APPEAL (Denning, Hodson and Morris, L.JJ.), November 14, 15, 1955.]

Nullity—Jurisdiction—Residence—Petition alleging husband's wilful refusal and incapacity—Husband domiciled in Scotland—Husband and wife resident in England—Matrimonial Causes Act, 1950 (14 *Geo.* 6 *c.* 25), *s.* 8 (1) (*a*).

An English court has jurisdiction to entertain a petition for a decree of nullity where the parties are resident in England, although they are not domiciled in England. Jurisdiction may be founded on residence both where the ground for the decree of nullity is one on which the ecclesiastical courts had jurisdiction and where the ground is an additional ground now enacted in s. 8 of the Matrimonial Causes Act, 1950.

Hutter v. *Hutter* (*otherwise Perry*) ([1944] 2 All E.R. 368) and *Easterbrook* v. *Easterbrook* (*otherwise Jervis*) ([1944] 1 All E.R. 90) approved and followed.

Inverclyde (*otherwise Tripp*) v. *Inverclyde* ([1931] P. 29) overruled.

Decision of WILLMER, J. ([1955] 2 All E.R. 709) affirmed.

[As to residence as a ground for jurisdiction in case of voidable marriages, see 7 HALSBURY'S LAWS (3rd Edn.) 109, para. 195 note (d); and for cases on the subject, see 11 DIGEST (Repl.) 480, *1077*, *1078*.

For the Matrimonial Causes Act, 1950, s. 8 (1), see 29 HALSBURY'S STATUTES (2nd Edn.) 397.

For the Matrimonial Causes Act, 1937, s. 7 (1), (3), replaced by s. 8 of the Act of 1950, see 11 HALSBURY'S STATUTES (2nd Edn.) 840.

For the Supreme Court of Judicature (Consolidation) Act, 1925, s. 21 and s. 32, see 5 HALSBURY'S STATUTES (2nd Edn) 350, 361.]

Cases referred to:

(1) *Le Mesurier* v. *Le Mesurier*, [1895] A.C. 517; 64 L.J.P.C. 97; 72 L.T. 873; 11 Digest (Repl.) 468, *1011*.

(2) *Baxter* v. *Baxter*, [1947] 2 All E.R. 886; [1948] A.C. 274; [1948] L.J.R. 479; 2nd Digest Supp.

(3) *Inverclyde* (*otherwise Tripp*) v. *Inverclyde*, [1931] P. 29; 100 L.J.P. 16; 144 L.T. 212; 95 J.P. 73; Digest Supp.

(4) *Easterbrook* v. *Easterbrook* (*otherwise Jervis*), [1944] 1 All E.R. 90; [1944] P. 10; 113 L.J.P. 17; 170 L.T. 26; 11 Digest (Repl.) 480, *1077*.

(5) *Hutter* v. *Hutter* (*otherwise Perry*), [1944] 2 All E.R. 368; [1944] P. 95; 113 L.J.P. 78; 171 L.T. 241; 11 Digest (Repl.) 480, *1078*.

(6) *De Reneville* v. *De Reneville*, [1948] 1 All E.R. 56; [1948] P. 100; [1948] L.J.R. 1761; 11 Digest (Repl.) 479, *1075*.

(7) *Sinclair* v. *Sinclair*, (1798), 1 Hag. Con. 294; 161 E.R. 557; 11 Digest (Repl.) 485, *1098*.

Appeal.

The husband was born in 1909, and had a domicil of origin in Scotland where his father was domiciled. The parties were married in Cairo on Nov. 22, 1947, and cohabited in Egypt, but after a time they quarrelled and separated. Following correspondence between them in 1952, they agreed to a reconciliation. In May, 1953, the wife returned to England, where the husband, who was in the Army, was stationed. The husband bought a house at Kingston-on-Thames, Surrey, and the parties lived there together until November, 1953, when they again quarrelled and the wife left to live in London. The husband continued to live in the house until the end of 1954, when he sold it on being posted to the Far East. He was in England at the time of the hearing of the suit.

On Mar. 2, 1954, the wife filed a petition for a decree of nullity, alleging that the marriage had never been consummated owing to the husband's wilful refusal to consummate it, and, alternatively, that the husband was at the time of the ceremony and had ever since been incapable of consummating it. The wife alleged in the petition that the parties were domiciled in England, and on Mar. 30, 1954, the husband entered an appearance under protest. On May 7, 1954, Mr. Registrar LONG ordered that an issue be tried to determine whether the court had jurisdiction to entertain the petition, and that the husband be the plaintiff and the wife be the defendant on the issue. On June 7, 1955, WILLMER, J. held that the husband was domiciled in Scotland but that the court had jurisdiction to hear the suit since the parties were both resident in England ([1955] 2 All E.R. 709). The husband appealed.

R. J. A. Temple Q.C., and *H. S. Law* for the husband.
H. J. Phillimore, Q.C., and *S. L. Elborne* for the wife.

DENNING, L.J.: The parties in this case went through a form of marriage on Nov. 22, 1947, whilst the husband was a major in the Army and his wife was employed in Cairo; and they were married in Cairo by an Army chaplain under the provisions of s. 22 (1) of the Foreign Marriage Act, 1892. The marriage can therefore be treated in all respects as if it were a marriage made in England.

While the parties were living in this country in 1954, the wife filed a petition for nullity on the ground of incapacity or, alternatively, wilful refusal to consummate the marriage. The domicil of the husband is in Scotland. It follows that, unless and until the marriage is annulled, the domicil of the wife is also in Scotland, because she takes the domicil of her husband. It is suggested that, because the domicil of the parties is in Scotland, the courts of England have no jurisdiction to deal with this petition. We are told that the husband has started proceedings in Scotland for nullity on like grounds, and wishes to proceed with his case there. The issue is whether the English courts have jurisdiction. It is a matter of practical importance, because in England the wife can get maintenance after a decree for nullity, whereas in Scotland she cannot get anything.

The jurisdiction in cases of nullity is, in my judgment, entirely different from the jurisdiction in cases of divorce. In cases of divorce, ever since *Le Mesurier* v. *Le Mesurier* (1) ([1895] A.C. 517), the only courts which have had jurisdiction to decree a dissolution of a marriage are the courts of the domicil; but the jurisdiction of our courts in nullity cases is different, dating from 1857, when s. 22 of the Matrimonial Causes Act, 1857, enacted:

> "In all suits and proceedings, other than proceedings to dissolve any marriage, the said court shall proceed and act and give relief on principles and rules which in the opinion of the said court shall be as nearly as may be conformable to the principles and rules on which the ecclesiastical courts have heretofore acted and given relief."

That section shows plainly that the jurisdiction in nullity suits depends on the principles and rules which were observed in the ecclesiastical courts before 1857.* It is true that the grounds of nullity have since been extended, nevertheless, in my opinion, all suits for nullity, whether under the original grounds (e.g., incapacity) or on the new grounds (e.g., wilful refusal) are to be governed by the principles and rules which were observed in the old ecclesiastical courts.

It is clear that the ecclesiastical courts based their jurisdiction in cases of nullity on residence, not on domicil. If the defendant to a petition was resident within the local jurisdiction of the court, then the court had jurisdiction to determine it. So here in this case. At the issuing of the petition the husband and wife were both resident in this country, and that is sufficient to give the court jurisdiction to decide the case. So much seems to me plain on the interpretation of the statutes. In addition, in *Baxter v. Baxter* (2) ([1947] 2 All E.R. 886) in the House of Lords, LORD JOWITT, L.C., said (at p. 889, letter F) that s. 22

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* The same jurisdiction is now vested in the High Court and Court of Appeal by s. 32 of the Supreme Court of Judicature (Consolidation) Act, 1925. That Act repealed s. 22 of the Act of 1857.

manifestly applied to suits for nullity on the ground of incapacity. It must also apply to suits on the new ground of wilful refusal.

That is a sufficient ground for the determination of this case, but, as there has been much difference of opinion on this matter, I must say a word about *Inverclyde* (*otherwise Tripp*) v. *Inverclyde* (3) ([1931] P. 29). In that case BATESON, J., held that, in a case of nullity on the ground of impotence, the only court which had jurisdiction was the court of the domicil. The basis of his reasoning was that a case of nullity, whether for impotence or for wilful refusal, was much more like a suit for divorce than anything else; that it should be equated, so to speak, with a suit for dissolution and be governed solely by the law of the domicil, and that the only courts which should have jurisdiction should be the courts of the domicil. He said, in a sentence (ibid., at p. 42):

> "To call it a suit for nullity does not alter its essential and real character of a suit for dissolution."

I differ from this view. Looking at the ground of wilful refusal from a legalistic standpoint, and treating marriage as a contract, the remedy of nullity does look like a remedy of divorce or dissolution, because it depends on events which occur subsequently to the marriage. But, looking at it from a sensible standpoint, and having regard to the true ends of marriage, one of the principal aims of which is the procreation of children, it seems to me that the remedy falls more truly within the category of nullity. No one can call a marriage a real marriage when it has not been consummated, and this is the same, no matter whether the want of consummation is due to incapacity or to wilful refusal. Let the theologians dispute as they will, so far as the lawyers are concerned, Parliament has made it plain that wilful refusal and incapacity stand together as grounds of nullity and not for dissolution: and being grounds of nullity, they fall within the old ecclesiastical practice, in which the jurisdiction of the courts is founded on residence and not on domicil. The courts of the place where the marriage was celebrated also may have jurisdiction, but the courts where both parties reside certainly have jurisdiction.

Counsel for the husband sought to draw a distinction between a marriage which was void and a marriage which was voidable. He admitted that the courts where the parties resided had jurisdiction over marriages which were void, but he said that only the courts of the domicil had jurisdiction over marriages that were voidable. I do not agree with this distinction. Take the case of impotence itself, which has always made a marriage voidable. The old ecclesiastical courts would certainly have assumed jurisdiction on the grounds of residence and not of domicil; and if they would have assumed jurisdiction, so should we also. Likewise with wilful refusal, which also makes a marriage voidable.

In two cases in 1944, *Easterbrook* v. *Easterbrook* (*otherwise Jervis*) (4) ([1944] 1 All E.R. 90), before HODSON, L.J., and *Hutter* v. *Hutter* (*otherwise Perry*) (5) ([1944] 2 All E.R. 368), before PILCHER, J., it was held that the English courts had jurisdiction in nullity cases where both parties were resident here. In the first of these cases, a Canadian soldier married an Englishwoman here, and it was held that, although he was domiciled in Canada, nevertheless the courts here had jurisdiction to determine his claim for nullity. Any other view would be most unfortunate. It would be absurd that a Canadian soldier married to an Englishwoman should have to go to the courts of Canada to get his remedy (or, conversely, that his wife should) when they were both resident here. In the second case, a United States soldier married an Englishwoman here. It was again held that the courts in this country had jurisdiction, even though the soldier was domiciled in one of the states of America. It is far too late in the day to say that those two cases were wrongly decided, considering that many decrees must have been given on the self-same footing and that many people have regulated their affairs on the basis of them It would be very wrong to suggest now that those decisions were bad and that the people who have acted on them

had been guilty of bigamy. I am clearly of opinion that those two cases were A
rightly decided and should be upheld, but that *Inverclyde* v. *Inverclyde* (3) was
wrongly decided and should be overruled.

It may be that the courts of the domicil also have jurisdiction in these nullity
cases. So do the courts of the place where the marriage was celebrated. But
the courts where both parties reside certainly have jurisdiction. I find myself
in agreement with Willmer, J., and would dismiss the appeal. B

HODSON, L.J.: The question in this case is whether the court has jurisdiction to entertain a petition for nullity where the parties are resident in this
country. The field of jurisdiction in nullity cases is a very wide one. Many cases
have been discussed by learned judges and learned professors, and it is not
always easy to see whether in a given case the decision can be justified or, if it C
can be justified, the precise ground on which it ought to be supported. In this
case I have no doubt that the decision of the learned judge was right for the
reasons which he gave.

I agree also with the reasoning of Pilcher, J., in *Hutter* v. *Hutter* (5), who, I
think, put this class of case on the right footing, basing his judgment on the
ecclesiastical jurisdiction and the way in which that jurisdiction was exercised. D
To be literally accurate in saying that I agree with that judgment, I should
perhaps add that I think he was corrected, though in a respect which has nothing
to do with the matter under discussion, by a later decision of this court in *De
Reneville* v. *De Reneville* (6) ([1948] 1 All E.R. 56), in that he did not take the view
that a wife would take the domicil of her husband in a voidable marriage as she
was held to do by this court in *De Reneville* (6). But in its main structure I agree E
entirely with the judgment of Pilcher, J., who dealt fully with the problem
under review, after argument, assisted by the Attorney-General acting on behalf
of the King's Proctor. As has been said many times, e.g., by Sir William
Scott in *Sinclair* v. *Sinclair* (7) (1798) (1 Hag. Con. at p. 297):

> ". . . the conclusion is carried too far when it is said that a sentence of
> nullity of marriage is necessarily and universally binding on other countries." F

MORRIS, L.J.: I am of the same opinion. The question is whether,
inasmuch as both parties were resident though not domiciled in England at the
date of the petition, the court had jurisdiction to grant a decree of nullity. In
my judgment, the learned judge came to a correct conclusion, and I agree with
his judgment. The authorities cited show that the ecclesiastical courts entertained suits of nullity where the marriage was voidable and where both parties G
were resident within their jurisdiction. The jurisdiction of the High Court is
now founded on s. 21 of the Supreme Court of Judicature (Consolidation) Act,
1925, with which has to be read s. 32.

It is true that under s. 8 of the Matrimonial Causes Act, 1950, replacing
s. 7 (1), (3) of the Matrimonial Causes Act, 1937, there are today additional
grounds for a decree of nullity of which the ecclesiastical courts had no cognisance. But I think that those are merely additional grounds for the court H
to grant a decree of nullity if it is endowed with a jurisdiction to grant such a
decree. There was such jurisdiction in the ecclesiastical court where the parties
were resident, and the effect of the statutory provisions is to give that jurisdiction
to the Probate Division of the High Court. I

Appeal dismissed.

Solicitors: *G. P. Voss* (for the husband); *Lee, Ockerby, Johnson & Co.* (for the
wife).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

Re ST. MARK'S CHURCH, LINCOLN.

[LINCOLN CONSISTORY COURT (The Chancellor (K. M. Macmorran, Q.C.)), October 27, November 21, 1955.]

Ecclesiastical Law—Consecrated ground—Disused burial ground—Authorisation of right of way.

Burial—Burial ground—Disused—Right of way—"Building"—Pavement—Roof whose supports would not touch the consecrated land—Whether a building—Disused Burial Grounds Act, 1884 (47 *&* 48 *Vict. c.* 72), *s.* 3—*Open Spaces Act,* 1887 (50 *&* 51 *Vict. c.* 32), *s.* 4.

A boundary wall dividing a churchyard on the east from the land of an omnibus company on the west ran in a straight line north and south except that at its southern end there was a projection to the west including in the churchyard a rectangle six feet wide and twenty-six feet long. The churchyard, including the rectangular piece of land, had been closed for burials, and there was no grave in the rectangular piece of land which was, however, consecrated land. The company proposed to build an omnibus station and desired to make the boundary wall a continuous straight line north and south and to use the rectangular piece of land (which would then lie on the west side of the re-made boundary wall) as part of a footpath, and to raise and pave it. The whole footpath would then run in a straight line north and south along the west side of the re-made wall. They also proposed to build a roof which would cover, amongst other things, the footpath (including the rectangular piece of land), but the roof would be so constructed that no part of it or its supporting pillars would touch the rectangular piece of land. The vicar and churchwardens and the company petitioned for a faculty for the use of the rectangular piece of land as a footpath which it was proposed should be paved and raised as a platform or pavement. It was contended that the construction of the roof would not constitute an "erection of a building upon" the rectangular piece of land so as to contravene s. 3 of the Disused Burial Grounds Act, 1884.

Held: (i) the part of the roof which would cover the footpath would be part of a building, alternatively it would itself be a building, which would be erected "upon" a disused burial ground, and accordingly so much of the petition as proposed the roofing in of the rectangular piece of land would be rejected (*St. Nicholas Acons* (*Rector & Churchwardens*) v. *London County Council* ([1928] A.C. 469) applied).

(ii) the court had power to grant a right of way over the rectangular piece of land and could permit the land to be paved (*Re Bideford Parish, Ex p. Bideford* (*Rector, etc.*) ([1900] P. 314) applied); but the question whether a raised platform or pavement, such as was proposed in the present case, was a building within s. 3 of the Disused Burial Grounds Act, 1884, would be reserved.

[As to the prohibition against building on disused burial grounds, see 4 HALSBURY'S LAWS (3rd Edn.) 88, para. 252 note (t); and for cases on the subject, see 7 DIGEST 551, 552, *291-294*.

As to the appropriation to sacred uses of consecrated ground, see 11 HALSBURY'S LAWS (2nd Edn.) 863, para. 1566; and for cases on the subject, see 7 DIGEST 555-557, *324-337*.

For the Disused Burial Grounds Act, 1884, s. 3, see 2 HALSBURY'S STATUTES (2nd Edn.) 792, and for the Open Spaces Act, 1887, s. 4, see ibid., 793.]

Cases referred to:

(1) *Bermondsey Borough Council* v. *Mortimer*, [1926] P. 87; Digest Supp.

(2) *St. Nicholas Acons* (*Rector & Churchwardens*) v. *London County Council*, [1928] A.C. 469; 97 L.J.P.C. 113; 139 L.T. 530; 92 J.P. 185; Digest Supp.

(3) *A.-G.* v. *St. Pancras Vestry*, (1893), 69 L.T. 627; 58 J.P. 22; 7 Digest 555, *316*.

(4) *Paddington Corpn.* v. *A.-G.*, [1906] A.C. 1; 75 L.J.Ch. 4; 93 L.T. 673; 70 J.P. 41; 7 Digest 553, *300*.

(5) *St. Botolph, Aldersgate Without* (*Vicar*) v. *St. Botolph, Aldersgate Without* (*Parishioners*), [1900] P. 69; 7 Digest 552, *299*.

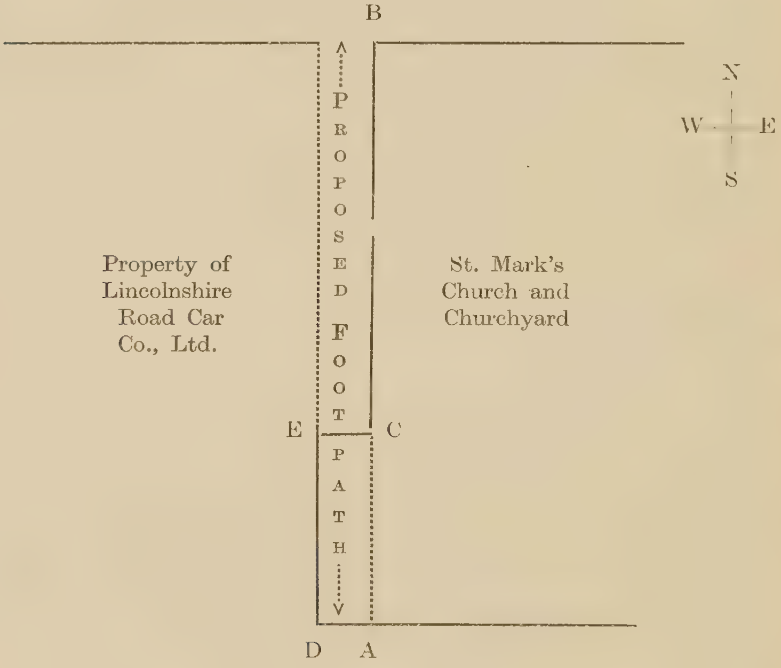
(6) *St. Nicholas, Leicester* (*Vicar*) v. *Langton*, [1899] P. 19; 7 Digest 556, *326*.

(7) *Re Bideford Parish, Ex p. Bideford* (*Rector, etc.*), [1900] P. 314; 64 J.P. 743; 7 Digest 556, *330*.

Petition.

In this case the vicar and churchwardens of the parish church of St. Mark, Lincoln, and the Lincolnshire Road Car Co., Ltd., sought a faculty for the use of part of the churchyard as a footpath. The petition was supported by the parochial church council and the part of the churchyard in question is marked A, C, E, D, in plan 1 below.

Plan 1


B
N
W
E
S
PROPOSED FOOTPATH
Property of Lincolnshire Road Car Co., Ltd.
St. Mark's Church and Churchyard
E
C
D
A

The petition was unopposed.

W. S. Wigglesworth for the petitioners.

Cur. adv. vult.

Nov. 21. **MR. CHANCELLOR MACMORRAN, Q.C.,** read the following judgment: This is a petition dated Sept. 16, 1955, by the vicar and churchwardens of the parish of St. Mark, Lincoln, and the Lincolnshire Road Car Co. Ltd., seeking authority for the use of a small portion of the churchyard of the parish church as a footpath. A citation was issued in the ordinary course, and no appearance has been entered in opposition. The petition was heard in court at the chapter house of Lincoln Cathedral on Oct. 27, 1955, and having heard counsel in support of the petition, I reserved judgment. By consent of the parties interested, the case now comes before me in London. I do not believe

A that there is any dispute in regard to the facts of the situation on which the petition is based, and I find these to be as follows: The churchyard in question is an ancient churchyard and is closed for burials pursuant to an Order in Council dated Feb. 8, 1855. It is bounded on the north by a public highway, and on the west by land owned by the Lincolnshire Road Car Co. Ltd., to whom I shall hereafter refer as "the company". This western boundary of the churchyard
B beginning at its north-west corner at a point marked B in plan 1 put in at the hearing, runs at right angles to the northern frontage for almost its whole length, but at its southern end it projects into the company's land for a length of twenty-six feet and to a breadth of six feet. This projection is marked A, C, E, D, and is coloured pink. I refer to this area as "the pink land". It is clear from the plan that except for the projection formed by the pink land, the boundary
C common to the churchyard and the company's property would be in a straight line for the whole of its length, but that the existence of the projection is a source of difficulty to the company in the development of their land as an omnibus station.

The object of the petition may be described in non-technical language as to construct a new wall between points A and C so as to throw the pink land into
D the company's premises and so to provide a straight line throughout the whole length of the common boundary. If this object can be achieved, the company propose to construct a raised platform along the boundary for the purpose of affording access by the public from both the north and south of their omnibus station to other platforms at which passengers may leave or board the omnibuses using the station. This will involve the use of the pink land as forming part of
E the platform which I have described. There is also plan 2 put in at the hearing, and in view of what I have to say hereafter I wish to make the following observation at this stage. The so-called raised platform, if constructed in accordance with plan 2, seems to be in fact no more than a paved footway similar to the side pavements which are normally constructed in public streets for pedestrian traffic. It was described at the hearing as a platform but, in my view, that is
F rather a grandiloquent and possibly rather a misleading description. I shall hereafter refer to it merely as the "proposed pavement". As part of the transaction proposed by the parties the company propose to build the new wall between points A and C. They also propose to rebuild the present boundary wall from point C to point B, and also from point B along the northern boundary of the churchyard to the existing gateway as shown on the plan. I am told that
G the existing churchyard wall is in a dilapidated condition, and that the effect of these proposals will be to provide the parochial church council with a new wall at a cost to the company of £1,250.

The petition recites that apart from the new wall and the platform or pavement which I have described, no buildings will be erected on the pink land. It is, however, proposed to place over the pink land a covering so as to provide
H shelter for persons using the platform. The petition thus assumes that this covering is not a building, and to this point I will refer in due course. I am further informed that while the churchyard as a whole is properly and decently maintained, this is not so with regard to the pink land (which is described as a rubbish dump) and that so far as is known there are no interments in the pink land. It is of course the duty of the parochial church council (unless that duty
I has passed by operation of law to the city corporation) to maintain the churchyard and its boundary walls, and if they have suffered the wall in question to become dilapidated and the pink land to become derelict, they cannot escape responsibility. In fairness to the petitioners it must be said that the present proposals will undoubtedly benefit the parishioners by giving them a new wall costing £1,250, and may well, also, benefit those members of the public who will use the platform as part of the amenities of the omnibus station. On the other hand, this being an ancient churchyard, its consecration is presumed in law, and

the ecclesiastical court will scrutinise carefully any proposal which seems to contradict an episcopal Act by which land is declared to be forever set apart from all profane and common uses. I have considered this aspect of the present case, and have indicated that were the matter one for my unfettered discretion I should come to the conclusion that the merits of the petition are such that in my discretion I should be justified in granting it. The main reason, however, for ordering a hearing in court was that I had grave doubts as to my power to grant a faculty for the use of the pink land in the manner prayed. I wish to express to counsel my appreciation of his learned and interesting arguments on the law applicable to the present case, and to this I will now turn.

The company desire to cover in the whole length of the platform to be constructed along their side of the line A, C, B, and southwards from point A so as to afford their patrons protection from the weather. Indeed the proposed covering over the pink land is part of a roof of much greater dimensions. The Disused Burial Grounds Act, 1884, s. 3, provides that it shall not be lawful to erect any buildings on any disused burial ground, except for certain purposes which do not cover the present application, and by s. 4 of the Open Spaces Act, 1887, the expression " building " includes a temporary or movable building. These enactments must have caused embarrassment to the company, who have sought to overcome the difficulty in a very ingenious way. By means of a model produced in court it was demonstrated that the roof over the pink land would be supported by pillars outside its area; these pillars would, as it seems, be " bridged " by some sort of girder, which in its turn would carry the members of so much of the roof as would be directly over the pink land. Further, the perpendicular shelter between the roof and the top of the new wall would be suspended from above and would at no point touch the wall. It is submitted by the petitioners that as no part of this superstructure is supported by the pink land, the construction of it could not properly be described as " erecting a building upon the land " within the mischief of the section. Illustrations of the general prohibition are contained in *Bermondsey Borough Council* v. *Mortimer* (1) ([1926] P. 87), and *St. Nicholas Acons* (*Rector & Churchwardens*) v. *London County Council* (2) ([1928] A.C. 469). In the former, it was held that a urinal was a building; in the latter, that an electric transformer chamber sunk into the soil of the churchyard to such an extent that no part of the chamber showed above ground except for two ventilators was none the less a building " erected upon the churchyard ". In the judgments delivered in both these cases the strict application of the prohibition was insisted on. Similarly, a bandstand was held to be a building in *A.-G.* v. *St. Pancras Vestry* (3) (1893) (69 L.T. 627). *Paddington Corpn.* v. *A.-G.* (4) ([1906] A.C. 1) was cited in argument. The subject-matter in that case was a screen or hoarding erected to prevent a neighbouring occupier from acquiring a right to light, and it was held not to be a building. The case was, however, decided in a different context from that now before me.

The most interesting case is *St. Botolph, Aldersgate Without* (*Vicar*) v. *St. Botolph, Aldersgate Without* (*Parishioners*) (5) ([1900] P. 69) in which mural paintings on the inner side of a churchyard wall were to be protected by an arcade or covered way. It was held that such a structure did not contravene the Open Spaces Act, 1887, inasmuch as the churchyard would remain as much an open space as before, and that the covered way was designed for the protection of what under the general law is permissible in a churchyard. I have considered the other cases which were mentioned before me, especially *St. Nicholas, Leicester* (*Vicar*) v. *Langton* (6) ([1899] P. 19), a Consistory Court decision, but that was concerned with widening a highway and is remote from the present discussion on the meaning of a " building upon a churchyard ". It seems to me that the general terms of the prohibition contained in the Act of 1884, as illustrated by the *St. Nicholas Acons* case (2), have never been qualified in a manner which will

A assist the petitioners. It is interesting to note that although the transformer station in that case was constructed almost wholly below the surface of the churchyard it was nevertheless held to be "upon" the churchyard. I have accordingly come to the conclusion, so far as concerns the roof, that this petition must fail. I am not impressed by the ingenious attempt to establish that the portion of the proposed roof which would be above the pink land would not be B a building. I regard that area of roof as part of a building and I decide that the proposals proposed by plan 1 would contravene the statute. If I am mistaken in that, I still regard the superficial area of twenty-six feet by six feet as a building, and I hold that if constructed as proposed it will be built "upon" part of a disused burial ground.

The rest of the case may be more briefly disposed of. I am satisfied that I C have power to grant a right of way over the pink land, a right in the nature of an easement. It is clear from the decision in *Re Bideford Parish, Ex p. Bideford* (*Rector, etc.*) (7) ([1900] P. 314) that the Consistory Court may sanction by faculty the use of consecrated land for the purpose of widening a highway. I think that such a faculty can permit the paving of a strip of land so added to the highway for that seems to me to be ancillary to the use for which the faculty D may be granted; and I see no valid reason why the pink land may not be similarly paved. If the petitioners take the view that a right of way without a roof will not serve their purpose I can only say that I regret the result. If, on the other hand, they are prepared to accept the easement, they must satisfy me that the platform on the pink land does not amount to building on it, but is merely an ancillary work to the right of passage. I am satisfied that the E proposed pavement disclosed in plan 2 is not a building and I am accordingly prepared to authorise its construction. I shall require that some permanent indication of the consecrated nature of the pink land be incorporated in the new wall between the points A and C. In view of the terms which I have indicated, I will not now either reject or allow the petition until the petitioners have had an opportunity of considering my judgment. If they wish to take the case to F a higher court I will content myself at this stage with saying that I reject so much of the petition as deals with the roofing in of the pink land, and reserve consideration of the question whether the platform to be constructed is in itself a building. I may add that if the section shown on plan 2 is to be followed I shall have no difficulty in sanctioning this part of the petitioner's proposals. I say this because in my view plan 2 as drawn discloses a mere pavement and G no more. Whether I am right or wrong in my conclusions, I hope I may say without impropriety that I find this subject-matter to be one on which an authoritative decision of the Provincial Court is very desirable.

W. S. Wigglesworth: It may be that we shall wish to appeal on the point which the court is ready to reject here and now, and in view of that possibility, I think that I should make the formal protest with all due reverence and respect, H and declare our intention to appeal accordingly. It may be, however, that we shall be content to bring in alternative plans, and so far as that part of the judgment is concerned I would like liberty to amend my petition.

The Chancellor: Yes.

Solicitor: *M. H. B. Gilmour* (for the petitioner).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

Re COTTAM'S WILL TRUSTS. MIDLAND BANK EXECUTOR AND TRUSTEE CO., LTD. AND ANOTHER *v.* HUDDERSFIELD CORPORATION AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), November 17, 22, 1955.]

Charity—Benefit to community—Aged persons—Gift to local authority to provide flats for married couples or bachelors over sixty-five years of age and living in the district—Flats to be let at economic rents.

By his will the testator gave the trust fund comprising his residuary estate to the Huddersfield Corporation to " apply the same (through such committee as the corporation shall in its absolute discretion think fit) for the provision of a flat or flats to be occupied by married couples or bachelors living within the boundaries of the . . . county borough of Huddersfield and being in every case over the age of sixty-five years ". The testator further directed: " (i) that the said flat or flats shall be let at economic rents bearing in mind the cost of providing the said flat or flats either by building or purchasing and adapting existing buildings and maintenance and repair of the said flat or flats; and (ii) that the corporation shall formulate such rules and regulations as it shall in its absolute discretion think fit for the letting of the said flat or flats along the lines of but not necessarily strictly complying with the rules and regulations now in existence relating to the corporation Cottage Homes for Old People and the Roebuck Memorial Homes Huddersfield . . ." The two institutions referred to in the will were admittedly charities, but, in both cases, the homes were provided free of rent and rates, and gas, electricity and coke were also provided to the residents free. In each case the rules provided that an applicant should have a minimum weekly income of 10s., and that the maximum weekly income of a single applicant should be 41s. 6d., and that of a married couple should be 62s. The rules also contained certain restrictions on the liberty of the inhabitants of the homes. On the question whether the gift to the corporation was a valid charitable gift,

Held: the trust, being for the benefit of the aged, was prima facie charitable; and as, having regard particularly to the testator's reference to the rules and regulations, his object was to provide homes for aged persons of small means, the direction that the flats should be let " at economic rents " did not displace the charitable purpose and accordingly the gift was a valid charitable gift.

Re Robinson ([1950] 2 All E.R. 1148) and *Re Monk* ([1927] 2 Ch. 197) applied.

[As to gifts for the relief of the aged and poor, see 4 HALSBURY'S LAWS (3rd Edn.) 213-218, paras. 492-495; and for cases on the subject, see 8 DIGEST (Repl.) 316-319, *13-43*.]

Cases referred to:

(1) *Re Robinson*, [1950] 2 All E.R. 1148; [1951] Ch. 198; 8 Digest (Repl.) 317, *34*.

(2) *Re Monk*, [1927] 2 Ch. 197; 96 L.J.Ch. 296; 137 L.T. 4; 8 Digest 322, *62*.

Adjourned Summons.

The plaintiffs, Midland Bank Executor and Trustee Co., Ltd. and Charles Smith, as executors and trustees of the will of the testator, Ernest Peter Cottam deceased, applied to the court by originating summons to determine whether the gift by the testator of the trust fund (as defined in the will) to the Huddersfield Corporation for the provision of a flat or flats on the terms specified in the will was a valid charitable gift. The " trust fund ", as defined in the will, comprised the testator's residuary estate, namely, the investments and all parts of the estate for the time being unsold.

B. G. Burnett-Hall for the plaintiffs, the trustees of the will.

E. J. T. G. Bagshawe for the first defendants, Huddersfield Corporation.

K. Backhouse for the second defendant, the testator's sister, interested on an intestacy.

B. J. H. Clauson for the Attorney-General.

DANCKWERTS, J.: The will in this case was made on Apr. 14, 1949, and the testator died on Feb. 14, 1951. The particular trust which I have to consider was to take effect on the death of the testator's brother, Rodger Cottam, and he died on May 23, 1952. The trust is in cl. 7 of the will and is in the following terms:

> "After the death of the said Rodger Cottam my trustees shall transfer the trust fund unto the council for the time being of the county borough of Huddersfield (hereinafter called 'the corporation') who shall apply the same (through such committee as the corporation shall in its absolute discretion think fit) for the provision of a flat or flats to be occupied by married couples or bachelors living within the boundaries of the said county borough and being in every case over the age of sixty-five years And I declare (i) that the said flat or flats shall be let at economic rents bearing in mind the cost of providing the said flat or flats either by building or purchasing and adapting existing buildings and maintenance and repair of the said flat or flats; and (ii) that the corporation shall formulate such rules and regulations as it shall in its absolute discretion think fit for the letting of the said flat or flats along the lines of but not necessarily strictly complying with the rules and regulations now in existence relating to the corporation Cottage Homes for Old People and the Roebuck Memorial Homes Huddersfield aforesaid."

It is plain that the class of persons selected for benefit by this trust by the testator is a class which falls within the definition of charity. It is for aged persons, and, therefore, prima facie, it is a charitable trust. Among other cases, *Re Robinson* (1) ([1950] 2 All E.R. 1148) may be referred to as an authority for that. It is contended, however, on behalf of the next of kin that the provision in the will that the flats "shall be let at economic rents" prevents there being any bounty in the gift, and, therefore, it is not really an effective charitable gift; the persons who are to receive the benefit of the trust are to pay a certain sum, and there is nothing in the nature of a gift to them to be found. The fact that persons have to pay something or re-pay something under a trust of a charitable nature does not necessarily render that trust one which is not a charitable trust: see, for example, *Re Monk* (2) ([1927] 2 Ch. 197), where the testator directed that part of his residuary estate was to be held as a loans fund for poor people. In that case, the recipients of the loan had to re-pay the principal sum loaned to them, although they were not to be charged interest. It was plain that the trust in that case was regarded by the Court of Appeal as a good charitable trust.

In the present case it is submitted by the corporation that the economic rent which the testator had in mind is not a full economic rent, not a full commercial rent, if I may paraphrase it in that way, because, although the rent is fixed so as to have regard to the cost of providing the flat or flats—I suppose that means taking into consideration interest on capital and maintenance and repairs—there is no provision for inclusion of sums for the replacement of the capital value of the properties as they eventually wear out. There is also the consideration that the corporation are to make rules and regulations on the lines of the Cottage Homes for Old People and the Roebuck Memorial Homes, Huddersfield. The set of rules relating to each of those two charities, which are admittedly charities, provides that the minimum income of applicants is to be 10s. a week in the case of a single person, married couples and two single persons, and the maximum incomes are to be 41s. 6d. a week in the case of a single person, 62s. A a week for married couples, and 68s. a week for two single persons. On the other hand, in the case of those two charities, the homes are to be provided free of rent and rates, and gas, electricity and coke are provided free. The rules, however, contain various restrictions on the liberty of the inhabitants of the homes which would not necessarily appeal to people with sufficient money to pick and choose their accommodation without regard to financial difficulties. B

It seems to me plain that the testator had in mind a class of persons of small means. The minimum income referred to in the regulations shows that the persons to be benefited in the case of the two existing charities are persons who, in present social conditions, where artisans are able to make £20 a week, are persons in the very low scale of income groups or income-receiving groups. C Accordingly, it seems to me that the intention of the testator was that homes of a cheap character should be provided so that the economic rent, even though they pay the economic rent as required by the testator, is such as might properly be paid by people falling within the class for which these other homes deal perhaps more adequately, because in the case of existing charities there are no rents payable at all. It is a case which is not without difficulty, but, on the whole, D I think that the provisions of the will are not such as to prevent the prima facie charitable intention of the testator being sustained. Therefore, I come to the conclusion that this is a valid charitable trust.

Declaration accordingly.

Solicitors: *Biddle, Thorne, Welsford & Barnes*, agents for *Cartwright & Fieldhouse*, Huddersfield (for the plaintiffs); *Sharpe, Pritchard & Co.*, agents for the *Town clerk*, Huddersfield (for the first defendants); *Francis Miller & Steele*, agents for *J. Nightingale & Co.*, Manchester (for the second defendant); *Treasury Solicitor*.

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

A

Re FINE INDUSTRIAL COMMODITIES, LTD.

[CHANCERY DIVISION (Vaisey, J.), November 23, 1955.]

Company—Winding-up—Debt—Interest on debts—Company apparently insolvent subsequently found to be solvent—Surplus of assets—Rights of unsecured creditors—Law Reform (Miscellaneous Provisions) Act, 1934 (24 *&* 25 *Geo.* 5 *c.* 41), *s.* 3 (1)—*Companies Act,* 1948 (11 *&* 12 *Geo.* 6 *c.* 38), *s.* 317—*Bankruptcy Act,* 1914 (4 *&* 5 *Geo.* 5 *c.* 59), *s.* 33 (8). B

In the course of the compulsory winding-up of a company on the footing that it was insolvent, the liquidator instituted and successfully maintained proceedings to have a debenture set aside and, as a result, the company's debts were paid in full and a substantial surplus of assets remained. C The company's unsecured creditors who, apart from one judgment creditor, were creditors whose debts did not carry interest under the rights accruing by virtue of those debts, claimed payment of interest on their debts out of the surplus assets.

Held: the judgment creditor was entitled to interest at four per cent. per annum which would run from the date of the order for the winding-up D of the company, in view of the fact that interest was claimed from this date and not from the date of judgment; but the unsecured creditors, whose debts did not carry interest, had no right to payment of interest because

(i) the Companies Act, 1948, s. 317, ceased to be applicable so soon as it was apparent that the company was not insolvent, and accordingly the Bankruptcy Act, 1914, s. 33 (8) which, if it had applied would have enabled E interest to be paid on the debts, ceased to be applicable, and

(ii) the court had no jurisdiction to order payment of interest to unsecured creditors under the Law Reform (Miscellaneous Provisions) Act, 1934, s. 3 (1), as the proceedings were not " for the recovery of any debt or damages " within that sub-section, and

(iii) the court had no general discretion to award payment of interest on F the debts.

Dictum of GIFFARD, L.J., in *Re Humber Ironworks & Shipbuilding Co., Warrant Finance Co.'s Case* (1869) (4 Ch. App. at p. 647) applied.

[**Editorial Note.** The ordinary rule in the winding-up of an insolvent company is that proof may be made in respect of a debt and interest down to G the beginning of the winding-up, if the debt is one which carries interest, but if it is not (and the debts in the present case, other than the judgment debt, were not) a claim for interest cannot be maintained, though interest to the date of the beginning of the winding-up may be able to be claimed under r. 100 of the Companies (Winding-Up) Rules, 1949 (S.I. 1949 No. 330) in cases to which that rule applies; see 6 HALSBURY'S LAWS (3rd Edn.) 657, para. 1303. The H rule is otherwise where a solvent company is being wound-up, and the debtor whose debt carries interest may obtain payment also in respect of interest accruing during the winding-up; see 6 HALSBURY'S LAWS (3rd Edn.) 658, para. 1304. For authority that s. 317 of the Companies Act, 1948, applies until it is shown that the company's assets are sufficient for the payment of debts in full, see 6 HALSBURY'S LAWS (3rd Edn.) 658, para. 1305 note (1).

I As to the application of Bankruptcy Rules in the case of an insolvent company, see 6 HALSBURY'S LAWS (3rd Edn.) 658, para. 1305; and for cases on the subject of interest on debts provable in liquidation, see 10 DIGEST 932, 933, *6385-6397.*

For the Law Reform (Miscellaneous Provisions) Act, 1934, s. 3, see 18 HALSBURY'S STATUTES (2nd Edn.) 525.

For the Companies Act, 1948, s. 317, see 3 HALSBURY'S STATUTES (2nd Edn.) 698.

For the Bankruptcy Act, 1914, s. 33 (8), see 2 HALSBURY'S STATUTES (2nd Edn.) 369.]

Case referred to:

(1) *Re Humber Ironworks & Shipbuilding Co., Warrant Finance Co.'s Case,* (1869), 4 Ch. App. 643; 38 L.J.Ch. 712; 20 L.T. 859; 10 Digest 933, *6392*.

Summons in the winding-up of a company.

By a summons in the compulsory liquidation of Fine Industrial Commodities, Ltd., the liquidator, Kenneth Russell Cork, applied to the court for the determination of the following question (among others): whether interest was payable out of the surplus assets of the company remaining after payment of 20s. in the pound of the amounts which had been admitted to proof (a) on the amounts admitted to proof in respect of creditors who were entitled to prove for interest on their debts; (b) on the amounts admitted to proof in respect of creditors who were not entitled to prove for interest on their debts.

On Dec. 11, 1950, Fine Industrial Commodities, Ltd. (hereinafter referred to as "the company") was ordered to be wound-up compulsorily, and on Jan. 25, 1951, a liquidator was appointed.

In the course of the winding-up, it appeared to the liquidator that a debenture which the company had issued to one of its directors for securing the sum of £22,000, was capable of being impeached. Accordingly, on the advice of counsel, the liquidator instituted an action in the Chancery Division to have the debenture set aside. The action was successful and the amount recovered was approximately £22,000, with the result that the liquidator had in hand £23,644 4s. having paid the creditors 20s. in the pound. If the action had not been successful, there would have been a deficiency as regards the unsecured creditors of the company. There were eighty-three unsecured creditors of the company whose debts totalled £16,064 6s. 8d. and the only creditor entitled to prove for interest was the respondent, Bennett Sons & Shears, Ltd., who recovered judgment against the company on Nov. 10, 1950, for £1,518 4s. and £13 costs.

C. A. Settle for the liquidator.

P. J. Sykes for Bennett Sons & Shears, Ltd., the judgment creditor entitled to prove for interest.

A. Heyman for creditors not entitled to prove for interest.

R. H. Hunt for the contributories.

VAISEY, J.: The strange feature of this case is that a company in the process of being wound up on the footing that it was an insolvent company now finds itself, in the person of its liquidator, in possession of a substantial surplus.

The question which arises may be summarised thus: Are the creditors of the company entitled to interest on their debts or not? Only one creditor was a judgment creditor, and there can be no doubt that that creditor is entitled to interest under his judgment. I shall make a declaration in his case that he is entitled to interest as from the date of the commencement of the winding-up. In strictness, he might have been entitled to interest from the date of his judgment which was some ten days earlier, but that has not been claimed and no further mention need be made of it.

The difficulty is as regards the ordinary creditors whose debts do not carry interest under the rights which accrued to them by virtue of their debts. The point may be thus formulated. Is there anything in the relevant statutes or in the general jurisdiction of the court which either entitles those creditors to interest or enables the court to give them interest as a matter of bounty or equity in the due process of carrying out the liquidation of this company's affairs?

The Law Reform (Miscellaneous Provisions) Act, 1934, s. 3 (1), cannot apply to this case, because, in my judgment, this is not a proceeding "for the recovery of any debt or damages ". Section 3 (2) of that Act declares that the Civil Procedure Act, 1833, s. 28 and s. 29, shall cease to have effect. In the note which appears in 18 HALSBURY'S STATUTES (2nd Edn.), p. 526, it is suggested that those repealed sections were more limited in scope than the new section which replaced them, i.e., s. 3 of the Act of 1934. The note says:

> " The court had, however, [under the Act of 1833] no general power, such as is conferred by the present section [s. 3 of the Act of 1934] to award interest on debts and damages."

Speaking for myself, I think that that note is misleading. I think that the scope of s. 3 of the Act of 1934 is not wider but narrower than the replaced sections of the Act of 1833. On the ground that this is not a proceeding for the recovery of any debt or damages, I do not think the claims of the unsecured creditors can be brought within the words of s. 3.

The next point which is taken is this. By the Companies Act, 1948, s. 317, it is provided:

> " In the winding-up of an insolvent company registered in England the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable . . . as are in force for the time being under the law of bankruptcy in England with respect to the estates of persons adjudged bankrupt . . ."

It has been argued with some force that the company with which I am now dealing, must be treated as having been an insolvent company by reason of the proceedings which began with the presentation of the petition and continued with the order to wind it up. Those proceedings have gone on, and must be deemed to be founded on the assumption that the company was insolvent. It is suggested that because the company must be treated as having been insolvent, s. 317 of the Companies Act, 1948, applies and consequently that the Bankruptcy Act, 1914, s. 33 (8), applies. Section 33 (8) is in these terms:

> " If there is any surplus after payment of the foregoing debts, it shall be applied in payment of interest from the date of the receiving order at the rate of £4 per centum per annum on all debts proved in the bankruptcy."

This is a highly technical matter, and I am bound to say that I have approached it with considerable hesitation, and I decide it with considerable doubt. It seems to me that s. 33 (8) of the Act of 1914 can only come into operation in the event of there being a surplus on which that direction can act. Although for some purposes during the winding-up proceedings this company must have been deemed to be insolvent, it seems to me that when the time comes for dealing with the surplus it must no longer be deemed to be an insolvent company, but has to be treated as a company which is, and was, and always has been, solvent. I agree that that is a curious conclusion to reach, because one would have thought that the payment of interest on debts would only occur where there is a surplus to which s. 33 (8) applies. But s. 33 (8) is made applicable only as a result of the opening words of s. 317 of the Companies Act, 1948, which are: " In the winding-up of an insolvent company ". As far as I can make out from the very complicated wording of these sections, as soon as there is found to be a surplus, it is no longer an insolvent company which is being wound-up, but a solvent one. The creditors other than the first respondent, who was a secured judgment creditor, are asking me to put them in the position of secured creditors or judgment creditors entitled to interest. It would be a very strange result if I were to say that they had brought themselves into exactly the same position, subject to a point which I will mention in a moment, as judgment creditors. I feel very reluctant to bring about such a result. It seems to me that the creditor whose right rests on his judgment must be entitled to interest, but that the creditors other than the judgment creditors ought to come in and prove their debts without any claim to interest.

In *Re Humber Ironworks & Shipbuilding Co., Warrant Finance Co.'s Case* (1) (1869) (4 Ch. App. 643), GIFFARD, L.J., says (ibid., at p. 647):

> "For these reasons I am of opinion that dividends ought to be paid on the debts as they stand at the date of the winding-up; for when the estate is insolvent this rule distributes the assets in the fairest way; and where the estate is solvent, it works with equal fairness, because, as soon as it is ascertained that there is a surplus, the creditor whose debt carries interest is remitted to his rights under his contract; and, on the other hand, a creditor who has not stipulated for interest does not get it. I may add another reason, that I do not see with what justice interest can be computed in favour of creditors whose debts carry interest, while creditors whose debts do not carry interest are stayed from recovering judgment, and so obtaining a right to interest."

I rather hoped that I should find in this case that I had some sort of discretion, and that, applying equitable rules in the winding-up of this company, I should be in a position to award some interest, not necessarily at any particular rate, to the creditors whose rights are now in question, who have stood by and allowed an action to be brought for the benefit of the shareholders, the contributories, and thereby have been kept out of their money for some period. I should have been very much disposed, if I had a discretion in the matter, to allow those creditors interest, at any rate from the date of the winding-up order, down to the time when the company was finally proved to be solvent. I confess that I cannot find any case or any section of the Act of 1948 which enables me to say, as a matter of equity, justice or fairness, that these creditors should be put, either in regard to the whole period from the winding-up to the date of payment, or in regard to some part of that period, in the same position as if they were judgment creditors.

It seems to me that I must declare that the first respondent, the judgment creditor, is entitled to receive and be paid the principal amount of his debt with interest at four per cent. from the date of the winding-up; and I must hold that the other creditors must be treated as creditors of a solvent company and not entitled to any interest.

Declaration accordingly.

Solicitors: *Herbert Oppenheimer, Nathan & Vandyk* (for the liquidator, and creditors not entitled to prove for interest); *E. F. Turner & Sons* (for the judgment creditor entitled to prove for interest); *W. R. J. Hickman & Randall* (for the contributories).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

AUSTRALIAN WOOLLEN MILLS, LTD. *v.* COMMONWEALTH OF AUSTRALIA.

[PRIVY COUNCIL (Viscount Simonds, Lord Oaksey, Lord Reid, Lord Keith of Avonholm and Lord Somervell of Harrow), October 18, 19, 20, 25, 26, 27, November 23, 1955.]

Privy Council—Australia—Subsidy—Wool subsidy payable by government—Whether contract to pay subsidy.

Subsidy—Payments under Australian wool subsidy scheme—Whether administrative or recoverable under contractual right—Computation of final adjustment and refund—Discretion of Realization Commission charged with administration of scheme.

The appellant was an Australian company which manufactured woollen and worsted goods for the Australian market. In June, 1946, when the respondent, the Commonwealth of Australia, ceased to buy all the Australian wool clip and auctions were reintroduced, a scheme of subsidies in respect of purchases of wool to be manufactured into articles for the Australian market was brought into operation, the object of the scheme being to enable manufacturers to sell the articles in the Australian market at the controlled prices. Details of the scheme were set out in a number of letters written on behalf of the respondent during 1946 to 1948 to, among others, the appellant. The letters stated, among other things, that the respondent proposed to grant a subsidy on wool purchased at auction by Australian manufacturers; that the amount of the subsidy payable would be as determined by the Australian Wool Realization Commission; that, if all or any of the wool was not, for any reason, used for manufacture of goods eligible for subsidy, any subsidy paid was to be refunded to the Commission; and that subsidy might be withheld on purchases which were deemed excessive or inappropriate to a mill's functions. The procedure was elaborated and varied from time to time. The subsidy was discontinued at the end of July, 1948. By a letter of the Commission in August, 1948, it was stated that if a manufacturer used unsubsidised wool in manufacture before Christmas, 1948, regard might be had to that use in computing any refund in respect of subsidised stocks in excess of prescribed maxima. The appellant had claimed under this letter in respect of wool so used between June, 1948, and Christmas, 1948, but its claim had been treated as being in respect of wool bought after the subsidy scheme ended and had been disallowed; accordingly, regard had not been had to this user of wool in computing the appellant's refund. The amount of the refund was computed at £67,282 4s. 9d. and was paid by the appellant under protest. The appellant claimed that, under the scheme, certain subsidy payments became due to it under a series of contracts, that the letters setting out the details of the scheme constituted offers which were accepted by a purchase of wool by the appellant, and that the appellant was entitled to subsidy (amounting to £92,002 10s.) on all purchases of wool between June, 1946, and June, 1948. The appellant claimed, alternatively, repayment of the refund of £67,282 4s. 9d. (part of the £92,002 10s.) on the ground that regard should have been had in computing the refund to the use of unsubsidised wool between June and Christmas, 1948, on which basis the refund would not have been due from the appellant. The alternative claim was the claim finally pursued.

Held: the basis of the subsidy scheme was administrative and, assuming that an invitation on the part of the respondent to manufacturers to purchase wool so that there should be woollen goods for the home market was to be implied, that did not give rise to any contractual right to subsidy; further, although under the subsidy scheme the Commission might have regard, in computing refund, to the use of unsubsidised wool by a manufacturer between June and Christmas, 1948, yet it was in the Commission's discretion not to do so, and, accordingly, the respondent had been entitled to the refund of £67,282 4s. 9d.

Appeal dismissed.

[As to arrangements which are not enforceable as contracts, see 8 HALSBURY'S LAWS (3rd Edn.) 54, para. 90; and as to the power of the Crown to contract unconditionally to make a money payment, see 7 HALSBURY'S LAWS (3rd Edn.) 252, para. 547, note (q).]

Appeal.

Appeal by special leave by the Australian Woollen Mills, Ltd. (formerly called the Australian Woollen Mills Pty., Ltd.) from an order of the Full Court of the High Court of Australia, dated May 4, 1954, in an action brought by the appellant in the original jurisdiction of the High Court of Australia. The action was first heard by KITTO, J., who, after hearing oral and documentary evidence on May 1, 1952, and May 6, 7, 1953, directed, pursuant to the Judiciary Act, 1907-1950, s. 18, that the case be heard by the Full Court of the High Court.

The facts are set out in the judgment of the Board.

Sir Garfield Barwick, Q.C., *J. Leaver* (both of the Australian Bar) and *I. C. Baillieu* for the appellant.

W. J. V. Windeyer, Q.C., and *G. H. Lush* (both of the Australian Bar) for the respondent.

LORD SOMERVELL OF HARROW: This is an appeal by special leave from an order of the High Court entering judgment for the respondent with costs. The appellant manufactures woollen and worsted goods for the Australian market. During the war years, the respondent bought all the Australian wool clip. The sale of that wool to the United Kingdom excluded wool required for local manufacture. There was control by the respondent of prices for woollen and worsted goods. The sales by the respondent to the appellant and other manufacturers were at a price fixed with reference to the controlled prices of the manufactured articles. This is described by the High Court as " in effect " a subsidy. There is a small item of claim in this case, £2,121 0s. 7d., which relates to wool purchased by the appellant in the period 1942-46, when the position was as above. For reasons which will appear, the decision in this case does not require an investigation of the provisions of that procedure. This appeal arises out of, and depends on, the arrangements made for 1946-47 and 1947-48.

The respondent ceased, as from June, 1946, the beginning of the season, to buy all the wool clip and auctions were then reintroduced. The prices of woollen and worsted goods were still controlled. It was realised that the auction prices which local manufacturers with others would have to pay might be such that the manufacturers could not manufacture to sell at the controlled prices unless they got financial assistance. There was, therefore, a scheme of subsidies in respect of purchases of wool to be manufactured into articles for the home market. The appellant claims that, under this scheme, the subsidy payments became due to it under a series of contracts. There was no contract form signed by each party. The appellant contends that the letters to which reference will be made later constituted offers, the terms of which were varied from time to time, to be accepted by a purchase by a manufacturer, and further contends that, under these contracts, it is entitled to subsidy on all purchases between June, 1946, and June, 1948. The actual way in which the sums claimed are arrived at depends on later complications, which will emerge in due course.

The first answer of the respondent to this claim is that there were no contracts; that the basis of the scheme was not contractual but administrative, and that the letters contained statements of policy and not contractual offers. In the alternative, the respondent submits that, if there were contracts, nothing is due under them. This is based on a contention that the respondent was entitled to refuse to pay subsidy on stocks over a certain amount held at the end of the scheme and to reclaim subsidy on such stocks if already paid. The respondent maintains that, if there were contracts, they contained a term to that effect.

There are other issues which it is desirable to indicate in outline. The subsidy was discontinued as from July 31, 1948. Price control of woollen goods by the respondent came to an end in September, 1948. It passed to the states. There is no evidence what was the exact position after that date.

Under the scheme, the subsidy had been paid shortly after the purchases of wool. The object of the subsidy was to enable manufacturers to sell in the home market at the controlled prices and, if the products made with the wool were exported, it is not disputed that the subsidy had to be repaid, whatever the legal position. The respondent also claimed that reasonable stocks only were eligible for subsidy. If, when the scheme came to an end, subsidy had been paid on stocks purchased in excess of a reasonable quantity, it had to be repaid. A fortiori no subsidy was claimable on such stocks if there had been no payment. Reference has already been made to the respondent's contention that, if there were contracts, this was a term of them. Correspondence passed between the parties in the period following June, 1948. The respondent claimed that the appellant had to repay £67,282 4s. 9d. on the grounds hereinbefore set out. The appellant paid this sum on May 9, 1949, at the same time putting forward a claim to £92,002 10s., the basis of which will be explained later.

The appellant's main claim includes this £67,282 4s. 9d. which, apart from the small item of £2,121 0s. 7d., represents subsidy on wool bought in the period June, 1946, to July, 1948. It submits in the first instance that the repayment should be disregarded or treated as provisional. It has, however, an alternative claim for this sum as money had and received to its use, it having been paid, as it is alleged, under protest and without prejudice. This claim is maintained, though it be held that there were no contracts, on the following ground. Although a scheme of this kind is administrative and not contractual in that the party subsidised cannot sue at law, still the respondent, it is said, cannot recover back money that had once been paid. In the present case, the respondent did not suggest that, if wool had, in fact, been turned into goods which had been marketed in the home market, there could be a claim for repayment of subsidy already paid. The respondent does, however, submit that, having regard to the general and special provisions of this scheme, it was entitled to demand the repayment of the sums which made up the £67,282 4s. 9d.

This alternative claim of the appellant raises two issues. First, was the respondent entitled under the scheme to demand the repayment of the money ? Second, if it was not so entitled, was the "protest" of such a nature as to entitle the appellant to sue for the recovery of money paid ? These in outline are the issues.

The first, contract or no contract, turns on the construction of the letters. The appellant submitted that, in construing them, the Board should have regard to the fact that the respondent had substantial stocks of wool of which it would be anxious to dispose. Their Lordships get no assistance from this fact. There is no ground for suggesting that this "interest" of the respondent in any way entered into this scheme. The appellant further submitted that the respondent wanted the manufacturers to purchase so that there could be woollen goods on the home market. There was, therefore, an implied request to do so. Let this be admitted. It does not appear to their Lordships to advance the argument. There may be cases where the absence of a request negatives the existence of a contract. The presence of a request does not, however, in itself establish a contract. Manufacturers may be requested to come into and work a non-contractual scheme. On this aspect of the argument their Lordships think, with all respect, there was force in the criticism of that passage in the judgment of the High Court in which it is said that there was nothing in the nature of a request or invitation. A

The terms of the contracts are said to be contained in some thirty-six letters covering the period from 1946 to 1948. In considering whether a series of B contracts were made, the first two or three letters setting out the lines of the scheme are decisive. If these letters constituted a contractual offer the later letters could be read as varying its terms; if they do not constitute a contractual offer there is nothing in the later letters which does so. The first letter is from the Commonwealth Prices Branch to the Associated Woollen and Worsted Textile Manufacturers, of which the appellant is a member. The second letter is from C the Wool Realization Commission to the appellant. It is desirable to set out these two letters in full.

" Commonwealth Prices Branch to Associated Woollen and Worsted Textile Manufacturers.

June 20, 1946.

Dear Sir, D

I refer to recent discussions between the Wool Advisory Committee and the Associated Woollen and Worsted Textile Manufacturers of Australia. the chairman and the executive member of the Australian Wool Realization Commission and the representatives of the Commonwealth Prices Commissioner, relating to the subsidisation of raw wool purchased by Australian manufacturers for domestic consumption under auction conditions which will E operate after June 30, 1946.

The Commonwealth government has decided that subsidy will be paid to maintain the price of wool purchased for domestic use by Australian manufacturers when auctions recommence after June 30, 1946.

The subsidy will be calculated as the difference between the present basic F price of wool for domestic consumption and the average market price for each auction series. Manufacturers will be required to carry any excess cost by purchasing above average market level, but under certain specified conditions, will be allowed the benefit of keen buying at lower than average market level. The amount of subsidy payable will be as determined by the Australian Wool Realization Commission.

The administration of the scheme will be vested in the Australian Wool G Realization Commission and complete details of procedure will be made available to your members as soon as possible.

A copy of a press statement issued by the Minister for Trade and Customs is attached.

Yours faithfully,
(*Sgd.*) P. D. Kewish, H
Secretary.

The Secretary,
Associated Woollen and Worsted
Textile Manufacturers of Australia,
Flinders Street,
Melbourne. Vic. I

The Secretary,
National Council of Wool Selling
Brokers of Australia,
120 King Street,
Melbourne. Vic.

" Press Statement of Minister for Trade and Customs.

The Minister for Trade and Customs (Senator J. M. Fraser) announced

A today that subsidy would be paid to maintain existing prices of wool to Australian manufacturers for utilisation in goods for domestic consumption, when auction sales recommence after June 30, 1946.

The purpose of the subsidy is to enable Australian manufacturers to compete with overseas buyers in a manner that will avoid interference with normal auction purchases.

B Senator Fraser stated that subsidies would be paid to manufacturers to reimburse any excess paid in purchasing at prices for domestic consumption but not in excess of the average market level for individual wool types at a series of auction sales. This ensures that manufacturers will not bid extravagantly on the assumption that the Commonwealth government will meet deficiencies resulting from unlimited bidding.

C 'The aim of the proposal,' said Senator Fraser, 'is to place Australian manufacturers as near as possible in the same bidding position as if they were buying in a competitive market prior to the war. As an inducement to efficient buying manufacturers will obtain benefits from purchases made below average market level. The scheme will be so designed as to ensure rapid payment of subsidy and will be administered by the Australian D Wool Realization Commission on behalf of the Commonwealth government and the amount of subsidy payable to manufacturers will be as determined by the Commission.'

Canberra. A.C.T.
June, 1946."

E

" Australian Wool Realization Commission to Australian Woollen Mills Pty., Ltd.

Head Office: Pitman House,
540-542 Little Collins Street,
Melbourne,
F C.1.

Aug. 7, 1946.

Dear Sir,

The Commonwealth government proposes to grant a subsidy on wool purchased at auction by Australian manufacturers in the 1946/7 season, and this Commission has been charged with the calculation and payment G of the subsidy.

The Commission realises the necessity for as prompt payment of the subsidy as possible to manufacturers, and full details of subsidy procedure will be made available to all manufacturers at an early date. However, the following interim information is advised to you in respect of the procedure to operate *for subsidy on wools purchased for Australian manufacturers at* H *auction*:—

(A) In general, subsidy on wool purchased at auction will be paid by this Commission in full immediately the amounts have been computed for each series.

(B) It is anticipated that payments will be completed within twenty-eight days from the close of each series.

I (C) *Payment will be automatically made from the Commission's records of auction results* and no claim will be required from the manufacturer.

(D) With each payment, there will be forwarded a statement showing in respect of each lot purchased—(i) The basic cost assessed, i.e., at present, appraisement plus ten per cent. for fleece wools and appraisement plus five per cent. for skin wools. (ii) The average greasy market price established. (iii) The subsidy as calculated by the Commission.

In discussions between the Commission and the Advisory Committee of Woollen and Worsted Manufacturers on Mar. 19 and 20, 1946, manufacturers were advised of the Commission's responsibilities as to ensuring that the reserve prices for Australian-grown wool, provided for under the United Kingdom-Dominions Wool Disposals Plan, are made effective; and it was understood at that meeting that members of your Association would be willing to purchase all wool required by your members at auction with the following exceptions:—(A) Wool produced by the manufacturer himself and used by him in his own factory. (B) Wool purchased by a country manufacturer on a normal quantitative basis according to his normal policy from producers in his district. (C) Wool the product of fellmongering the skins owned by the manufacturer and used by him in a continuous process of manufacture.

You should note that auction purchases of raw wool will provide the basis of subsidy to manufacturers in so far as such wool is used in the manufacture of goods sold for Australian domestic consumption, and therefore any manufacturer who does not buy his wool at auction will have to submit to the Commission an application for subsidy, and in each case he will need to supply:—(A) The names of the persons from whom he has bought wool. (B) The quantities purchased from each of these persons, and full details of the description and prices of such purchases.

As stated previously, when a manufacturer purchases wool at auction, it will not be necessary for him to submit an application to the Commission for subsidy because the Commission will have available to it from its records of auction results all the necessary information for calculation of the subsidy and automatic payment to the manufacturer.

It should also be noted that a manufacturer purchasing wool other than at auction will not receive subsidy up to average market level when the price paid by him for such wool is below average auction level. The subsidy, in this case, will be the difference between basic cost and the actual price paid by the manufacturer for the wool in question whereas in the case of wool purchased through auction, the subsidy will be the difference between the basic price and the average auction market level, irrespective of the auction price paid for the wool.

The attention of manufacturers is also drawn particularly to s. 17 of the Wool (Contributory Charge) Assessment Act, 1945, which reads: 'Except in pursuance of an arrangement with the Commissioner, *a person shall not subject any wool*, other than wool purchased by him, *to any process or treatment of manufacture*, or export any wool, unless—(a) The wool has first been submitted at an appraisement place or, with the approval of the Commission, at any other place, for appraisement by or on behalf of the Commission, and has been so appraised; or (b) He is in possession of a certificate issued in respect of the wool under s. 15 of this Act.

Penalty: £200.'

In submitting wool purchased by a manufacturer, otherwise than at auction, for appraisement for purposes of the Contributory Charge Assessment Act, the prescribed form must be completed and forwarded to the Commission.

To enable the wool to be properly examined and appraised it will be necessary for such wool to be displayed in accordance with instructions from the Commission and on premises approved by the Commission as suitable for the appraisement of wool. If the premises of the manufacturer are unsuitable for this purpose, the Commission may order the wool elsewhere for appraisement.

The Commission is endeavouring to communicate with all woollen and worsted textile manufacturers understood not to be members of the Association, and to advise them of the above arrangement which, of course, must apply on the same basis to all manufacturers of goods made from wool.

A The Commission is charged by the government with the responsibility of doing all things necessary to ensure that the United Kingdom-Dominions Wool Disposals Plan is successful, particularly in regard to making effective the reserve prices provided for under the Plan, and the Commission feels sure that you will co-operate in every way possible.

Yours faithfully,
B (*Sgd.*) H. B. Leigh,
Secretary.

The Manager,
Australian Woollen Mills Pty., Limited,
46 Martin Place,
Sydney, N.S.W."

C Their Lordships are of opinion that these letters cannot be read as an offer or offers to contract. They contain a statement of policy. The "scheme" is to be administered by the Commission which is itself to determine the amount of the subsidy. No single phrase or provision may be decisive. The letters must be read as a whole. If the intention had been to provide for a series of contracts D one would, as between these parties, have expected a form containing the provisions which, if disputes arose, would be construed and applied by the courts. The number of uncertain factors make it natural that the basis should be administrative. Nor is there anything remarkable in the fact that the manufacturers should be content to act on the respondent's statement of policy. A further letter of Aug. 20, elaborating the procedure, emphasises the control which the respon- E dent, through the Commission, was keeping on the scheme. The later letters contain no sentences which support the appellant's contention and many which illustrate the administrative nature of the scheme. Some of these are cited below in dealing with the later points.

It is unnecessary, therefore, to consider the respondent's alternative claim that, if there were contracts, the terms have been fulfilled, but it is necessary F to consider on the appellant's alternative claim whether the respondent, under the scheme, was entitled to demand the repayment of the £67,282 4s. 9d.

It was not disputed that the subsidy could be demanded back if goods made with the wool "subsidised" were exported. This was referred to in a letter from the Commission of Aug. 20, 1946. As and from Mar. 20, 1947, the appellant, with other manufacturers, was required to sign a declaration to be forwarded G with its subsidy statements. It contained the following provisions:

> "(a) that the wool shown in this statement will be used by the said manufacturer for purposes of manufacture of goods within the Commonwealth (excluding goods which are notified to me as being ineligible for such subsidy)
>
> (b) that the above-mentioned wool or no part of that wool will be re-sold without prior notification being given to the Australian Wool Realization H Commission (for these purposes 'resold' is deemed to include any transfer of title in wool oddments or offsorts for a consideration or as remuneration or part-remuneration to any person processing such wool on behalf of a manufacturer)
>
> (c) that if all or any of the wool is not for any reason used for manufacture of goods eligible for subsidy, the subsidy paid will be refunded to the I Australian Wool Realization Commission as agent for the Commonwealth
>
> (d) that the above information is a true and correct statement of wool for manufacture of subsidised goods within the Commonwealth purchased by the said manufacturer at the auction series for which this statement is submitted."

As the High Court point out, the subsidy is regarded as on the manufactured goods rather than on the wool, though paid conditionally on the purchases of the wool.

The question of excess stocks is dealt with in a circular letter from the Commission of Apr. 21, 1947:

> " Pitman House,
> 540-542 Little Collins St.,
> Melbourne, C.1.
> Apr. 21, 1947.
>
> Dear Sir,
>
> The purpose of this letter is to inform you of an instruction received by the Commission from the Commonwealth Prices Commissioner, relating to a condition governing the payment of subsidy on raw wool purchased during the remainder of the 1946/47 season.
>
> The Commonwealth Prices Commissioner has ruled that subsidisation of wool purchased by manufacturers during the 1946/47 season is proposed only on the quantity of wool necessary for the manufacturer to carry on his normal manufacturing activities to June 30, 1947, and for such period after that date during which he is unable to obtain supplies of wool from the market.
>
> If any manufacturer is found to have purchased wool in excess of these requirements, payment of subsidy on such excess will be withheld by the Commission.
>
> Yours faithfully,
> (*Sgd.*) J. H. Willis,
> for Secretary."

The point was further emphasised on Jan. 30, 1948.

At some date during that year the question of the respondent's ceasing to control the prices came under consideration, and there was clearly no question of the respondent continuing the subsidy after that. As the whole purpose of the scheme was to enable manufacturers to keep in business at the controlled price, it would be contrary to the scheme if there was a subsidising to any substantial extent of goods to be sold after control had ceased. The last paragraph of a circular letter of Feb. 20, 1948, is relevant:

> " *It is important to note that there is no guarantee that stocks held at June* 30, 1948, *will remain subsidised to the present basis. All or portion of the subsidy on stocks held at that date may be adjusted by the Commonwealth government if it deems such action necessary.* This should be borne in mind in the formulation of purchasing programmes as well as the fact that subsidy may be withheld forthwith on purchases which are deemed *excessive or inappropriate to a mill's functions.*"

Early in June, 1948, there was an announcement that the subsidy would be discontinued as from July 31. In a letter of June 18, the Commission reminded manufacturers of the previous ruling as to reasonable stocks and invited discussions as to what would be reasonable stocks at June 30. The first result of these discussions was a decision by the Commission that five and a half months' stocks would be reasonable. Control ceased in September. There was a complication as to equalising stocks among manufacturers which does not help in the present issue. On Aug. 30, 1948, the Commission wrote a letter from which the following is an extract:

> " Adjustment of subsidy on stocks in excess of five and a half months requirements as from June 30, 1948.
>
> The Commonwealth Prices Commissioner has now declared that goods manufactured from wool stocks in excess of five and a half months normal requirements from June 30, 1948, are ineligible for wool subsidy. Therefore, in accordance with sub-para. (c) of the conditions under which subsidy has been claimed on wool (see Declaration by Manufacturer on reverse of subsidy claim form) the subsidy on wool stocks in excess of this period will

> be either withheld in cases where payment has not yet been made or must be refunded to the Commission as agent for the Commonwealth government if payment of subsidy has already been made.
>
> In making these adjustments the Commission will adopt the following procedure:—(A) Advise the manufacturer of the amount by which his stocks held, in the opinion of the Commission exceed five and a half months' requirements from June 30, 1948. (B) Invite him to give a considered estimate of what groups and styles of wool will be in stock at the Christmas 1948 closedown. (C) In formulating the basis for refund or adjustment regard will be had initially for the level of wool values ruling over the last six months of the 1947/48 wool season and not necessarily to the level established on the last purchases made. (D) An interim determination as to withholding or refund will be given by the Commission as soon as practicable in the case of each mill to give each a basis of adjustment. The interim determination may be reviewed by the Commission or the Commonwealth Prices Commissioner. Payments will be made on outstanding claims forthwith within the framework of the procedure outlined."

Their Lordships are of opinion that those adjustments were plainly in accordance with the scheme. If a manufacturer had had subsidy on more than the five and a half months' stock it could have been reclaimed. There was, however, a modification and a special circumstance affecting the appellant which must now be considered.

In September, the appellant suggested that it would be fairer to take the actual figures of stocks used over five and a half months from June 30 rather than an estimate. The Commission accepted this in principle and, in a long letter of Dec. 15, set out their final basis for winding-up the scheme. In effect, subsidy was returnable or not claimable on stocks in hand at Christmas, 1948. This was to adopt the actual user test if, over that period, only wool bought in the subsidy period had been used. Wool bought before the 1946/47 season was, if still on hand, to be treated as "subsidised", having received an indirect subsidy as set out above. That explains how the item of £2,121 0s. 7d. relating to wool bought before the scheme comes into the appellant's claim for the return of £67,282 4s. 9d. It may be asked how the Commission was justified in going back to pre-1946 purchases or, perhaps, to purchases before March, 1947. No objection on this ground was taken by the appellant. These parcels had not, in fact, been used for goods for the home market though on hand for more than twenty-one months. It might also be said that these parcels should, as it were, be set against later purchases in fact used on which subsidy would be retained. This is speculation, no objection having been taken on these lines. Their Lordships are satisfied that the basis was in accordance with the general principles of the scheme as applicable to the situation which had arisen.

There remains the last paragraph of the letter which was as follows:

> "*Usage of unsubsidised wool before the Christmas* 1948 *closedown.*
>
> 9. If any manufacturer has used unsubsidised wool in manufacture prior to the Christmas 1948 closedown, the Commonwealth Prices Commissioner may have regard to such usage in computing any refund in respect of subsidised stocks in excess of the prescribed maxima. It is necessary for such consideration that the following conditions are observed:
>
> (a) That the wool was purchased at auction.
>
> (b) That no relief has been obtained by means of price increase.
>
> (c) That subsidised goods have not been withheld from the consumer.
>
> (d) That the manufacturer has kept satisfactory records and otherwise complied with the requirements of the National Security (Prices) Regulations."

In a letter of Jan. 12, 1949, the appellant stated that it had used unsubsidised wool and that the conditions of para. 9 had been complied with.

On Feb. 25, 1949, the Commission set out their claim against the appellant. The appellant had substantial stocks at Christmas, 1948, on which it had received subsidy. It had claims in respect of wool used before Christmas on which subsidy had not been paid. On balance and subject to final audit the amount refundable and claimed was £67,282 4s. 9d. On Apr. 13 there was a further demand and a statement that, if no reply was received within ten days, the matter would be referred to the Crown Law Authorities. On May 9 the appellant wrote two letters. In one it enclosed a cheque for £67,282 4s. 9d. In the other it elaborated its claim in respect of the " unsubsidised " wool bought and used between June and Christmas, 1948. This was stated to be 2,115 bales and the claim in respect of it was said to be £92,002 10s. Although para. 9 of the letter of Dec. 15 was referred to, the words used can be read as claiming subsidy on these bales which were bought after the scheme had come to an end. The claim was so treated by the Commission and the Commonwealth Prices branch by letters dated May 19 and July 19, and refused. In answer to this there was a solicitor's letter, and these proceedings were started in which no claim based on these bales, or on any adjustment consequent on their purchase was made. It is one of the curious features of this case that the appellant did not state clearly its present submission that the claim as then made was not for subsidy on the 2,115 bales as such, but that the Commission should have regard to the usage of unsubsidised wool as suggested in para. 9 of the letter of Dec. 15. If this had been done there might have been some light on the Commission's reasons for not operating para. 9. In their Lordships' opinion, it was within the discretion of the respondent not to have regard to the user referred to in para. 9. The respondent was, therefore, entitled to demand the £67,282 4s. 9d. without regard to that user.

Their Lordships have thought it right to consider this issue on its merits, rather than by approaching first the question whether circumstances which entitle a plaintiff to recover money paid, which that plaintiff was not liable to pay, were present in this case. Although the appellant clearly preserved its right to proceed with the counterclaim, as it was called, based on the 2,115 bales, that is not what it is now seeking to do. It is unnecessary to decide the point, but the appellant might well have failed to surmount the obstacles which the law places in the path of those who seek to recover back money paid.

In the result, their Lordships agree with the decision of the High Court. They will humbly advise Her Majesty that the appeal should be dismissed. The appellant will pay the costs of the appeal.

Appeal dismissed.

Solicitors: *Galbraith & Best* (for the appellant); *Coward, Chance & Co.* (for the respondent).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

CHARD *v.* CHARD (otherwise NORTHCOTT).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sachs, J.), November 7, 8, 18, 1955.]

Nullity—Re-marriage—Husband going through second ceremony of marriage sixteen years after wife last known to be alive—Presumption of continuance of life—Presumption of death.

Presumption—Death—Husband going through second ceremony of marriage sixteen years after wife last known to be alive—Continuance of life a question of fact—When presumption of death arises.

Any presumption of continuance of life which there may be is a presumption of fact, not of law (see p. 726, letter E, post); and, where no statute lays down another rule, the issue whether a person is to be presumed dead is, subject to the one exception stated at (ii) below, also a question of fact and not subject to a presumption of law (see p. 728, letter E, post).

In 1909 the husband married R.M.L. R.M.L. was then eighteen years of age and an orphan with no known parents or other relations. Between October, 1909 and 1915, the husband was sentenced on six separate occasions to terms of imprisonment. In 1915 he saw R.M.L. on two occasions. In 1917 R.M.L. was known to be in Yorkshire. From October, 1917, until Apr. 23, 1933, the husband was almost continuously in prison and did not hear of or from R.M.L. On May 15, 1933, the husband went through a ceremony of marriage with the respondent. In 1954 inquiries were made concerning R.M.L. but no one was found who was likely to have heard from her and there was no trace of any death certificate concerning her. There was no evidence that in 1917 she was otherwise than in normal health with a normal expectation of life.

The husband in his petition and the respondent in her answer prayed for a decree of nullity of their marriage on the ground that at the time of the ceremony in 1933, R.M.L. was still alive and that the husband's marriage with her was still subsisting.

Held: (i) once the husband was shown to have contracted the marriage in 1909 the court was put on inquiry as to the validity of the marriage in 1933, and it was for the husband or the respondent to prove facts from which a cessation of the marriage in 1909 could be inferred (dictum of PILCHER, J., in *Tweney* v. *Tweney* ([1946] 1 All E.R. at p. 565) applied); in the present case there was no presumption of law either of the continuance of life of R.M.L. or of her having died, and since the correct inference from the known facts was that R.M.L. was alive on May 15, 1933, the marriage on that date was null (*MacDarmaid* v. *A.-G.* ([1950] 1 All E.R. 497) applied); accordingly there would be a decree of nullity both on the petition and on the prayer in the respondent's answer, notwithstanding, in the case of the husband, his bigamy (*Miles* v. *Chilton* (*falsely calling herself Miles*) (1849) (1 Rob. Eccl. 684) applied).

(ii) although where due inquiries had been made for an individual and he had not been traced as a result of them there was a presumption of law that, if he had not been heard of during seven years by persons who would have been likely to have heard of him if he had been alive, he had died at some time within the seven years, yet that presumption did not apply in the present case as the husband would not have been likely to have heard of his first wife during the period between 1917 and his purported marriage in 1933. Principle stated by LORD BLACKBURN in *Prudential Assurance Co.* v. *Edmonds* (1877) (2 App. Cas. at p. 509) applied; *Re Phené's Trusts* (1870) (5 Ch. App. 139) and *Chipchase* v. *Chipchase* ([1939] 3 All E.R. 895) explained.

[As to there being no presumption of law in favour of the continuance of life, see 13 HALSBURY'S LAWS (2nd Edn.) 629, para. 701; and for cases on the subject, see 22 DIGEST (Repl.) 157-159, *1430-1443*.

As to the presumption of death, see 13 Halsbury's Laws (2nd Edn.) 630, para. 701; and for cases on the subject, see 22 Digest (Repl.) 159, 160, *1446-1461*.

As to the granting of a decree of nullity in relation to a bigamous marriage and the onus of proof of death, see 12 Halsbury's Laws (3rd Edn.) 224, para. 420 note (c).]

Cases referred to:

(1) *Preston-Jones* v. *Preston-Jones*, [1951] 1 All E.R. 124; [1951] A.C. 391; 2nd Digest Supp.
(2) *Tweney* v. *Tweney*, [1946] 1 All E.R. 564; [1946] P. 180; 115 L.J.P. 60; 174 L.T. 335; 2nd Digest Supp.
(3) *Re Peete*, [1952] 2 All E.R. 599; 3rd Digest Supp.
(4) *Re Watkins*, [1953] 2 All E.R. 1113; 3rd Digest Supp.
(5) *Nepean* v. *Doe d. Knight*, (1837), 2 M. & W. 894; 7 L.J.Ex. 335; 150 E.R. 1021; 22 Digest (Repl.) 159, *1448*.
(6) *R.* v. *Lumley*, (1869), L.R. 1 C.C.R. 196; 38 L.J.M.C. 86; 20 L.T. 454; 33 J.P. 597; 15 Digest 739, *7990*.
(7) *MacDarmaid* v. *A.-G.*, [1950] 1 All E.R. 497; [1950] P. 218; 2nd Digest Supp.
(8) *R.* v. *Harborne* (*Inhabitants*), (1835), 2 Ad. & El. 540; 4 L.J.M.C. 49; 111 E.R. 209; 22 Digest (Repl.) 158, *1434*.
(9) *Bradshaw* v. *Bradshaw*, (Mar. 8, 1954), Unreported.
(10) *Ivett* v. *Ivett*, (1930), 143 L.T. 680; 94 J.P. 237; 22 Digest (Repl.) 162, *1477*.
(11) *Hogton* v. *Hogton*, (1933), 103 L.J.P. 17; 150 L.T. 80; 97 J.P. 303; 22 Digest (Repl.) 162, *1478*.
(12) *Re Phené's Trusts*, (1870), 5 Ch. App. 139; 39 L.J.Ch. 316; 22 L.T. 111; 22 Digest (Repl.) 158, *1438*.
(13) *Chipchase* v. *Chipchase*, [1939] 3 All E.R. 895; [1939] P. 391; 108 L.J.P. 154; 27 Digest (Repl.) 49, *259*.
(14) *Prudential Assurance Co.* v. *Edmonds*, (1877), 2 App. Cas. 487; 22 Digest (Repl.) 164, *1497*.
(15) *Hopewell* v. *de Pinna*, (1809), 2 Camp. 113; 170 E.R. 1098; 22 Digest (Repl.) 157, *1431*.
(16) *Thorne* v. *Rolff*, (1560), 2 Dyer, 185a; 73 E.R. 408; 22 Digest (Repl.) 159, *1446*.
(17) *Miles* v. *Chilton* (*falsely calling herself Miles*), (1849), 1 Rob. Eccl. 684; 163 E.R. 1178; 27 Digest (Repl.) 448, *3798*.

Petition.

The parties went through a ceremony of marriage on May 15, 1933. On Jan. 23, 1952, the husband presented a petition for divorce on the grounds of the wife's desertion and of her adultery with two co-respondents; by an amendment dated Sept. 11, 1952, he alleged adultery also with two other co-respondents. By her answer dated Dec. 1, 1952, the wife admitted adultery with two co-respondents but said that it was condoned and denied adultery with the other two co-respondents; she also cross-prayed for a divorce on the grounds of the husband's desertion and of his adultery with two women cited. On Jan. 31, 1955, the husband re-amended the petition by praying for a decree of nullity on the ground that at the date of the marriage with the wife a marriage contracted by him in 1909 was still subsisting. On Feb. 25, 1955, the wife amended her answer to allege also that her marriage to the husband was null and void. This report deals only with the issue of nullity. The facts appear in the judgment. At the beginning of his judgment Sachs, J., referred to the fact that the case had been brought before the court under the Law Society Divorce Department scheme, whereby counsel received only token remuneration; and at the end of his judgment His Lordship referred to reg. 18 (5) of the Legal

Aid (General) Regulations, 1950*, and stated that in his view the case had been particularly complicated and that it would be a proper case for the Lord Chancellor to order, if he thought fit, the taxing officer to allow more than the normal fee.

K. B. Campbell for the husband.

R. L. Bayne-Powell for the wife. *Cur. adv. vult.*

Nov. 18. **SACHS, J.**, read the following judgment in which he referred to the pleadings and continued: As the facts came to be put in evidence it appeared that the validity of other marriages, in addition to that of 1933, might be touched on by what was proved in the present case. Three such marriages were as follows. First, a 1913 marriage, in the locality in which the 1909 wife may well have been then living, to one Edmund Louis Woods of one Rosina Margaret Lewis, whose age corresponds closely with that of the Rose Margaret Lewis of the 1909 marriage, whose signature has points of distinct resemblance to that of Rose Margaret Lewis, and in relation to whom the absence of stated parentage in the marriage certificate of 1913 would correspond with a similar absence in that of 1909. Secondly, the 1940 marriage between the wife in the present proceedings and one Wynstanly; an occasion when the wife chose to describe herself as a spinster. That marriage is or is not a nullity according to the event of the present proceedings. Thirdly, the 1946 marriage between the husband and one of the women cited; on an occasion when this twice " married " husband felt able to describe himself as a bachelor. That marriage was in 1948 adjudged null and void by a decree of this court made on such evidence as was then put before it. As both parties on the trial before me sought in unison to have the 1933 marriage declared null, and as other ceremonies were also involved, I considered calling in the Queen's Proctor. The exemplary way, however, in which counsel put forward all angles of the matters in issue enabled me to avoid putting the country to yet further expense in relation to this matter.

The issue whether the 1933 marriage is null and void has to be considered from two different lines of approach. The first is in relation to statements by the husband as to his 1909 wife having been, to his knowledge, alive in 1933; the second is on the footing of the above statements being disregarded, in which case one has to deal with the matter on the footing that from 1917 to 1933, a matter of some fifteen or sixteen years, there is no positive evidence one way or the other as to the 1909 wife being alive or dead. Any statement of the husband, whether in writing or oral, has, of course, to be assessed on the basis that in matters of status this court only acts on evidence that is cogent and convincing: see *Preston-Jones* v. *Preston-Jones* (1) ([1951] 1 All E.R. 124). In the present case the only affirmative evidence of the 1909 wife being alive in 1933 is to be found in some letters which the husband wrote while in prison awaiting the trial on which on Nov. 21, 1933, he was sentenced to three years' penal servitude to be followed by five years' preventive detention—his third sentence as a " habitual criminal ". In one letter to the wife on Nov. 7, 1933, he wrote:

> " I know you worried a great deal concerning whether or not our marriage was valid. Well, Violet, all as I can say is you are perfectly free to marry again should you wish to do so; as I saw my first wife, Rose, not long since and know she was alive when I married you."

The husband, when in the witness-box, said that it was wholly untrue that he had at any time since 1915 seen the 1909 wife and wholly untrue that when he remarried he knew she was alive. He gave as his reason for making this and other statements while awaiting trial in 1933 that he wished to help the wife to freedom when he realised that a long sentence was awaiting him. Neither counsel felt able to ask me to place reliance on the above passage or on any other in the 1933 correspondence. In view of the nature of his record, which includes sentences for at least nineteen offences of obtaining money by false pretences, it is obviously impossible to attach credence to anything he writes or says; indeed, the wife appears to have used an apt phrase in the witness-box when she stated: " untruths just pour off his tongue." Accordingly I must, and do, disregard the husband's statements in his letters, and there is thus no affirmative evidence before me of the 1909 wife being alive after 1917.

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* For the Legal Aid (General) Regulations, 1950, reg. 18 (5), as amended by the Legal Aid (General) (Amendment No. 1) Regulations, 1954 (S.I. 1954 No. 166), reg. 12, see HALSBURY'S STATUTORY INSTRUMENTS Supplement, 1955. See also, as regards the exercise of this discretion, *Bezzi* v. *Bezzi*, p. 785, post.

Turning then to the second line of approach, the facts from which inferences can be drawn are as follows. At the time of the 1909 marriage the wife was aged about eighteen, and not twenty-two as falsely stated to the registrar. There were two children of that marriage, both of whom seem at an early stage to have been cared for first by the husband's mother and later at Dr. Barnardo's Homes. In 1923 they emigrated to Canada, and attempts to get in touch with them in 1954 proved fruitless. Between October, 1909, and August, 1912, the husband was on six separate occasions sentenced to terms of imprisonment, the last of these being a sentence of four years' penal servitude on July 31, 1912. In 1915 the husband, while at liberty, for some seven weeks enlisted in the Army and saw his 1909 wife on two occasions. In mid-1917 he had another short spell of liberty from prison, and his 1909 wife was then working at Wakefield in Yorkshire and appears to have been drawing marriage allowance. On Oct. 9, 1917, the husband was sentenced to three years' penal servitude. From Oct. 31 to Nov. 5, 1917, the wife was for one week in the Wakefield workhouse under the name of Chard. From October, 1917, to Apr. 23, 1933, the husband was in prison continuously, save for three occasions when he was at liberty for periods none of which exceeded six weeks. During this period there is no evidence that he heard from his 1909 wife. While thus in prison he received letters from his present wife, whom he met for the first time either when she visited him in prison or just after his release. Pursuant to arrangements then made he in fact married her on May 15, 1933.

So far as can be ascertained, the 1909 wife was an orphan with no known parents, no brothers or sisters or other relatives. Quite apart from the possibility that she had in 1913 contracted a bigamous marriage, there seems between 1917 and 1933 to have been no person whatsoever, known to the husband, with whom she would be likely to have kept in touch; indeed she may have had good reason for not wishing to appear connected with a man who spent his life continuously in prison, or with any of his relatives. As previously indicated, there is no affirmative evidence of her being alive during those sixteen years; on the other hand, full and careful searches at Somerset House have disclosed no trace between those years of the death being registered of any person under the names of Rose Margaret Lewis, Rose Margaret Chard, or Rosina Margaret Lewis or Rosina Margaret Woods—the last name being that under which she might have been going by virtue of the possible 1913 marriage. At one stage there was a suggestion that the 1909 wife might have died at Wakefield in the influenza epidemic of 1917, but there is nothing at all in the way of evidence to support this theory, and indeed at the trial it turned out to be the merest speculation fostered by the husband or his mother.

The position may accordingly be summarised by stating that there is no evidence of her having been, between 1917 and 1933, other than a normally healthy woman who would have attained in the latter year the age of forty-two. On the facts so far stated it is clear that the present is one of those cases where the court cannot accept the 1933 marriage certificate as necessarily binding, but must examine the possibility of the 1909 wife still then being alive. The court is put on its inquiry on the principle stated by PILCHER, J., in *Tweeney* v. *Tweeney* (2) ([1946] 1 All E.R. at p. 565), and explained by ROXBURGH, J., and HARMAN, J., in their respective judgments in *Re Peete* (3) ([1952] 2 All E.R. at p. 602), and

A *Re Watkins* (4) ([1953] 2 All E.R. at p. 1114). What, on that footing, is the correct approach to the question whether or not she was alive in 1933? Is there a prima facie presumption of continuing life which has not been rebutted? Is there, in the present case, a presumption of death after seven years, or is the matter one in which the court has to draw inferences from the known facts in the same way as a jury charged with deciding the balance of probabilities?
B Before considering those questions, the position as regards facts can conveniently be brought up to date. The husband was in custody or prison throughout the sixteen years from Oct. 2, 1933, to Sept. 1, 1949, except for ten months. From 1933 to date he has not heard of the 1909 wife, and the inquiries of 1954 have produced no positive result except that no trace has been found of any death certificate in any of the names to which I have previously referred. It was
C during the 1954 searches that the 1913 marriage certificate was brought to light; whether that "marriage" related to the 1909 wife it is not necessary to decide, though that may very well be the case.

There has been a considerable number of decisions touching the questions of law, which I mentioned previously, in each Division of the High Court. Many of these have concerned cases where some statute has laid down the conditions
D on which the court shall, prima facie, presume death; for instance:
(i) 18 & 19 Car. 2 c. 11*—

> "An Act for redress of inconveniences by want of proof of the deceases of persons beyond the seas or absenting themselves, upon whose lives estates do depend"

E which enacts in s. 1:

> "If such person or persons [on whose life or lives estates depend] . . . shall remain beyond the seas or elsewhere absent themselves in this realm by the space of seven years together and no sufficient and evident proof be made of the lives of such person or persons respectively . . . the person or persons upon whose life or lives such estate depended shall be accounted
> F as naturally dead."

(ii) The Offences against the Person Act, 1861, s. 57†, relating to bigamy—

> "Provided, that nothing in this section . . . shall extend . . . to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last
> G past, and shall not have been known by such person to be living within that time . . ."

This was the third of a line of statutory provisions relating to bigamy: the first, 1 Jac. 1 c. 11 s. 2, was more on the lines of 18 & 19 Car. 2 c. 11 above.
(iii) The Matrimonial Causes Act, 1950, s. 16 (2)‡:

> ". . . the fact that for a period of seven years or upwards the other party
> H to the marriage has been continually absent from the petitioner, and the petitioner has no reason to believe that the other party has been living within that time, shall be evidence that he or she is dead until the contrary is proved."

Considerable caution has to be exercised when considering decisions and dicta which were concerned with presumptions arising in cases to which such
I statutes applied, the more so because sometimes the words used in the judgments appear to state a general rule applicable to all types of cases. It must also be noted that the above statutory provisions were enacted in order to provide a

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* See 20 HALSBURY'S STATUTES (2nd Edn.) 377, sub nom. The Cestui Que Vie Act, 1666, which is the short title given to the Act by the Statute Law Revision Act, 1948, s. 5, Sch. 2.

† See 5 HALSBURY'S STATUTES (2nd Edn.) 809.

‡ See 29 HALSBURY'S STATUTES (2nd Edn.) 403.

convenient rule for particular matters and would have been hardly necessary if a general rule of law already existed. In particular, caution is needed when examining dicta in the much quoted *Nepean* v. *Doe d. Knight* (5) (1837) (2 M. & W. 894). That was a case to which the provisions of 19 Car. 2 c. 6, applied (per Lord Denman, C.J., at p. 912). Neither in the Exchequer Chamber nor in the court below was it ever suggested otherwise than that Matthew Knight (the joint life copyholder of certain tenements, including one bearing the aptly litigious name of " Roofless Living ") must be presumed dead under the provisions of the statute on the lapse of seven years from 1807; and the question for decision (apart from points as to the doctrine of adverse possession) was whether the presumption of law laid down by statute applied to any particular date in those seven years. The court ruled that the time of death when material must be " the subject of distinct proof ". In relation to matters such as the present, to which no statute applies, counsel before me have helpfully discussed whether there is applicable to the present case any presumption of continuing life or any presumption of death after seven years. Before going further into dicta which were said to conflict on these points, it is to be observed that, in the main, presumptions fall, of course, into three categories. There are rebuttable presumptions of fact, which are no more than inferences logically drawn from one fact as to the existence of other facts, as exemplified by the res ipsa loquitur cases: there are rebuttable presumptions of law, such as that of the innocence of adults and that in s. 16 (2) of the Matrimonial Causes Act, 1950; and there are conclusive presumptions of law, e.g., the innocence of a child under eight. As is stated in Phipson on Evidence (9th Edn.), at p. 699, the demarcation lines between classes of presumption are, even when visible, not always regarded in the dicta of judges and text-book writers.

Taking first what is termed the " presumption of continuance of life ": this is stated in Phipson (9th Edn.), at p. 702, to be one of fact, while Taylor on Evidence (12th Edn.) treats it in para. 196 onwards as a presumption of law. As between these two views I have no hesitation in holding that the former is correct. That would tally with the statement by Lush, J., when in *R.* v. *Lumley* (6) (1869) (38 L.J.M.C. at p. 88), he delivered the judgment of the court (Kelly, C.B., Byles, Lush and Brett, JJ., and Cleasby, B.) as follows:

> " The existence of the party at an antecedent period may or may not afford a reasonable inference that he was living at the subsequent date . . . Thus the question is entirely for the jury. The law makes no presumption either way."

Similarly it would conform with the statement of Hodson, J., in *MacDarmaid* v. *A.-G.* (7) ([1950] 1 All E.R. at p. 499) that

> " There is no presumption of law as to continuance of life, but each case must be determined on its own facts."

In view of the misapprehension which it appears to have caused in one or two later cases, I should mention that Lord Denman's statement in *Nepean's* case (5) (2 M. &. W. at p. 913):

> " It is true, the law presumes that a person shown to be alive at a given time remains alive until the contrary be shown . . ."

conflicts, on the face of it, with his own statement two years earlier in *R.* v. *Harborne* (*Inhabitants*) (8) (1835) (2 Ad. & El. at p. 544):

> " I must take this opportunity of saying, that nothing can be more absurd than the notion, that there is to be any rigid presumption of law on such questions of fact, without reference to accompanying circumstances, such, for instance, as the age or health of the party."

and, later on (ibid., at p. 545) he said:

> " . . . the only questions in such cases are, what evidence is admissible, and what inference may fairly be drawn from it."

It is the latter proposition on which HODSON, J., founded his above cited statement " there is no presumption of law as to continuance of life ". On the basis, which I have adopted, that any presumption of continuance of life is simply one of fact, the various decisions cited to me and the dicta therein become reconciled. Further, due weight can thus be given in each case to the different circumstances of any given individual, e.g., whether a friendless orphan or a gregarious man in public life, whether in good or in bad health, and whether following a safe or a dangerous occupation.

Turning next to the question as to presumptions of death, whether before or after a lapse of seven years, the same reasoning to my mind generally applies, save in one set of circumstances to which I will refer later. I respectfully agree with the conclusion of HARMAN, J., in *Re Watkins* (4) ([1953] 2 All E.R. at p. 1115), that where no statute applies there is no " magic " in the mere fact of a period of seven years elapsing without there being positive evidence of a person being alive. It is, generally speaking, a matter in each case of taking the facts as a whole and of balancing, as a jury would, the respective probabilities of life continuing and having ceased. That line of approach was adopted by HARMAN, J., in the case cited when holding on the facts that death was to be presumed in the relevant twenty-six years. A similar approach was adopted by the Divisional Court (LORD MERRIMAN, P., and COLLINGWOOD, J.), in *Bradshaw* v. *Bradshaw* (9) (unreported). There the court, on the facts, declined to accede to the plea of a wife that her first husband be presumed dead in 1940, where on the one hand she had not then heard from him for some nineteen years, but on the other hand had made no inquiries in that period. Similarly the decisions of the Divisional Court in *Ivett* v. *Ivett* (10) (1930) (143 L.T. 680), where HILL and BATESON, JJ., were not prepared to assume death after the lapse of some seven years when there were facts which could account for the husband not being heard of, and *Hogton* v. *Hogton* (11) (1933) (103 L.J.P. 17), where on the other hand death within six years was presumed, both appear in the upshot to have turned on the question " what were the proper inferences to be drawn from established facts ". If any dicta in the unusual case of *Re Phené's Trusts* (12) (1870) (5 Ch. App. 139), tend in a contrary direction, then they seem to me to run counter to the general stream of authority. On the facts in that case it was held that a United States marine sergeant in good health, who disappeared when on leave from his ship and was then not heard of for more than seven years, was not proved affirmatively to have survived seven months from the time his leave was up, though it was also stated that the court would have inferred that he died while on leave, decisions which might perhaps not be repeated if parallel facts were considered in modern conditions.

At this point I should mention that the decision in *Bradshaw* v. *Bradshaw* (9) (of which counsel for the husband helpfully put before me the full terms of the judgment and details of the cases cited) might at first sight appear to conflict with certain passages in the judgment in *Chipchase* v. *Chipchase* (13) ([1939] 3 All E.R. 895), if those passages were both taken too literally and were intended to apply beyond the particular facts there under consideration. In *Chipchase* v. *Chipchase* (13) a lapse of twelve years was being discussed, and SIR BOYD MERRIMAN, P., when referring (ibid., at p. 897) to " the presumption which arises in circumstances of this kind ", stated (ibid.):

> " That presumption—I am taking the statement of it from the judgment of SIR G. M. GIFFARD, L.J., in *Re Phené's Trusts* (12) (5 Ch. App. at p. 144)—is that the law presumes a person who has not been heard of for over seven years to be dead . . ."

HENN COLLINS, J. (ibid., at p. 901), said:

> " As soon as it was established . . . that the former husband . . . had not been heard of for seven years, then undoubtedly there was evidence for

> their consideration that he was dead, and it was more than evidence because it was a presumption and conclusive evidence until it was rebutted by evidence which showed, in fact, that he was alive."

In neither of these passages is there added after the words "heard of" a phrase such as "by persons who would naturally have heard of him, if alive," (per HODSON, J., in *MacDarmaid* v. *A.-G.* (7) ([1950] 1 All E.R. at p. 499). *Chipchase's* case (13) was, however, cited in *Bradshaw's* case (9) and not therein commented on, and it thus seems to me that there is no conflict between them and that the passages above set out related to the facts of the particular case and are to be construed on the footing that the words "heard of" were used in that particular sense which LORD BLACKBURN analysed in his well-known speech in *Prudential Assurance Co.* v. *Edmonds* (14) (1877) (2 App. Cas. at p. 509), where he said:

> ". . . in order to raise a presumption that a man is dead from his not having been heard of for seven years, you must inquire amongst those who, if he was alive, would be likely to hear of him, and see whether or no there has been *such an absence of hearing of him* as would raise the presumption that he was dead."

The italics are mine. Were I, however, to be wrong in my conclusion as to there being no conflict, then I would have elected to follow *Bradshaw's* case (9), especially as a full set of authorities, including *Re Watkins* (4), was there laid before the court, while in *Chipchase's* case (13) the only authority apparently referred to was *Re Phené's Trusts* (12).

My view is thus that in matters where no statute lays down an applicable rule, the issue whether a person is, or is not, to be presumed dead is, generally speaking, one of fact and not subject to a presumption of law. To that there is an exception which can be assumed without affecting the present case. By virtue of a long sequence of judicial statements, which either assert or assume such a rule, it appears accepted that there is a convenient presumption of law applicable to certain cases of seven years' absence where no statute applies. That presumption in its modern shape takes effect (without examining its terms too exactly) substantially as follows. Where as regards "A B" there is no acceptable affirmative evidence that he was alive at some time during a continuous period of seven years or more, then if it can be proved first, that there are persons who would be likely to have heard of him over that period, secondly, that those persons have not heard of him, and thirdly, that all due inquiries have been made appropriate to the circumstances, "A B" will be presumed to have died at some time within that period. (Such a presumption would, of course, be one of law and could not be one of fact, because there can hardly be a logical inference from any particular set of facts that a man had not died within two thousand five hundred and fifty-five days but had died in two thousand five hundred and sixty.) Counsel for the husband has cogently argued that the greater regimentation and registration of our lives and deaths in 1955 now renders unrealistic any such general presumption, at any rate where a death certificate could be expected to be found but is not; and has suggested that, as the dicta really originate from judgments of the first half of last century when the presumption of continuing life was also regarded as one of law, they are now suspect too. Further it appears on examination that some of the above dicta derive from some case such as *Nepean* v. *Doe d. Knight* (5), to which some statute applied, and that others, as *MacDarmaid* v. *A.-G.* (7), were based on earlier judgments in such cases. Against that, however, one can point to others, e.g., that of LORD ELLENBOROUGH in *Hopewell* v. *de Pinna* (15) (1809) (2 Camp. 113), and LORD BLACKBURN's speech [in *Prudential Assurance Co.* v. *Edmonds* (14)], where there is no apparent trace of such an origin and the rule has even been said to have been traced back before the statute of 1 Jac. 1, c. 11, e.g., to *Thorne*

A v. *Rolff* (16) (1560) (2 Dyer 185a). (See the useful discussion of the rule and its older shapes in the articles printed in 1890 in 34 Sol. Jo. starting at p. 247.)

It is, however, not necessary for me to deal further with the questions raised by counsel for the husband because in the present case there is no one who has been shown to have been likely to have heard from the 1909 wife in the years 1917 to 1933 or, indeed, from 1933 to date and so such a rule could not operate.
B The present case is thus one where there is no suggestion that in 1917 the 1909 wife was other than a woman of normal health, nor any evidence of any fact by reason of which her expectation of life could be regarded as greatly sub-normal. There are many factors which, as previously mentioned, might have led her not to wish to be heard of by the husband or his family, there is no one known who would naturally have heard of her, and there is no registration of a relevant
C death. I accordingly approach the matter on the footing (i) that the present is a case in which the court is put on inquiry as to the validity of the 1933 marriage; (ii) that once the husband was shown to have contracted the 1909 marriage it is for him (or the present wife) to prove facts from which a cessation before May 15, 1933, of the earlier marriage can be inferred before it can be said that the 1933 marriage is valid (see *MacDarmaid* v. *A.-G.* (7), [1950] 1 All
D E.R. at p. 499 per HODSON, J.); (iii) that there is in the present case no presumption of law either as to the continuance of life or as to death having supervened; (iv) that the present is thus one of the class of cases which has to be determined on its own facts. Whether the proper way of putting it is to say that there is an obvious presumption of fact that a woman normally continues to live until she is forty-two, or whether one prefers to look at the matter from
E the angle of " what are the inferences to be drawn from the facts as a whole ? " seems to me to be somewhat immaterial. The correct inference in the present case from the known facts is that the 1909 wife was living on May 15, 1933, and not that she was by then dead.

It follows that the 1933 marriage is null, and there will be a decree of nullity both on the prayer in the petition and on the cross-prayer in the answer. I
F would add that, although there seems to be no reported case in which a spouse has been granted a decree of nullity in respect of his or her own bigamy, the reasoning of DR. LUSHINGTON in *Miles* v. *Chilton* (*falsely calling herself Miles*) (17) (1849) (1 Rob. Eccl. 684), where the husband in effect procured the wife to marry him bigamously, clearly covers the present case.

Decrees accordingly.

Solicitors: *G. Francis Woods* (for the husband); *L. H. Whitlamsmith* (for the wife).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

NOTE.

In the Estate of ALBERTI (*deceased*).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Wallington, J.), October 26, 1955.]

Conflict of Laws—Will—Will made in England in accordance with English law disposing of real estate in England—Subsequent will made in Switzerland according to Swiss law—Purported revocation of any former will—Subsequent will not executed in accordance with English law—Wills Act, 1837 (7 *Will.* 4 *&* 1 *Vict. c.* 26), *s.* 9, *s.* 20.

[As to wills relating to immovables, see 7 HALSBURY'S LAWS (3rd Edn.) 51, para. 102 notes (t), (u); and for cases on the subject, see 11 DIGEST (Repl.) 390, 391, *489-497*.

For the Wills Act, 1837, s. 9 and s. 20, see 26 HALSBURY'S STATUTES (2nd Edn.) 1332 and 1341.]

Cases referred to:

(1) *In the Estate of Gossage, Wood* v. *Gossage,* [1921] P. 194; 90 L.J.P. 201; 124 L.T. 770; 39 Digest 338, *245*.

(2) *Re Cartwright,* (1939), unreported.

(3) *Re Bradby,* (1936), unreported.

Motion.

The applicants, Guido Alberti and Adelaide Grassi, sought a grant of letters of administration with the deceased's English will and codicil annexed.

The deceased, Pietro Alberti, was born in Switzerland but for many years was the proprietor of a restaurant in England. On Apr. 21, 1939, he made a will in England in accordance with s. 9 of the Wills Act, 1837, disposing of his real and personal estate, save any real estate in Switzerland, in favour of his nephew, Guido Alberti and his niece, Serafina Alberti. In 1939 the deceased sold his restaurant and returned to Switzerland where he remained throughout the war. He came back to England and on Oct. 28, 1946, Serafina Alberti having died, he made a codicil also in accordance with s. 9 of the Wills Act, 1837, substituting his niece, Adelaide Grassi, for Serafina Alberti. On Feb. 15, 1952, while on a visit to Switzerland, the deceased made a holograph will in accordance with Swiss law but not in accordance with the Wills Act, 1837, revoking any former wills and disposing of his movable property in England and Switzerland and his immovable property in Switzerland in favour of the applicants and of the wife and children of the applicant, Guido Alberti; he made no express disposition of his real estate in England. In 1953 the deceased decided to return to live permanently in Switzerland and proposed to sell the freehold house in England where he had been living, but he died in Switzerland on Feb. 23, 1953, before the contract for the sale of the house was signed. The value of his real property in England was £3,000, the proceeds of sale of the house. The deceased left surviving him, in addition to the applicants who lived in Switzerland, certain other nephews and nieces who lived in England. Application was made for a grant of letters of administration with the English will and codicil annexed.

The application was refused by MR. Registrar WILKINSON who gave reasons in writing for the refusal. These were that one of the first principles of the law of wills was that no will was irrevocable. Another principle was that the court

A at all times endeavoured to ascertain, and to carry out if that were possible, the intention of a testator. It would be strange if a testator who wished to revoke a testamentary gift of part of his estate, and did everything required by the law of his domicil to effect this, were unsuccessful. If the contrary view were correct, such a testator could, in many cases, revoke his English will only by a B will not valid by the law of his domicil. The principles under which immovables must be devised by a will in English form, applied to the disposition under the will. There was nothing that provided that English law should apply in every respect, including the method of revocation. If it were the case that a will in English form could be revoked only by a will in similar form, it would follow that a foreign testator could not, in any other way, revoke a will of English C movables. There was, therefore, an intestacy as to the immovable estate in England; and the movable estate passed under the later will.

To resolve the question application was made to the court by motion; notice was served on such nephews and nieces of the deceased as lived in England, but they did not appear.

D *H. C. Mortimer* for the applicants.

H. C. Mortimer: The present motion raises a point of law which, so far as I have been able to gather, has not been definitely concluded by any reported case though I submit that the principle is clear. The question is this: If there is a will duly executed in accordance with the Wills Act, 1837, disposing of English E real estate, can such a will be revoked by a will which contains a clause of revocation but which is not executed in accordance with the Wills Act, 1837, yet is valid by the law of the testator's domicil? My submission is that it cannot, and that the English testamentary law applies both to the making and the revocation of a will relating to immovables in this country.

F **WALLINGTON, J.:** If the Swiss will has not revoked the English will there is no objection to this motion. The sole question is whether the Swiss will has in fact and in law revoked the English will. That is the only point which I have to consider.

H. C. Mortimer: Yes. My submission is that immovables are governed by G the lex situs. It is stated clearly in DICEY'S CONFLICT OF LAWS (6th Edn.), at p. 529:

> "Rule 127. All rights over, or in relation to, an immovable are . . . governed by the law of the country where the immovable is situate."

H At p. 535 your Lordship will see:

> "(5) Succession. Every question with regard to the succession of immovables, or land, in consequence of death is (subject, of course, to the exceptions hereinafter mentioned) governed by the lex situs."

It follows that if the formalities required for the devise of immovables in England I are those required by English law, that is s. 9 of the Wills Act, 1837, then a will disposing of English real estate can only be revoked in accordance with s. 20 of the Wills Act, 1837. The authority, in my submission, for that proposition is the dictum of YOUNGER, L.J., in *In the Estate of Gossage, Wood* v. *Gossage* (1) ([1921] P. at p. 203) where he said that the power of revocation is merely another aspect of the power of disposition. In the recent edition of TRISTRAM AND COOTE'S PROBATE PRACTICE (20th Edn.) the learned editors, basing themselves, wrongly in my submission, on *Re Cartwright* (2), say, at p. 91, that

> " it would seem that a testator who, by a will made strictly in accordance with the law of his domicil, *specifically* revokes all previous wills, effectively revokes a will valid to pass realty in England, even though his last will may not be valid to dispose of English realty."

That passage arises from a misreading of *Cartwright's* case (2) because in my submission in that case the will containing a revocation clause was not valid according to the law of the domicil and was admissible to probate only under Lord Kingsdown's Act.* If your Lordship would look a little higher on p. 91† your Lordship will see that *Re Bradby* (3) is dealt with, where the testator died domiciled in France but leaving real estate in England. The testator in that case had made a will in English form disposing of his real and personal estate, but made a will subsequently valid according to French law disposing of the whole of his estate. In that case it was held that the French will did not revoke the English will so far as the real estate in England was concerned. In my submission the law was correctly applied in *Re Bradby* (3) and that should be followed.

WALLINGTON, J.: I think that it is clear and I make the order in the terms of the case on motion.

Grant accordingly.

Solicitors: *Vizard, Oldham, Crowder & Cash*, agents for *Parker & Bangor Jones*, Worthing (for the applicants).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

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* For the Wills Act, 1861 (Lord Kingsdown's Act), see 26 HALSBURY'S STATUTES (2nd Edn.) 1356.

† The passage reads as follows: " Where there was a will, English in form—dealing with the whole estate real, and personal—and a later will in French form, disposing of all the movable and immovable estate, not in accordance with the Wills Act, 1837. French domicil, real estate in England; it was held that the French will did not revoke the English will as far as immovables were concerned and it was ordered that administration with the English will annexed be granted to one of the residuary legatees (the executors not being entitled, as the will was revoked, except as regards immovables in England), a grant to be limited to realty and leasehold property in England. It was left open to the person entitled by the law of the domicil to take a grant of administration with the French will annexed, limited to the rest of the estate [*Bradby*, 1936, unreported motion]. In this case there was no formal revocation clause in the French will, but there was a universal gift to the wife. The ratio decidendi appears to have been that the revocation which would normally have been implied by the gift of " all his possessions " was not effective, inasmuch as the will was not valid to pass his real estate in England."

Re WESTERN MANUFACTURING (READING), LTD.
MILES *v.* ADAMANT ENGINEERING CO. (LUTON), LTD.

[CHANCERY DIVISION (Wynn-Parry, J.), November 17, 18, 29, 1955.]

Company—Scheme to transfer shares to transferee company—Offer of transferee company open for less than four months—Nine-tenths in value of shareholders approving scheme—Notice of compulsory acquisition served on dissentient shareholder—Whether transferee company entitled to acquire shares—Companies Act, 1948 (11 *&* 12 *Geo.* 6 *c.* 38), *s.* 209 (1).

The terms of a proposal for amalgamation of the W. Co. and the respondent company were communicated to shareholders by circular dated Feb. 11, 1955. The circular contained an offer by the respondent company to acquire the shares of the W. Co in exchange for shares of the respondent company, which was conditional on its being accepted on or before Mar. 4, 1955, or such later date as should be agreed by the boards of the two companies, in respect of not less than ninety per cent. of the issued shares of the W. Co. The offer was accepted by over ninety-eight per cent. of the holders of the shares in the capital of the W. Co., but not by the applicant whose shareholding in the W. Co. represented ·168 per cent. of the issued share capital. In due course the respondent company served on the applicant a notice pursuant to s. 209 of the Companies Act, 1948*, that they desired to acquire his shares on the terms of the offer contained in the circular. The applicant applied by summons for a declaration that the respondent company was not entitled to acquire his shares in the W. Co., contending that the notice served on him was not a notice given pursuant to a scheme or contract to which s. 209 applied because to be within that section the offer to acquire shares must remain open for a fixed period of four months.

Held: the phrase "within four months after the making of the offer" in s. 209 (1) of the Companies Act, 1948, described a maximum period within which the event contemplated, namely, the approval of the offer by holders of not less than nine-tenths in value of the shares whose transfer was involved, might occur; that it was competent to the respondent company to fix a shorter period within the four months during which the offer must be accepted, and, therefore, that the notice to the applicant was a valid notice.

Rathie v. *Montreal Trust Co. & B. C. Pulp & Paper Co., Ltd.* ([1953] 2 S.C.R. 204) considered and distinguished.

Re Evertite Locknuts, Ltd. ([1945] 1 All E.R. 401), and *Re Press Caps, Ltd.* ([1948] 2 All E.R. 638) considered.

Observations on the reliability of a middle market quotation for shares as a guide in settling fair terms of acquisition (see p. 741, post).

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* Section 209 of the Companies Act, 1948, provides, so far as is relevant, as follows:

"(1) Where a scheme or contract involving the transfer of shares or any class of shares in a company (in this section referred to as "the transferor company") to another company, whether a company within the meaning of this Act or not (in this section referred to as "the transferee company"), has, within four months after the making of the offer in that behalf by the transferee company been approved by the holders of not less than nine-tenths in value of the shares whose transfer is involved (other than shares already held at the date of the offer by, or by a nominee for, the transferee company or its subsidiary), the transferee company may, at any time within two months after the expiration of the said four months, give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares, and when such a notice is given the transferee company shall, unless on an application made by the dissenting shareholder within one month from the date on which the notice was given the court thinks fit to order otherwise, be entitled and bound to acquire those shares on the terms on which, under the scheme or contract, the shares of the approving shareholders are to be transferred to the transferee company . . ."

[As to the power of a company to acquire the shares of a dissenting shareholder for the purposes of a scheme of arrangement or reconstruction, see 6 Halsbury's Laws (3rd Edn.) 774, 775, para. 1561; and for cases as to the rights of shareholders, see 10 Digest 1057, *7392-7398*.

For the Companies Act, 1948, s. 209, see 3 Halsbury's Statutes (2nd Edn.) 628.]

Cases referred to:

(1) *Rathie* v. *Montreal Trust Co. & B.C. Pulp & Paper Co., Ltd.*, [1953] 2 S.C.R. 204; 4 D.L.R. 289; 9 Digest (Repl.) 360, *961*.

(2) *Re Evertite Locknuts, Ltd.*, [1945] 1 All E.R. 401; [1945] Ch. 220; 114 L.J.Ch. 193; 172 L.T. 378; 2nd Digest Supp.

(3) *Re Press Caps, Ltd.*, [1948] 2 All E.R. 638; 2nd Digest Supp.

(4) *Trimble* v. *Hill*, (1879), 5 App. Cas. 342; 49 L.J.P.C. 49; 42 L.T. 103; 25 Digest 400, *53*.

(5) *Diggle* v. *Higgs*, (1877), 2 Ex.D. 422; 46 L.J.Q.B. 721; 37 L.T. 27; 42 J.P. 245; 25 Digest 400, *52*.

(6) *Tinkham* v. *Perry*, [1951] 1 All E.R. 249; [1951] 1 K.B. 547; 2nd Digest Supp.

(7) *Re Hoare & Co., Ltd.*, (1933), 150 L.T. 374; Digest Supp.

Adjourned Summons.

The applicant applied by originating summons under the Companies Act, 1948, s. 209, for a declaration that the respondent company, Adamant Engineering Co. (Luton), Ltd., was neither entitled nor bound to acquire the shares of the applicant in the capital of Western Manufacturing (Reading), Ltd., on the terms of a scheme or contract dated Feb. 11, 1955, notwithstanding that it had been approved by the holders of nine-tenths in value of the shares whose transfer was involved.

The facts appear in the judgment.

R. B. S. Instone for the applicant.

P. J. Sykes for the respondent company.

Cur. adv. vult.

Nov. 29. **WYNN-PARRY, J.**, read the following judgment in which, after stating the nature of the application, he continued: On Feb. 11, 1955, Western Manufacturing (Reading), Ltd. (to which I will refer as "the company") issued a circular to the whole of its shareholders. At the head of the circular it is stated in red ink:

> "This document is important. If you require advice you should consult your stockbroker, banker or solicitor without delay as the offer contained herein lapses on Mar. 4, 1955."

The circular opens as follows:

> "As you may have seen in the Press, on Dec. 9, 1954, the directors of your company held a meeting with the directors of Adamant Engineering Co. (Luton), Ltd. (hereinafter called 'Adamant') at which agreement was reached in principle on a scheme for the amalgamation of the two companies. The two boards had previously sought an impartial opinion from Lazard Brothers & Co., Ltd., as to the method by which a merger could be brought about, and the terms which would be fair to the shareholders of both companies. They have been advised that the amalgamation can most conveniently be effected by Adamant (which is already a holding company) acquiring the shares of your company, and accordingly I am now authorised to transmit to you the following offer by Adamant in accordance with formal letters dated Feb. 3, 1955, exchanged between the directors of the two companies. 1. 'Subject to the conditions mentioned below, Adamant offers to acquire all the shares of 5s. each of your company in exchange

> for new shares of 5s. each of Adamant to be issued credited as fully paid up on the basis of one new share of Adamant for every two existing shares of your company '."

Paragraph 5 so far as material reads as follows:

> " 5. The offer is conditional upon: (a) the offer being accepted on or before Mar. 4, 1955, or such later date as may be agreed between the boards of the two companies in respect of not less than ninety per cent. of the issued shares of your company or such less percentage as may be decided by Adamant after consultation with your board."

The date for acceptance was extended by agreement and in the result the offer was accepted by over ninety-eight per cent. of the holders of shares in the capital of the company. The applicant is the holder of 3,585 shares in the company out of a total issued capital of £532,776 divided into 2,131,104 shares of 5s. each. His holding therefore represents, according to the calculations of counsel, ·168 per cent. of the issued capital. The respondents in due course served on the applicant a notice pursuant to s. 209 of the Companies Act, 1948, to the effect that they desired to acquire the applicant's shares on the terms of the offer contained in the circular. The applicant, however, objects to having his shares acquired on those terms, and puts forward two objections.

One of these objections goes to the question of jurisdiction, and I propose to deal with it first. Put shortly it is that the notice served on him was not a notice given pursuant to a scheme or contract to which s. 209 of the Companies Act, 1948, applies, because to fall within the section the offer involved must remain open for four months, whereas in the present case the offer was issued on Feb. 11, 1955, and provided that it had to be accepted by the holders of not less than ninety per cent. of the issued shares of the company by Mar. 4, 1955, a period of just over three weeks, or such later date as might be agreed between the boards of the two companies. The second point taken on behalf of the applicant was that the offer was not a fair offer, and was not one on the basis of which the court would countenance the acquisition by the respondents of the applicant's shares against his will.

Counsel for the respondents took a procedural point: he argued that the applicant could not challenge, in the present proceedings, the validity of the notice to acquire, in which the notice must be treated as valid, and that such challenge must be made in separate proceedings. He made it clear, however, that his objection was no more than procedural, and that he desired to meet the challenge in this or other proceedings. For myself, I do not feel any difficulty in dealing with the issue as to the validity of the notice in these proceedings. In my view it is open to the applicant to say that the notice is invalid because the requirements of the section have not been complied with, and then to contend alternatively, if his first point is not held to be a good one, that the offer was an unfair one. I therefore turn to deal with the submission that the notice was not made in pursuance of a scheme or contract to which s. 209 of the Companies Act, 1948, applied.

The basis of counsel's point is that the words in s. 209 (1) of the Companies Act, 1948, " within four months after the making of the offer in that behalf " denote a fixed period during the whole of which the offer must remain open and not a maximum period, so that it could be provided that the offer should remain open for a shorter period. In support of the former construction the case of *Rathie* v. *Montreal Trust Co. & B. C. Pulp & Paper Co., Ltd.* (1) ([1953] 2 S.C.R. 204) was relied on. The headnote reads as follows:

> " Section 124 (1) of the Companies Act, 1934 (Canada) c. 33, provides that where when any contract involving the transfer of shares in one company has within four months after the making of the offer been approved by the holders of not less than nine-tenths of the shares affected, the

> transferee company may, at any time within two months after the expiration of the said four months give notice in such manner as may be prescribed by the court, to any dissenting shareholder that it desires to acquire his shares, and where such notice is given the transferee shall, unless on an application made by the dissenting shareholder within one month from the date on which the notice was given the court thinks fit to order otherwise, be entitled and bound to acquire those shares on the terms on which, under the contract, the shares of the approving shareholders are to be transferred to the company. The respondent trust company, acting on behalf of an undisclosed principal, on Dec. 1, 1950, made an offer to the shareholder of the common stock of the respondent pulp and paper company to purchase their shares at $200 per share, subject to the offer being accepted by Dec. 15, 1950, by the holders of not less than ninety per cent. of the shares. It further provided that it should not be bound to accept or pay for any shares not deposited with it by that date. The holders of more than the required percentage accepted and complied with the terms of the offer, but the appellant did not, nor did the intervenants. On Apr. 15, 1951, upon application of the respondents, Coady, J., made an order under s. 124 (1) of the Act authorising the trust company to notify the shareholders who had not accepted the offer that it desired to acquire their shares under its terms and that, unless upon an application made by any of them within one month from the date upon which notice was given them the court should otherwise order, the trust company would be entitled to acquire their shares on such terms. The appellant then brought an action naming the respondents as defendants, claiming a declaration that the trust company was neither entitled nor bound to purchase his shares, nor the plaintiff bound to sell or transfer them to it, and that s. 124 was ultra vires, and alternatively that its provisions did not apply to the plaintiff's shares. He also moved for an order setting aside the ex parte order made by Coady, J. The latter dismissed the action and the motion. An appeal to the Court of Appeal for British Columbia was also dismissed. Held: That the language of s. 124 (1) of the Companies Act contemplates that the offer shall be open for acceptance for a period of four months after its making by those to whom it is made. Where the offer, as in this case, does not comply with the terms of the sub-section, the offeror is not entitled to invoke the assistance of the court to compel the dissentients to transfer their shares."

The first judgment was given by Locke, J., on behalf of himself and four other members of the court. In the course of his judgment Locke, J., said ([1953] 2 S.C.R. at p. 210):

> " The offer of the Montreal Trust Company, it is to be noted, was made subject to the condition that it should be accepted in the manner specified on or before a date fourteen days after the date of the offer by the holders of not less than ninety per cent. of the shares. As to those who did not accept within that time, the offer read: ' The Trust Company may, but shall not be bound, to accept deposit of or to pay for any shares not deposited on or before Dec. 15, 1950.' The appellant contends that such an offer is not within the terms of the section. For the respondents it is said that, since it was shown that within two weeks it was accepted by the holders of more than ninety per cent. of the shares, they are entitled to invoke the provisions of the first paragraph of sub-s. (1) for the compulsory acquisition of the shares of those who did not accept the offer. The point was carefully considered by Coady, J., who was of the opinion that an offer open only for this limited period complied with the requirements of the section. With great respect, I am unable to agree. The trust company's offer was open for acceptance for a period of two weeks only: for the remainder of the four month period after the making of the offer the company might,

> A at its option, decline to purchase the shares of any of those who had not accepted on or before Dec. 15, 1950. In my opinion, the language of sub-s. (1), 'Where any contract involving the transfer of shares or any class of shares in a company . . . to any other company . . . has, within four months after the making of the offer in that behalf by the transferee company, been approved by the holders of not less than nine-tenths of the B shares affected . . .' contemplates that the offer shall be open for acceptance for the period of four months by those to whom it has been made. The procedure authorised by the first paragraph of sub-s. (1) enables the transferee company, if the offer is not accepted, to apply to the court for an order that the dissenting shareholders transfer the shares on the terms of the offer. The intention of Parliament in providing that such an C application could not be made until four months after the making of the offer was, in my opinion, to enable the shareholders to make such investigation as they might think advisable to enable them to determine whether the offer was fair and one that they wished to accept. I cannot think that it was contemplated that the offeror might limit the period within which the offeree might make these inquiries in such manner as might suit his D own convenience. If the time for acceptance might be limited to two weeks, it might, of course, be limited to a much shorter period and afford the shareholders a wholly inadequate opportunity to make such inquiries as they saw fit to make before deciding upon the acceptance or rejection of the offer. As, in my opinion, the offer made did not comply with the terms of the sub-section, the respondents were not entitled to invoke the E assistance of the court to compel the dissentients to transfer their shares."

The second judgment was delivered by RAND, J., on behalf of himself and TASCHEREAU, J. In the course of it, RAND, J., said (ibid., at p. 212):

> "The language of this section, which appears within a fasciculus headed, 'Arrangements and Compromises,' may have been clear to the draftsman, F but I confess that it presents to me many difficulties of construction. What, for instance, does the word 'contract', even including an 'offer of exchange and any plan or arrangement', mean ? With whom is the contract made ? Certainly not with the shareholders; both the singular number and the fact that their individual acceptances would be necessary exclude that; and I doubt that the word 'exchange', although in one sense including G purchase, is an exemplary use of language. Then the contract, within four months after the 'making of the offer', is to be 'approved'. If the offer is to be made direct to the shareholders, it is quite impossible to say that in the ordinary case it could be made on a particular day from which the four months would be computed; and the word 'approved' is quite out of place if used in relation to such an offer. By sub-s. (2) the transferor H company is to change the register upon receipt of a copy of a notice sent out to the dissenting shareholder, which would be an extraordinary mode of dealing with registered titles were that copy the only matter of record before the transferor company.
>
> "In view of these difficulties, I am bound to interpret the section as contemplating, in the practical working out of a business scheme, an offer I or plan or arrangement submitted by the proposed transferee to the transferor company and by the latter to its shareholders for approval. That was the course pursued in *Re Evertite Locknuts, Ltd.* (2) ([1945] 1 All E.R. 401); and in *Re Press Caps, Ltd.* (3) ([1948] 2 All E.R. 638) the proposal was accompanied by a letter from the directors to the shareholders recommending acceptance. In that way the date of the 'making of the offer' is fixed by its delivery to the transferor company; meaning is given to the word 'approved'; and the notice to the dissenting shareholder as received by the transferor takes its place in the records of that company as arising out

> of the proposal already received. The proposal must also remain open for approval by any shareholder for the four months mentioned, otherwise the postponement of the right to proceed by notice against the dissenting shareholder until after the expiration of that period would scarcely make sense. I should say, too, that every shareholder who approved the proposal would be entitled to compel the transferee to purchase his shares, but there seems to be no obligation to acquire shares of dissenting shareholders."

It will thus be seen that two grounds are put forward for the view that the offer must remain open for four months; first, the presumed intention of Parliament to provide a sufficiently long period in which the shareholders may make investigations ; and secondly, the view that the postponement of the right to proceed by notice against the dissenting shareholder until after the expiration of the period of four months would otherwise hardly make sense. Now, although that decision is not binding on me, even as a judge of first instance, it is one which should of course be examined and treated with the greatest respect. Further, I am bound to bear in mind, and I do bear in mind, what was said by the Privy Council in *Trimble* v. *Hill* (4) (1879) (5 App. Cas. 342). In the course of his judgment Sir Montague Smith said (ibid., at p. 345):

> " Their Lordships would not have felt themselves justified in advising Her Majesty to depart from the decision in *Diggle* v. *Higgs* (5) (1877) (2 Ex.D. 422) unless they entertained a clear opinion that the construction it has given to the proviso in question was wrong, and had not settled the law; since in their view it is of the utmost importance that in all parts of the empire where English law prevails, the interpretation of that law by the courts should be as nearly as possible the same."

Nevertheless it is incumbent on me to construe s. 209 of the Companies Act, 1948, for myself, bearing in mind that a provision equivalent to sub-s. (2) does not appear in the Canadian Companies Act, and in the light of the relevant English decisions.

First let me deal with the intention which Locke, J., attributed to Parliament to give the offeree shareholder a sufficiently long period in which to investigate the merits or demerits of the offer. In *Tinkham* v. *Perry* (6) ([1951] 1 All E.R. 249) Sir Raymond Evershed, M.R., said in the course of his judgment (ibid., at p. 250):

> " Plainly, words should not be added by implication to the language of a statute unless it is necessary to do so to give the enactment sense and meaning in its context . . ."

In doing so he was doing no more than reiterating a long and well-established principle. The decided cases appear to me to indicate that a shareholder whose shares are made the subject of such a scheme or contract as is contemplated by s. 209 of the Companies Act, 1948, has very limited rights (if any) to further information than that given in the circular setting out the terms of the offer. In *Re Evertite Locknuts, Ltd.* (2), Vaisey, J., said in the course of his judgment ([1945] 1 All E.R. at p. 403):

> " The applicant does not say, and does not attempt to say, that the offer of 1s. 3d. for each 1s. share which is made to him in common with the rest of the ordinary shareholders, is an unfair offer, an inadequate price. What he says is that at the time when the offer was made, and when he was called upon to consider whether or not he should accept it, he was without sufficient, or perhaps without any, information as to the relevant facts upon which he could have based his conclusion one way or the other. That grievance or complaint is obviously one which he cannot urge against the respondents to the present summons, who are not the transferor company under the section, but the transferee company. It may be that he

> could, by appropriate proceedings against the transferor company, have compelled a disclosure of documents or other information sufficient to satisfy him; or, at any rate, which would be regarded by the court as sufficient to satisfy him. I am bound to say that I think the information which he received was perhaps a little meagre. The point was that the transferor company, the name of which is the Evertite Locknuts (1938), Ltd., had as its principal asset a large holding of shares in another company known as Nuts & Bolts (Darlaston), Ltd. What the applicant says is that the directors of the transferor company withheld from him information in their possession or under their control with relation to the position or prospects of Nuts & Bolts (Darlaston), Ltd. I have really no materials before me which will enable me to say either that any information with regard to that company was withheld, or as to whether, if so, it was withheld improperly.
>
> "The difficulty I feel is that, if once it is conceded that a scheme of this kind can be upset merely for the reason that a shareholder is not given all the information which he might require or might expect from the directors of the transferor company, there would be no limit to the inquiry which would have to be set on foot as to the extent to which his demands for disclosure ought to be conceded. It may be—I do not say that it is—possible that the present applicant has some grievance against the directors of the Evertite Locknuts (1938), Ltd. But I am quite satisfied in my own mind that I should be going much further than MAUGHAM, J., was prepared to go in *Re Hoare & Co., Ltd.* (7) (1933) (150 L.T. 374), if I said that it was not necessary for a dissentient shareholder, making an application under the Act, to establish unfairness, but that it would suffice if he merely said that he regarded himself, or was in fact, unprovided with all the materials upon which he could come to a just conclusion in regard to the acceptance or rejection of the offer."

It will be observed that the learned judge left open the question whether or not an applicant on a summons such as this could obtain an order for discovery of documents. However, in the later case of *Re Press Caps, Ltd.* (3) ROXBURGH, J., refusing an order for discovery, said ([1948] 2 All E.R. at p. 639):

> "I do not feel able to say that any special circumstances have been disclosed which would justify an order for discovery in this case. In reaching that conclusion I have taken into account not only the matters which I have specially mentioned, but also the nature of the section under which this application is being made, s. 209 of the Companies Act, 1948. I have also taken into account, as I think I ought to take into account, the serious consequences which might follow if the holder of one per cent. of the shares of a company should in any large number of cases become entitled by making an application under this section to obtain an extensive investigation of the company's affairs. That remark is not directed to this particular application, but is intended to be of general application. Accordingly, I dismiss this motion with costs."

In the light of these authorities I should feel considerable difficulty in attributing to Parliament the intention of providing a fixed period of four months during which an offer must remain open in order that shareholders may hav ean opportunity of investigating the merits or demerits of the offer. Nor, again speaking with the greatest respect, should I have thought that the circumstance that the exercise by the transferee company of the right to proceed by notice against the dissenting shareholder was by the section postponed for four months was conclusive of the construction of the preceding phrase, "within four months after the making of the offer," although I agree that it is a consideration to be borne in mind. My task, as I see it, is to construe the critical phrase "within four months after the making of the offer" as it stands in s. 209 of the Companies Act, 1948, read as a whole. First construing the phrase by itself, I would say that it indicates not a fixed period to the end of which the offer must remain open, but a maximum period during which the event contemplated, namely, approval of the offer by the holders of not less than nine-tenths in value of the shares, whose transfer is involved, must occur, if the right of the transferee company to acquire the share of a dissentient shareholder is to arise. To say that something must be approved within four months, appears to me to allow any date within that period to be fixed for such approval. This construction appears to me to be borne out by a consideration of the rest of the section. In addition to the phrase which I have been considering, there are four somewhat similar periods mentioned in the section. First there is the phrase in sub-s. (1): "within two months after the expiration of the said four months." Secondly, there is the phrase, also in sub-s. (1): "within one month from the date on which the notice was given." Thirdly, there is the phrase in sub-s. (2) (a): "within one month from the date of the transfer"; and fourthly, the phrase in sub-s. (2) (b): "within three months from the giving of the notice." Now, it will be observed that in the case of each of those four phrases the period is a maximum period during any moment of which the event contemplated may occur. In the light of this it would be odd indeed if the first phrase of all had to be construed in a different sense, namely, as describing a fixed period until the expiration of which one must wait in order to see whether the event contemplated has or has not occurred.

The matter, however, does not end there. It appears to me that the critical moment for ascertaining whether the obligation thrown on the transferee company under sub-s. (2) (a) has arisen cannot possibly be the expiration of a fixed period but must be that moment of time when the condition is fulfilled, namely, that as a result of a transfer of shares in the transferee company, the transferee company, taking into account shares in the transferor company already held or acquired by it, holds ninety per cent. or more of the issued share capital of the transferor company. But that is an event which may well occur so early within the four months' period first mentioned in sub-s. (1) that the period of one month mentioned in sub-s. (2) (a) may expire before the expiration of the period of four months first mentioned in sub-s. (1). It follows, therefore, that the only satisfactory way in which to construe the phrase in question in sub-s. (1) is as a phrase which describes a maximum period, during any moment of which the event contemplated may occur. On any view it is hardly possible to regard s. 209 of the Companies Act, 1948, as entirely satisfactory in its language. On the view which I favour, for example, it is difficult to see why the right of the transferee company to serve notice to acquire the shares of a dissentient shareholder in the transferor company is postponed till the expiration of the four months' period; but in view of the considerations which I have discussed, it appears to me impossible to treat that postponement as decisive of the construction of the phrase "within four months after the making of the offer" in sub-s. (1) of s. 209. Further, those considerations appear to me, when construing s. 209, as opposed to s. 124 of the Canadian Companies Act, 1934, to prevent the introduction of the implied intention which LOCKE, J., attributed to the Canadian Parliament.

In the result, I hold that the present case is distinguishable from *Rathie* v. *Montreal Trust Co.* (1); that the phrase in s. 209 (1) of the Companies Act, 1948, "within four months after the making of the offer" describes a maximum period within which the event contemplated may occur; that it was competent to the respondents to fix a period within but shorter than the four months, during which the offer must be accepted, and, therefore, that the notice to the applicant was a valid notice.

[HIS LORDSHIP then considered the question raised by the applicant whether the offer made by the respondent company was a fair offer and having reviewed all the facts and the evidence on both sides, came to the conclusion that the

A offer was a fair offer. HIS LORDSHIP continued:] It remains to deal with one last point. There is a paragraph in the circular which reads thus:

> "The middle market quotation on the Stock Exchange, London, for the shares of Adamant on the day prior to the announcement of the proposed amalgamation was 25s. The middle market quotation for the shares of
> B your company on the same day was 10s. 9d. On Feb. 3, 1955, the quotations were 27s. 6d. and 13s. 3d. respectively."

It is agreed that on the basis of the middle market quotation there would be a paper profit to shareholders of the company of 1s. 9d. per share. But according to the evidence, if reference be made to the markings for shares in the company on Dec. 9, 1954, the day before the announcement, the paper profit is reduced
C to 1s. 4d. Therefore, it is said that it was misleading to take the middle market quotation. The middle market quotation was the middle price between 24s. and 26s. the prices between which the jobbers were prepared to do business. The markings represent dealings appearing in the Stock Exchange Daily Official List, which the jobbers or brokers concerned recorded. They are not, however,
D bound so to record their dealings. The test of the price of share markings affords an incomplete, and very possibly misleading guide. In the case, however, of the middle market quotation a much sounder guide is afforded, particularly when an estimate of the value of shares on two different dates is desired to be made. There may, of course, be circumstances in which the middle market quotation may not be a satisfactory guide; but no such circumstances were
E shown to exist in this case, and in my view in their absence the middle market quotation should be taken as the reliable guide in preference to markings. For these reasons, I dismiss this summons.

Summons dismissed.

Solicitors: *Daybell, Watts-Jones & Co.* (for the applicant); *Slaughter & May* (for the respondent company).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

STAINER *v.* TRAGETT.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett and Romer, L.JJ.), November 18, 21, 1955.]

Practice—Summary judgment—Leave to sign judgment—Application in respect of one of several claims—Second application, in respect of remaining claims —Whether second application maintainable—R.S.C., Ord. 14, r. 1 (a).

On June 27, 1952, the plaintiff began an action by a specially indorsed writ, under R.S.C., Ord. 3, r. 6, alleging, among other things, that she was the owner of certain premises which she had let to the defendant at a rent of £600 a year, payable half-yearly in advance, and claiming (a) a declaration that the tenancy had been forfeited, (b) possession of the premises, (c) the sum of £900 as arrears of rent due up to Jan. 1, 1952, and (d) damages for use and occupation of the premises from July 1, 1952, to the date of judgment or delivery up of possession. The defendant having appeared to the writ, the plaintiff, on July 28, 1952, took out a summons under R.S.C., Ord. 14, r. 1 (a), asking for leave to sign final judgment in the action for the amount indorsed on the writ, namely, £900. At the hearing of the summons on Aug. 14, 1952, an order was made giving the plaintiff liberty to sign " final judgment " in the action for £900, and it was further ordered that execution on the £900 should be stayed until further order, with liberty to restore, and that the costs of the application should be costs in the cause. No part of the £900 was paid. On July 1, 1955, the plaintiff, having given notice under R.S.C., Ord. 64, r. 13, to proceed with the action, took out a second summons under Ord. 14, r. 1 (a), asking for leave to sign final judgment for possession of the premises, together with mesne profits at the rate of £600 a year from June 27, 1952, until possession, and for the stay of execution imposed by the order of Aug. 14, 1952, to be removed. On July 26, 1955, the master made an order granting the application. An appeal by the defendant to the judge having been dismissed, the defendant appealed to the Court of Appeal.

Held: (i) it was not open to the plaintiff to proceed by way of the second summons under R.S.C., Ord. 14, r. 1 (a), because a summons under that rule for liberty to enter judgment should be an application for all the relief to which the plaintiff was entitled in the action and, therefore, the plaintiff had, by her first summons, exhausted the remedy available to her under the rule, notwithstanding that by her first summons she had not asked for possession; accordingly the order made on the second summons would be discharged.

(ii) it was open to the plaintiff in July, 1955, to restore the summons of July 28, 1952, because, in view of the terms of the order made thereon, that summons was not exhausted or dead; and on that summons so restored the plaintiff would be entitled to an order which, as was conceded, would include removal of the stay of execution and taxation and payment of costs.

Appeal allowed.

[**Editorial Note.** ROMER, L.J., intimates (see p. 749, letter A, post) that in cases of mistake or where fresh material is discovered a second application under R.S.C., Ord. 14, r. 1, may be allowed. Similarly a second application may be made, it seems, where the first has failed in consequence of a technical defect which has subsequently been remedied; see *Dombey & Son, Ltd.* v. *Playfair Bros.* ([1897] 1 Q.B. 368).

As regards estoppel by signing judgment for less than the amount claimed, comparison may be made between the cases of *Dewar & Sons, Ltd.* v. *Winder* (1895), 12 T.L.R. 54, and *Sanders* v. *Hamilton* (1907), 96 L.T. 679; 21 DIGEST 213, *512*, *513*.

As to the application for summary judgment under R.S.C., Ord. 14, see 19 HALSBURY'S LAWS (2nd Edn.) 225, para. 527; and for forms of summons and affidavits and orders, see 12 ENCY. COURT FORMS 139 et seq.]

Cases referred to:

(1) *Bellew* (*Lord*) v. *Markey*, (1878), 2 L.R.Ir. 185; *affd.* C.A. (Ireland), 4 L.R.Ir. 747.

(2) *Sykes Brewery Co.* v. *Chadwick*, (1891), 7 T.L.R. 258; Digest (Practice) 281, *145*.

(3) *Wagstaff* v. *Jacobowitz*, [1884] W.N. 17; Digest (Practice) 281, *147*.

Appeal.

The defendant appealed from an order of McNAIR, J., dated Aug. 2, 1955, dismissing the defendant's appeal from an order of Master BURNAND made on July 26, 1955. By a specially indorsed writ, issued on June 27, 1952, under R.S.C., Ord. 3, r. 6, the plaintiff claimed (i) a declaration that the defendant's tenancy of a mansion and grounds to the extent of 108 acres or thereabouts known as Awbridge Danes in the county of Southampton, of which premises the plaintiff was the owner, had been forfeited or lawfully terminated; (ii) possession of the premises; (iii) the sum of £900 as rent accrued due from the defendant to Jan. 1, 1952, under the terms of a lease, or, alternatively, £600 due from the defendant as a tenant at will up to Jan. 21, 1952; and (iv) damages for use and occupation of the premises from July 1, 1952, or, alternatively, from Jan. 23, 1952, to the date of judgment or delivery up of possession. On July 28, 1952, the plaintiff took out a summons, under R.S.C., Ord. 14, r. 1 (a), asking for final judgment for the amount indorsed on the writ with interest, if any, and costs. On Aug. 14, 1952, Master LAWRENCE gave leave to sign final judgment for £900, granted a stay of execution, gave liberty to restore, and ordered the costs of the application to be costs in the cause. On July 1, 1955, the plaintiff took out a second summons under Ord. 14, r. 1 (a), and by an order of Master BURNAND, dated July 26, 1955, she was granted liberty to sign final judgment for possession of the land described in the indorsement of the writ, together with mesne profits at the rate of £600 per annum from June 27, 1952, until possession, and costs to be taxed, and it was further ordered that the stay of the execution imposed by the order of Aug. 14, 1952, be removed.

S. Terrell and *A. J. Bateson* for the defendant.

J. H. Inskip for the plaintiff.

SIR RAYMOND EVERSHED, M.R.: This appeal has raised a question on the true effect of R.S.C., Ord. 14, r. 1, and it is perhaps surprising that there is no guidance in the books on the particular matter which has been most discussed before us. The present action (which bears the number and letter "1952 S. No. 3081") was an action started by way of specially indorsed writ in accordance with R.S.C., Ord. 3, r. 6. The statement of claim recited that the plaintiff was the owner of a certain mansion house known as Awbridge Danes, and further recited a series of facts which (so far as relevant) led to this, that the defendant was in possession either under a contract of tenancy or under some similar title, whereby (according to the allegation) she was obliged to pay a rent of £600 per annum, payable in equal half-yearly proportions on July 1 and Jan. 1 in each year. The statement of claim stated (and this is not in issue) that the rateable value of the premises was such as to take it out of the Rent and Mortgage Interest (Restrictions) Acts. The plaintiff then prayed, first, for a declaration that the tenancy had been forfeited or lawfully terminated, the reason being non-payment of the rent alleged; second, for possession of the premises; third, under two of the paragraphs in the claim, for £900, being in effect eighteen months' rent due up to and including the instalment due on Jan. 1, 1952; and, finally, for damages for use and occupation from the date therein mentioned. The date of the issue of that writ was June 27, 1952—very shortly before the next rent instalment became due (according to the allegation) on the following July 1.

That writ having been issued and duly served, the plaintiff then proceeded, on July 28, 1952, to take out a summons under R.S.C., Ord. 14, r. 1 (a), which summons was as follows:

> "Upon reading the affidavit of George Leopold Lush let all parties concerned attend the Master in chambers [on the date mentioned and at the time mentioned] on the hearing of an application on the part of the plaintiff that she be at liberty to sign final judgment in this action against the defendant for the amount indorsed on the writ, with interest, if any, and costs."

When the matter came before Master LAWRENCE on Aug. 14, 1952, he (as is the practice in these matters) proceeded to indorse his order as follows: "Judgment for £900. Execution stayed until leave of this court"; and there followed symbols which clearly meant "Liberty to restore; costs in the cause; certificate for counsel", and then he initialled it. In accordance with that direction, the plaintiff's solicitors drew up an order which followed the direction, namely, an order for the sum of £900 to be paid by the defendant to the plaintiff, but also included directions that execution for the £900 should be stayed until further order, with liberty to the parties to restore, and that the costs of the application be costs in the cause, "save that the costs of one adjournment be the plaintiff's in any event. Certificate for counsel".

It is now well advanced in the year 1955: more than three years have elapsed. So far as litigation between these two parties is concerned, we are informed that the intervening time has not been idle. The defendant suggested that she had a counterclaim, which, according to the terms of the agreement made between the parties, was a subject-matter for arbitration. Part of the intervening period has been employed on that arbitration. We are informed that the award has not yet been taken up, because the claimant in the arbitration, the defendant, has been unwilling to pay the necessary fees; and the plaintiff, perhaps not unnaturally, has been unwilling to pay the fees herself. According to the evidence, no further sums of rent have been paid by the defendant, nor has she paid any part of the £900 for which judgment was obtained against her.

The next step was that a notice was served by the plaintiff's solicitors on the defendant's then solicitors on May 19, 1955: "Take notice that the above-named plaintiff intends to proceed in this action one month after the date hereof". That was a notice given pursuant to R.S.C., Ord. 64, r. 13, and occasioned by the long dormancy of the proceedings. The plaintiff at some stage took the original summons to the master. She also prepared a fresh summons asking for possession and, by way of mesne profits, for the equivalent of the rent since June 27, 1952, the date of the writ. Counsel for the plaintiff told us that the master (Master BURNAND, a very experienced master) was then of the opinion that the plaintiff could not proceed, by way of restoration or otherwise, on the summons of 1952, and he, with his own hand, proceeded to amend the second summons which I have mentioned by adding to it, after that part of it which related to possession and mesne profits, the words "and that the stay of execution imposed by the order of Aug. 14, 1952, be removed". In that amended form, that second summons was served on the defendant, and in due course she, first alone and later by counsel, attended before Master BURNAND. It is, I think, clear that she was never given any notice of the restoration of the first summons, and the matter with which the master dealt was exclusively the matter raised by the second summons as amended. On that summons the order made on July 26, 1955, was:

> "It is ordered that the plaintiff be at liberty to sign final judgment in this action for possession of the land . . . Awbridge Danes [which was described]

> together with mesne profits at the rate of £600 per annum from June 27, 1952, until possession [that amounted to over £1,800] and costs to be taxed And it is further ordered that the stay of execution imposed by the order of Aug. 14, 1952, be removed."

The order went on to say: " And it is further ordered that the costs of and occasioned by two adjournments be the plaintiff's in any event ". I am not clear what the purpose of that was, because in the earlier part of the order the whole of the costs had already been given to the plaintiff. The defendant appealed to McNAIR, J. The point taken on her behalf was that the original summons and the order made on it, having regard to their respective terms, exhausted any rights or remedies available to the plaintiff in this action, " 1952 S. No. 3081 ", save only so far as it remained available by virtue of the liberty to restore given by Master LAWRENCE in August, 1952, for the limited purposes for which the liberty had been given. McNAIR, J., rejected that suggestion and dismissed the appeal. He has, in fact, given us no reasons for his judgment. The matter has now come before this court on the same point. We are told by counsel for the defendant that in the meantime, a stay of execution having been refused, the plaintiff has regained possession of Awbridge Danes, and that some execution has been or may have been levied in respect of £1,800, or of the larger total of £2,700.

The terms of R.S.C., Ord. 14, r. 1 (a), are as follows:

> " Where the defendant appears to a writ of summons specially indorsed with . . . a statement of claim under Ord. 3, r. 6, the plaintiff may on affidavit made by himself or by any other person who can swear positively to the facts, verifying the cause of action and the amount claimed (if any liquidated sum is claimed), and stating that in his belief there is no defence to the action except as to the amount of damages claimed if any, apply to a judge for liberty to enter judgment for such remedy or relief as upon the statement of claim the plaintiff may be entitled to."

Counsel for the plaintiff contended that, according to the language which I have read, where the writ, strictly speaking, covers more than one cause of action, the order contemplates that a series of applications may be made under Ord. 14, r. 1, for judgment on the distinct causes of action, leaving it to the plaintiff to proceed from time to time on all or any of the causes of action at his pleasure. To take an extreme case, if the specially indorsed writ were for six instalments of a debt due on specified past dates, each instalment being of £50 (the total being £300), the order contemplates (according to the argument) that a plaintiff could take out a summons for final judgment on one instalment and later take out five more applications for judgment on the other five. Counsel for the plaintiff conceded that in such an extreme case the court might regard the proceeding as being abusive of the court's process; but he submitted that, so far as the wording of the order was concerned, such a method of attack was inherent in the language. Counsel drew attention to the variation in the phrasing, " cause of action ", which has to be verified, and " action ", and, again, " statement of claim "; and, paraphrasing the order, he said that a plaintiff might, in the case which I have supposed where there were, let us say, two separate causes of action strictly so called, verify one of them, state that in his belief there was no defence to either of them, and then apply to the judge for liberty to enter judgment for such remedy or relief as on the statement of claim, in so far as it related to the one which he had verified, the plaintiff might be entitled to.

I cannot so read the order. What is contemplated is that, in cases within R.S.C., Ord. 3, r. 6 (which provides for specially indorsed writs), a plaintiff, if he verifies his cause of action (or, if there is more than one, his causes of action) and says that there is no defence to any part of his action, may then ask the court to give him judgment at once for that to which he is entitled (that is to say, for *all* to which he is entitled) on the statement of claim. When the matter comes before the master on such an application, the master may think (particularly after any evidence has been filed by the defendant) that there is a defence either to one of the causes of action or to part of the one cause of action. He may then (and so much is clear from R.S.C., Ord. 14, r. 4*) give judgment for part of the relief claimed and give liberty to the defendant to defend, conditionally or otherwise, on the other parts of the claim. It is quite clear that a plaintiff, having issued such a writ, cannot then swear an affidavit saying, in effect: " Well, as to part of the claim, as a matter of fact, the defendant has got a defence if he chooses to take it; but as to the rest he has not, and I ask for judgment for that ". It has been laid down in Ireland (in, for example, *Lord Bellew* v. *Markey* (1) (1878) (2 L.R.Ir. 185) and it is stated in the notes to R.S.C., Ord. 14, r. 1, in the ANNUAL PRACTICE, 1955, p. 175, that that is a procedure outside the scope and purpose of Ord. 3, r. 6, and Ord. 14. These rules (for Ord. 14 is confined to cases under Ord. 3, r. 6) can only be invoked where it can be shown that there is no defence, at any rate in the deponent's belief, to any of the matters which are being claimed. Thus it is that, whatever remedy a plaintiff ultimately seeks or may obtain, a condition precedent to an application under R.S.C., Ord. 14, r. 1, is affidavit evidence verifying " the cause of action ", and also stating that in the belief of the deponent there is no defence to the action.

The view which I have suggested seems to me strongly borne out by the language of R.S.C., Ord. 3, r. 6, itself. Rule 6 provides:

> " In actions . . . (2) Where a landlord seeks to recover possession of land, with or without a claim for rent or mesne profits, against a tenant whose term has expired or has been duly determined by notice to quit, or has become liable to forfeiture . . . (3) Where the plaintiff seeks to recover possession of a specific chattel with or without a claim for the hire thereof or for damages for its detention . . . the writ of summons may, at the option of the plaintiff, be specially indorsed with or accompanied by a statement of his claim or of the remedy or relief to which he claims to be entitled."

Those last words, " remedy or relief to which he claims to be entitled ", are echoed in the language in Ord. 14, r. 1 (a), which I have already read†; and although it may be strictly true, for some purposes, no doubt, that a claim for arrears of rent is a cause of action distinct from a claim for a declaration of forfeiture, and a claim for damages for detinue may be distinct from a claim to recover possession of a specific chattel, yet, for the purposes of these orders, I think that each of the instances which I have cited is treated as a single matter, the subject of one action which may be brought within the orders.

If I am right, the result is that where, in such a case as this, a plaintiff has sued for possession and arrears of rent, then if he chooses to apply under Ord. 14 he must ask for such relief as he is entitled to, or such of that relief as he wants. I do not, of course, for one moment wish to dispute that the master, when he deals with the case, may say, for one reason or another, that it is not appropriate or just to give such a plaintiff all he seeks then and there: he may give him liberty to sign judgment for part of the claim and adjourn the rest of the summons. He may (as I have already mentioned), under Ord. 14, r. 4, give leave to defend as to part, with liberty to sign judgment as to the rest. The forms of the orders which he may make are illustrated in the ANNUAL PRACTICE, 1955. ROMER, L.J.,

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* R.S.C., Ord. 14, r. 4, reads: " If it appear that the defence set up by the defendant applies only to a part of the plaintiff's claim, or that any part of his claim is admitted, the plaintiff shall have judgment forthwith for such part of his claim as the defence does not apply to or as is admitted, subject to such terms, if any, as to suspending execution, or the payment of the amount levied or any part thereof into court by the sheriff, the taxation of costs, or otherwise, as the judge may think fit. And the defendant may be allowed to defend as to the residue of the plaintiff's claim."

† See p. 745, letter E, ante.

A drew attention to them. There is an example (ibid., at p. 2680) of an order under Ord. 14 " where the Crown sues in respect of death duties ":

> " It is ordered that the plaintiff be at liberty to sign final judgment in this action . . . for the amount indorsed on the writ, with interest . . ."

On the opposite page (ibid., at p. 2681) there is a form for use where the defendant B is given liberty to defend. It is to be noticed that in this form the word " final " is omitted, where the plaintiff is given liberty to sign judgment for some part of his claim. Thus the orders, numbered 9 and 9A, give liberty to defend as to the whole or part of the claim, and then there is liberty to sign judgment as to the balance, but not, as I say, expressed in the form " final judgment ".

It is to be observed that in the summons taken out in July, 1952, the plaintiff C asked, in terms, for " liberty to sign final judgment in this action "; and it would appear quite plain that the draftsman of the summons may have had a form before him to guide him, but certainly did not have in his mind the terms of the writ which the plaintiff had issued. What was sought in the summons was

> ". . . liberty to sign final judgment in this action against the defendant for the amount indorsed on the writ, with interest, if any . . ."

D

There was no interest claimed on the writ. There was a claim in the writ for damages which appears to have dropped from view altogether. There was also a claim in the writ for possession, but no reference to it in the summons. On that summons the order made was an order " that the plaintiff be at liberty to sign final judgment in this action ". What I have called the condition precedent E to any application under Ord. 14, r. 1, had in truth been complied with, for the affidavit of George Leopold Lush, to which the summons referred, had not only verified the cause of action, or, as counsel for the plaintiff supposes, the causes of action, but also positively stated that, in the view of Mr. Lush, there was no defence to them or to any part of them. In those circumstances, and on the facts of this case, it looks to me perfectly clear, unless the thing can somehow be F explained, that the plaintiff was saying that she wanted final judgment in this action for £900, and was not troubling about anything else—possession or damages or anything. Whether she meant that is much more doubtful. Indeed, counsel for the plaintiff said that it was a slip on someone's part. Not unnaturally, the passage of three years has managed to bury in an obscurity from which they cannot be rescued the true facts of what did occur and what G happened when the parties came before the master.

I agree with counsel for the plaintiff that the indorsement by the master, " costs in the cause ", seems to suppose that the action was not finished, but, having regard to the terms of the summons and the order, I cannot construe that indorsement, conformably with the terms of Ord. 14, r. 1, as meaning that it was in the contemplation of anybody, and particularly of the court, that the H plaintiff would thereafter, at her pleasure or leisure, issue another summons under Ord. 14, r. 1, for possession. The words may be related to the circumstance that the defendant was then intimating that she had a counterclaim. More likely, as I think, the master decided that he could give immediate liberty to sign judgment for the £900, but, as he was granting a stay of execution, he thought it better to adjourn the award and the taxation of the costs until the I matter had been restored, and the question determined whether execution would have to proceed.

In my judgment, notice having been given under R.S.C., Ord. 64, r. 13, it is now open to the plaintiff to restore the summons of July 28, 1952: and counsel for the defendant conceded that, if the plaintiff did restore it, he would have no answer to an order on the summons so restored (a) removing the stay of execution, and (b) directing a taxation of all the costs incurred in relation to the action up to and including that summons and the proceedings on it, and an order that those costs should be paid by the defendant to the plaintiff. In my judgment, however, the learned master, with all respect, was wrong to say that that summons was now, in effect, exhausted and dead; and, indeed, if he were right, I do not know what he intended to do about the costs of the action which had been incurred up to and including that first summons. I think also that he was wrong to amend the plaintiff's second summons so as to add to it an application to stay the execution ordered by the first summons; and I think, finally, with respect to him, that he was wrong to have made an order for possession on the second summons. For the reasons which I have intimated, I do not think that in this case it was open, or is now open, to the plaintiff, having proceeded as she did, to apply, by a fresh summons or at all, in the action " 1952 S. No. 3081 " for possession as claimed on that writ. I therefore disagree also with the view of McNair, J., who dismissed the appeal to him. I think that the master and the judge should have dismissed the second summons and that, accordingly, the order made on it must be discharged. The parties will then be left with such rights and remedies against each other as the law may provide. It is, I should think, fairly certain that the plaintiff may issue a new writ against the defendant. Quite plainly, she is in no way estopped or embarrassed by her first judgment from proceeding against the defendant in respect of the rent which has got into arrear since July 27, 1952, or from asking for possession on that ground. Those are matters which, no doubt, in due course will be dealt with. The matter before us is limited to the order made by the master and affirmed by the judge on the second summons, and I think that that judgment and order should be set aside, and that this appeal should be allowed.

BIRKETT, L.J.: I am entirely of the same opinion, and in view of the full judgment of Sir Raymond Evershed, M.R., I need add very little to what has already been said. [His Lordship referred to the fact that the lease of the premises was for six years ending in June, 1956, that no rent had been paid since July, 1950, to the course of proceedings, and to the fact that the order of Aug. 14, 1952, merely gave liberty to sign judgment for the £900 arrears although the affidavit in support of the application had stated the plaintiff to be entitled to possession. His Lordship stated that the matter was unsatisfactory because of these facts and because, owing to the date of the hearing on Aug. 14, 1952, being by now long ago, no one could inform the court what happened when the order was made. His Lordship continued:] The order of Aug. 14, 1952, states that " the plaintiff be at liberty to sign final judgment in this action "—I repeat, *final judgment*—" against the defendant for £900 ", the amount claimed on the writ. The order contains nothing about interest, nothing about damages and nothing about possession. The order continues:

> " And it is further ordered that execution upon the said £900 be stayed until further order, and that the parties may be at liberty to restore. And that the costs of this application be costs in the cause, save that the costs of one adjournment be the plaintiff's in any event. Certificate for counsel."

One has had to speculate why the order was made in that form. In July, 1955, there came the order of Master Burnand, which was affirmed by McNair, J. So far as the facts are known, I agree with what Sir Raymond Evershed, M.R., has said with regard to the matter. I think that on the three matters which were mentioned by him, the learned master was wrong, and, consequently, that the learned judge in affirming the master (without giving any reasons) was also wrong, and that the course which my Lord indicated as the course to be followed in this case ought to be followed. I agree that the appeal should be allowed.

ROMER, L.J.: I also agree, and have very few words to add to what my brethren have said. R.S.C., Ord. 14, as is well known, provides a means whereby a plaintiff who brings an action under R.S.C., Ord. 3, r. 6, can get a summary judgment in his favour where there is no defence to the action, if he swears that in his belief there is no defence to the action; and he can then get leave to sign judgment without more ado. In my opinion, however, R.S.C., Ord. 14, r. 1, which provides for that procedure, does not, on its true construction, contemplate more than the application by a plaintiff who desires to take advantage of the opportunity which the order provides—except in cases of mistake or the like (such as happened in *Sykes Brewery Co.* v. *Chadwick* (2) (1891) (7 T.L.R. 258)), or where fresh materials are discovered (as in *Wagstaff* v. *Jacobowitz* (3) ([1884] W.N. 17)). I am well satisfied that a plaintiff cannot issue a second summons under R.S.C., Ord. 14, after there has been final judgment in the action on a summons which he has issued earlier, for the simple reason that, except for the purpose of working out the order which has been already obtained, the action is at an end.

Such was the position in the present case. The plaintiff specifically asked by her summons for liberty to sign final judgment in the action against the defendant for the amount indorsed on the writ, which was £900. In pursuance of that application she was given liberty to sign final judgment in the action for £900 and she did so. It appears to me that the inevitable consequence of, or inference from, that is that she was waiving the other relief which she claimed on her specially indorsed writ, namely, a declaration of forfeiture and an order for possession, and that the action was at an end. I think that that is confirmed by the reference to the forms in the Annual Practice, 1955, which Sir Raymond Evershed, M.R., has made. Those forms seem to draw a clear distinction between a " final " judgment, where no question of defending any part of the action to trial is concerned, and judgment simpliciter, where a defendant is given leave to defend part of the action. Consequently, it seems to me that on those grounds the plaintiff was not entitled to issue the second summons.

What appeared to me at one time to be a possible alternative, having regard to (i) the form which the summons took, (ii) the form of the affidavit on behalf of the plaintiff in which it was said there was no defence either to the claim for the arrears of rent or to the claim for possession, and (iii) the form of the order, which provides for " costs in the cause ", was that the case was, in some loose sense, being regarded as a reflection, as it were, of an application under Ord. 14, r. 4, which provides for a plaintiff signing judgment in respect of part of his claim and the master giving liberty to the defendant to defend the other parts of the claim. As Birkett, L.J., said, we do not know what happened before the master when the order of Aug. 14, 1952, was made, and it is largely a matter of speculation; but, even assuming that such an idea was present in the minds of the parties, namely, that the plaintiff should sign final judgment for £900 and that the defendant should defend as to the other issues, that still would be of no avail to the plaintiff because she could not apply twice, and her remedy (if any) on that footing, when she found that the defendant was not putting in a defence on the other issues, would be to make an appropriate application founded on default in delivering a defence. It would not entitle her to make the second application which she has made under Ord. 14. I agree with the order which my brethren propose.

Appeal allowed. Judgment set aside.

Solicitors: *Victor Mishcon & Co.* (for the defendant); *Vizard, Oldham, Crowder & Cash*, agents for *Whitehead, Vizard, Venn & Lush*, Salisbury (for the plaintiff).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

J. H. VANTOL, LTD. *v.* FAIRCLOUGH DODD & JONES, LTD.

[COURT OF APPEAL (Singleton, Jenkins and Parker, L.JJ.), November 4, 7, 24, 1955.]

Sale of Goods—C.i.f. contract for sale of Egyptian cottonseed oil—London Oil and Tallow Trades Association form of contract—Force majeure clause—Time of shipment to be extended for two months " should the shipment be delayed . . . by prohibition of export "—Construction.

In November, 1950, the sellers sold to the buyers one hundred tons of Egyptian cottonseed oil, c.i.f. Rotterdam, to be shipped during December, 1950/January, 1951. The contract was in a form issued by the London Oil and Tallow Trades Association and cl. 11 thereof, which was a force majeure clause, provided, so far as is relevant, as follows: " B. Should the shipment be delayed by . . . prohibition of export . . . or any other cause comprehended in the term force majeure other than war, hostilities, blockade, the time of shipment shall be extended by two months . . ." The shippers had arranged to ship the oil on a ship which was due to load on Dec. 20, 1950, but on Dec. 12, 1950, the Egyptian government imposed a ban on the export of cottonseed oil. On Jan. 3, 1951, the ban was lifted, and between Jan. 4 and Jan. 31 oil of the contract description and quantity was available for shipment. On Feb. 17, 1951, before any shipment of oil for the purposes of this contract was made, the ban on export was re-imposed and continued in force until after April, 1951. The buyers claimed that the sellers were in default under the contract. On the question whether the shipment had been delayed by prohibition of export within cl. 11B so that the time for shipment would have been extended by two months to the end of March, 1951,

Held: " the shipment " referred to in cl. 11B meant shipment in accordance with the contract, viz., during the months of December, 1950/January, 1951; the shipment was not, therefore, delayed within the meaning of cl. 11B unless the delay was one which continued to or beyond the last date allowed by the contract for shipment, viz., Jan. 31, 1951, and accordingly the sellers were in breach of contract and the buyers were entitled to recover damages.

Decision of McNAIR, J. ([1955] 2 All E.R. 516) reversed.

[As to shipment of goods sold under a c.i.f. contract, see 29 HALSBURY'S LAWS (2nd Edn.) 214, para. 286.]

Appeal.

The buyers appealed from an order of McNAIR, J., dated May 5, 1955, and reported [1955] 2 All E.R. 516, on a Special Case stated by the Board of Appeal of the London Oil and Tallow Trades Association, under the Arbitration Act, 1950, s. 21 (1), whereby he gave judgment in favour of the sellers.

At all material times a licence from the Egyptian government was required for the export of cottonseed oil. On Sept. 27, 1950, the Egyptian Salt & Soda Co., Ltd. of Alexandria (referred to hereinafter as " the shippers ") obtained a licence to export at least two hundred tons. The licence was valid until Dec. 26, 1950, but was subject to a term that it might be withdrawn at any time. By a contract dated Nov. 10, 1950, Fairclough Dodd & Jones, Ltd. bought two hundred tons of Egyptian washed cottonseed oil from the shippers, at £138 per ton f.o.b. Alexandria. One hundred tons was to be delivered in December, 1950, and one hundred tons in December, 1950/January, 1951, for shipment to Rotterdam. The contract contained (a) a clause that, in the event of the shippers' export licence being rescinded, the contract was to be cancelled for any unshipped quantity, and (b) a force majeure clause. On the same day (Nov. 10, 1950), Fairclough Dodd & Jones, Ltd. (referred to hereinafter as

A "the sellers") entered into a contract with Irish Oil & Cake Mills, Ltd. of Drogheda (referred to hereinafter as "the Irish company"), to sell one hundred tons of the oil to the Irish company, at £145 10s. a ton c.i.f. Rotterdam, to be ready for shipment during the first half of December, 1950, and to be shipped on the first available steamer.

By a contract in writing dated Nov. 27, 1950, the sellers sold to J. H. Vantol, B Ltd. (referred to hereinafter as "the buyers") one hundred tons of Egyptian washed cottonseed oil, to be shipped during the months of December, 1950/January, 1951, from Alexandria, at a price of £146 10s. a ton c.i.f. Rotterdam. The contract of Nov. 27, 1950, was on form 5a, issued by the London Oil and Tallow Trades Association, and headed "Contract for Oriental Oils. C.i.f. Terms Continental". Clause 11 provided:

C

> "A. In the event of war, hostilities or blockade preventing shipment this contract or any unfulfilled part thereof shall be cancelled. If required sellers must produce proof to justify cancellation.
>
> "B. Should the shipment be delayed by fire, strikes, lock-outs, prohibition of export, riots, or revolution, or any other cause comprehended in D the term force majeure other than war, hostilities, blockade, the time of shipment shall be extended by two months. Should the delay exceed two months, buyers shall have the option of cancelling the contract forthwith or accepting the goods for shipment as soon as possible, but should the shipment not be possible within eight months from the date of shipment originally stipulated, contract to be void. The option to be declared as E soon as shippers announce their inability to ship within the extended period of two months, a reasonable time being allowed for passing on such announcements. Should buyers fail to exercise their option in due time, contract to be void. If required sellers must produce proof to justify their claim for cancellation or extension."

This contract, unlike that of Nov. 10, 1950, between the sellers and the shippers, F did not contain an export licence clause.

Space was booked by the shippers for two hundred tons of cottonseed oil on board s.s. Mentor due to load on or about Dec. 20, 1950, but on Dec. 12 the Egyptian government imposed a ban on the export of cottonseed oil. On Dec. 13 the sellers received a cable from the shippers advising them of the shippers' inability to fulfil their contract by reason of the ban, and on the same G day the sellers sent a copy of the shippers' cable to the buyers. On Jan. 3, 1951, as a result of negotiations between the shippers and the Egyptian authorities, the shippers' licence was renewed for a period of three months. Goods of the contract description and quantity were available for shipment between Jan. 4 and Jan. 31, 1951. The shippers, with the consent of the sellers, intended to ship one hundred tons by the end of January and the remaining one hundred H tons during February. Towards the end of January, 1951, the shippers shipped one hundred tons to the sellers, and the sellers appropriated that shipment to their contract with the Irish company. On Feb. 17, before any further shipment had been made, the ban on export was re-imposed by the Egyptian authorities and was still in force at the end of April, 1951. On Feb. 22 the sellers notified the buyers of the re-imposition of the ban, and the buyers replied, on the same I day, alleging that shipment under the contract was then overdue, and claiming that the sellers were in default. The sellers denied that they were in default, and the matter went to arbitration. The arbitrators appointed by the parties having failed to agree, an umpire was appointed. On Feb. 4, 1953, the umpire awarded that the buyers had no claim against the sellers. The buyers thereupon appealed to the Board of Appeal of the London Oil and Tallow Trades Association; the contentions are stated at [1955] 2 All E.R. 518, letters H, I.

The board of appeal held, subject to the decision of the court, that the imposition of the ban on Dec. 12, 1950, operated to give the sellers an extension of two months in which to ship, and, in the event of the court deciding that the sellers were not in default, confirmed the award of the umpire.

On the Special Case stated by the board of appeal McNair, J., held that the sellers were not in default because (i) the shipment was delayed within the meaning of cl. 11B of the contract although the prohibition on export did not continue throughout the whole of the period remaining after its inception within which the contract might be performed, and (ii) it was not necessary for the sellers to prove that they were unable to purchase goods afloat.

A. A. Mocatta, *Q.C.*, and *J. F. Donaldson* for the buyers.
T. G. Roche, *Q.C.*, and *A. J. Bateson* for the sellers.

Cur. adv. vult.

Nov. 24. The following judgments were read.

SINGLETON, L.J., stated the facts and continued: The main contention of the buyers is set out in para. 42 (6) of the award of the Board of Appeal of the London Oil and Tallow Trades Association in these terms:

> "The imposition of the ban on the export of cottonseed oil on Dec. 12, 1950, did not of itself bring into operation the provisions of the 'force majeure' clause entitling the sellers to an extension of two months. To bring the said clause into operation, the ban must cause such delay as to prevent shipment at any time during the contract period. The sellers could have shipped the goods between Jan. 4 and 31. They did in fact (on their own admission) ship goods of the contract description and of the required quantity during that period to Irish Oil & Cake Mills, Ltd. The decision of the sellers to allocate the last-mentioned goods to Irish Oil & Cake Mills, Ltd., and not to the buyers was an arbitrary one."

The appeal depends on the true construction of cl. 11 of the contract, which reads:

> "A. In the event of war, hostilities or blockade preventing shipment this contract or any unfulfilled part thereof shall be cancelled. If required sellers must produce proof to justify cancellation. B. Should the shipment be delayed by fire, strikes, lock-outs, prohibition of export, riots, or revolution, or any other cause comprehended in the term force majeure other than war, hostilities, blockade, the time of shipment shall be extended by two months. Should the delay exceed two months, buyers shall have the option of cancelling the contract forthwith or accepting the goods for shipment as soon as possible, but should the shipment not be possible within eight months from the date of shipment originally stipulated, contract to be void. The option to be declared as soon as shippers announce their inability to ship within the extended period of two months, a reasonable time being allowed for passing on such announcements. Should buyers fail to exercise their option in due time, contract to be void. If required sellers must produce proof to justify their claim for cancellation or extension."

The clause has been in use for a good number of years, but so far as we have been told, there has been no previous decision on it. The contract is a c.i.f. contract for the sale of goods to be shipped during the months of December, 1950/January, 1951 from Alexandria to Rotterdam. Clause 11 makes provision for two distinct contingencies: A. provides that in the event of war, hostilities or blockade preventing shipment the contract or any unfulfilled part of it is cancelled. B. is intended to cover a case in which the shipment is delayed through causes less serious than those in A. which arise through no fault of the seller. If "the shipment be delayed" by any of the causes therein set out, "the time of shipment shall be extended by two months". The result of this appeal depends on the construction of these words, which are the first two lines of cl. 11B.

The contention of the sellers is that there was delay in shipping the goods by reason of prohibition of export, and that, but for the delay so caused, the goods would have been shipped on the s.s. Mentor on Dec. 20. They claim that in view of that delay, the time of shipment was extended for two months—that is, until the end of March, 1951—and that before the extended time had run, the contract was repudiated by the buyers. On the facts stated in the Special Case, this is a formidable argument. But for the prohibition of export between Dec. 12, 1950, and Jan. 4, 1951, it is fair to assume that the goods would have been shipped on Dec. 20, 1950. That they were not so shipped was due to the prohibition of export. The sellers were prevented from shipping goods in accordance with the terms of the contract so long as the prohibition lasted, and in that way delay in shipment was caused, it is said. That is the view which was taken by the arbitrators who were appointed, and which was upheld by the appeal committee and by MCNAIR, J. It is said that once delay in shipment—however short the period—arises through one of the causes mentioned in cl. 11B, the sellers have to make new arrangements either for the provision of the goods, or for shipping space, or for both, and, to avoid any question as to length of time during which the delay operates, the clause recognises and provides a fresh two months' period as the reasonable and proper extension.

The submission of the buyers is that cl. 11B does not apply unless the shipment is delayed through one of the causes mentioned until the end—for all practical purposes—of the agreed time for shipment. They agree that the prohibition of export between Dec. 12, 1950, and Jan. 4, 1951, was a bar to shipment during that time, and, perhaps, that it delayed shipment for a little time longer, but they say that there is nothing to show that it delayed the shipment of goods to comply with the terms of the contract during the remainder of the time provided by the contract for the shipment of the contract goods. "The shipment" in the first line of cl. 11B they contend, is the shipment contemplated by the parties to the contract and stated as December, 1950/January, 1951. Now, the commencing words of cl. 11B are "Should the shipment be delayed by" and not "Should shipment be delayed by". "The shipment" means the shipment already described; that is, shipment during the months of December, 1950/January, 1951. Thus, unless it is shown that the shipment agreed on was delayed by one of the causes mentioned beyond Jan. 31, 1951, the provisions of cl. 11B do not apply. There is no such finding.

The conclusion at which I have arrived, after considerable hesitation, is that the contention of the buyers is correct. It is the word "the" in front of the word "shipment" in cl. 11B which satisfies me that the clause is intended to apply only if delay is caused beyond the end of the period which the parties agreed as the time for the shipment of the contract goods. To put it in another way, "delayed" in the first line of cl. 11B means delayed as between buyers and sellers in relation to this contract. The clause may be of benefit to one or to the other party to the contract, or it may be of help to both. The words at the commencement of it protect the sellers if the shipment is delayed by one of the causes mentioned, and at the same time they keep the contract open, which may be to the buyers' advantage In a later part of cl. 11B the buyers are given the option of keeping the contract open for a further period, an option which may well be valuable. It is important to bear in mind that the sellers do not need protection unless and until the agreed time for shipment has gone. Before they can get it, they can be called on for proof to justify their claim for extension; in other words, they must show that the shipment agreed on by the parties to the contract was delayed by one of the causes mentioned beyond Jan. 31, 1951. I do not consider that help is given by the words in the later part of the clause, nor is it necessary to consider the obligations of the sellers to provide goods to comply with the contract in some other way. They had contracted to supply goods for shipment during December, 1950/January, 1951. It does not appear to me to matter whether cl. 11B is to be regarded as an exception to the provisions of the contract or as an extension of the time for delivery. If my reading of it is right, it does not come into operation. In my opinion, the appeal should be allowed.

JENKINS, L.J., stated the facts and continued: The case turns entirely on the true construction of cl. 11B of the contract, and in particular of its opening words:

> " Should the shipment be delayed by . . . prohibition of export . . . the time of shipment shall be extended by two months."

The question is simply whether " the shipment " was " delayed " within the meaning of this provision by the prohibition of export which was in force from Dec. 12, 1950, to Jan. 3, 1951. If the shipment was so delayed, then the sellers became entitled under cl. 11B to a two months' extension of the time of shipment—that is to say, an extension from Jan. 31, 1951, to Mar. 31, 1951—and the judgment in their favour should be upheld on the ground that they were never in default under the contract. If, on the other hand, the shipment was not so delayed, then the sellers are liable to the buyers in damages for breach of the contract in the shape of the sellers' failure to ship on or before the date originally stipulated, that is to say, Jan. 31, 1951.

In support of their view of the matter, which has so far prevailed, the sellers argue (in effect) that if the prohibition had not been imposed, they could have shipped at some time between Dec. 12, 1950, and Jan. 3, 1951, and in particular could have availed themselves of the arrangements for shipment by the s.s. Mentor on or about Dec. 20, 1950, made by their vendors; that the prohibition in fact imposed on Dec. 12, 1950, remaining in force as it did until Jan. 3, 1951, made it impossible for them to ship between Dec. 12, 1950, and Jan. 3, 1951, and in particular made it impossible for them to avail themselves of the arrangements made by their vendors for shipment by the s.s. Mentor on or about Dec. 20, 1950; and therefore that the prohibition putting off or postponing as it did the possibility of effecting any shipment from Dec. 12, 1950, to Jan. 3, 1951, and in particular preventing shipment by the s.s. Mentor on or about Dec. 20, 1950, was a prohibition of export by which " the shipment " was " delayed " according to the literal and ordinary meaning of those words. Thus, according to the sellers' argument, the language of cl. 11B, construed simply as it stands and applied in its literal and ordinary meaning to the events which actually happened, did give them the two months' extension of the time of shipment to which the learned judge held them to have been entitled. It will be seen that the effect of the sellers' argument is that any delay in shipment occurring at any moment however early during the period allowed by the contract for shipment of the goods, and continuing for any space of time however short, provided, of course, it was a delay due to one of the causes mentioned in cl. 11B, would suffice to entitle the sellers to the two months' extension allowed by that clause. In other words, according to the sellers' argument in its widest form, the two months' extension is given by cl. 11B unless at every moment of time during the period originally allowed for shipment the sellers were wholly immune from impediments to shipment occasioned by any of the causes mentioned in cl. 11B. A narrower form of the argument, which in view of the fate of the projected shipment by the s.s. Mentor would, if made good, suffice for the sellers' purpose, is to the effect that the two months' extension operates if the sellers can show that at any time during the period originally fixed some specific arrangement for effecting shipment had to be postponed or abandoned through one of the causes mentioned in cl. 11B.

The buyers, on the other hand, submit that what has to be delayed in order to bring cl. 11B into operation is "the shipment", that is to say, the shipment which by the contract the sellers agreed to effect during the months of December, 1950, and January, 1951; or, in other words, not later than Jan. 31, 1951. The buyers submit, further, that the shipment in this sense is only "delayed" within the meaning of cl. 11B if, through one of the specified causes, the sellers are unable to ship until a date later than Jan. 31, 1951. In this context (so proceeds the argument) "delay" connotes postponement of shipment beyond the date on or before which the buyers are entitled to expect shipment according to the terms of the contract; or, in other words, delay of which, but for cl. 11B, the buyers would be entitled to complain. The date within the period allowed by the contract on which the sellers may choose to ship concerns no one but the sellers themselves, and the mere fact that through one of the specified causes they have to postpone shipment until some later date within the period, provided that the cause of postponement does actually cease to operate in time to make it possible for them, if so minded, to ship before the end of the period, should not affect the buyers' rights.

In my judgment, the contention of the buyers should succeed. I think that in a clause such as cl. 11B of the contract here in question references to delay should be related to the time set by the contract for its performance. I think the proper time at which to decide whether there has been delay due to one of the causes mentioned in cl. 11B is the last date for shipment originally allowed by the contract, the question being whether as at that date "the shipment" has been "delayed" by one of those causes. If the sellers could in fact have shipped by that date but chose not to do so, then the only relevant delay was due to their own choice and not to any of the causes mentioned in cl. 11B, and it is immaterial that at some time during, or for some part of, the period for shipment as originally fixed the sellers were subjected to delay from one or other of those causes. I think, too, that the buyers' contention accords better with the scheme of cl. 11B as a whole. Delay brought about by one of the causes mentioned entitles the sellers to two months' extension of time measured from the expiration of the time for shipment as originally fixed. That suggests delay which has operated to prevent shipment by the date originally stipulated. Then the clause goes on to provide that "should the delay exceed two months" certain consequences are to ensue. In that part of the clause "the delay" must clearly be the delay which has operated to entitle the sellers to the two months' extension, and the two months referred to must be the two months constituting the extension, and measured from Jan. 31, 1951, as the latest date for shipment originally fixed by the contract. The consequences of the delay exceeding two months are that the

> "buyers shall have the option of cancelling the contract forthwith or accepting the goods for shipment as soon as possible."

Finally,

> "should the shipment not be possible within eight months from the date originally stipulated"

the "contract" is "to be void". These provisions seem to me to point quite distinctly to a delay from one of the specified causes, by reason of which it proves impossible to effect the shipment by the date originally stipulated, and a two months' extension of the time originally fixed for shipment to protect the sellers from the consequences which would otherwise ensue from failure to ship by the due date, and to give them an opportunity of shipping during the extended period should it become possible for them to do so within that period; and, on the other hand, a protection of the buyers from inordinate delay by giving them the option of cancellation in the event of shipment still being impossible at the expiration of the two months' extension; and, finally, a release of both parties from their obligations under the contract in the event of the impossibility persisting for as long as eight months from the date originally fixed for shipment.

The learned judge appears to have attached considerable importance to the reference in cl. 11A to the event of war, hostilities or blockade " preventing shipment " as contrasted with the reference in cl. 11B to the event of the shipment being " delayed " by any of the causes therein specified. I do not think this change of language really affects the question one way or the other. I can deduce nothing more from it than that the draftsman appears to have regarded the events of war, hostilities or blockade dealt with in cl. 11A as impediments of a permanent character to the performance of the contract while looking on the various other events dealt with in cl. 11B as possibly only transient in their effect. " To delay ", after all, means much the same as " to prevent temporarily ". Accordingly, I would allow this appeal.

PARKER, L.J.: I agree. The main point at issue is a short, although not an altogether easy, point of construction, namely, as to the meaning of the opening words of cl. 11B. The rival contentions are these. The sellers maintain that they are entitled to a two months' extension if they can show that the prohibition on export, however short in duration and effect, has in fact delayed the shipment which they would otherwise have made. If this be the correct interpretation, then on the facts of this case the sellers, having shown that they would have shipped on the s.s. Mentor on Dec. 20, 1950, but for the ban on export imposed on Dec. 12, are entitled to a two months' extension to Mar. 31, albeit that as between Jan. 3, 1951, when the prohibition was lifted and Jan. 31 they could have shipped the goods. Accordingly, they were not in default in March when the buyers claimed arbitration and thus repudiated the contract. The buyers, on the other hand, contend that the opening words of cl. 11B mean that before the two months' extension comes into being, the prohibition on export must have continued, or its effect must have persisted, up to and beyond Jan. 31, 1951, so that the prohibition must have been the effective cause of non-performance by that date. On this view, the sellers were in default, since goods of the contract description and quantity were available between Jan. 3 and Jan. 31, 1951, and in fact such goods were shipped by the sellers on Jan. 30, 1951, to the Irish Oil & Cake Mills, Ltd.

In approaching the construction of these words, it is, I think, important to bear in mind that this is a force majeure clause. Whether viewed as a clause which extends the time for shipment or as an exception clause, it is a clause which operates to prevent what otherwise might be a breach from being a breach. Such a clause would normally, at any rate, not be construed as being operative, unless in its absence the party protected would have been in breach. The first thing one notices on reading the opening words of cl. 11B is the definite article before " shipment ". Neither side attached any importance to this, and although I think that its presence assists the buyers' rather than the sellers' contention, I myself do not attach any great importance to it. " Shipment ", however, must mean " shipment in accordance with the contract ", that is, in the present case, by Jan. 31, 1951. When, then, is such shipment delayed ? Surely only when the time for shipment has expired. That, as it seems to me, is the natural meaning of the words. No doubt, from the sellers' point of view, it can be said that shipment is not delayed only when the contract period expired, since the prohibition on export prevented them from shipping the goods on the s.s. Mentor as they had planned. From the buyers' point of view, however, the shipment cannot be said to have been delayed until the contractual period for shipment expired. I think that the delay contemplated must be a delay as between the parties. If it were intended that the clause should operate whenever the domestic arrangements of the sellers were interfered with, express words to that effect would be necessary.

As I have said, I think that the construction put on cl. 11B by the buyers is the natural one, but some, albeit slight, assistance can be obtained from reading cl. 11 as a whole. In the first place, if the sellers' contention is correct, it follows that whereas a temporary revolution which delayed their shipping plans would result in an automatic extension of two months, temporary hostilities would not, since hostilities are dealt with solely in cl. 11A, under which, it is conceded, the contract remains in being unless the hostilities or their effect last throughout the contract period for shipment. It may be said that it is not likely that hostilities would be of only a short duration, but it is by no means impossible, in which case the sellers' contention produces, to say the least, an odd result. In the second place, the word " delay " where it occurs in the second sentence of cl. 11B is clearly referring to a continuing delay. I appreciate that it is there referring to a later stage, namely, when the two months' extension has already come into operation. Nevertheless, it seems to me a more logical scheme is produced if " delayed " and " delay " are read in the same sense. Otherwise, the result would be that whereas if the effect of any prohibition continued up to, say, one week before the end of the two months' extension, the sellers would be in breach if they did not ship during that week, yet if the prohibition and its effect only lasted two days and ceased, say, a month before the expiration of the contract period of shipment, they would not be in breach unless they failed to ship in three months. I appreciate fully the arguments of the sellers based on the use of the word " delayed " in cl. 11B as compared with the word " preventing " in cl. 11A. No doubt it is a principle of construction that the use of different words in separate clauses dealing with the same or a similar subject-matter prima facie points to the words being intended to bear different meanings. Here, however, I think that the meaning of cl. 11B is sufficiently clear to rebut any presumption afforded by that principle.

So far as concerns the buyers' argument based on the absence of a finding that the sellers could not have bought goods of the contract description and quality afloat, I agree with the learned judge in thinking that that argument fails. In the result, I would allow the appeal.

Appeal allowed.

Solicitors: *Stephenson, Harwood & Tatham* (for the buyers); *Thomas Cooper & Co.* (for the sellers).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

MARCZUK *v.* MARCZUK.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Barnard, J.), October 24, 26, 27, November 16, 1955.]

Justices—Husband and wife—Maintenance order—Discharge—Adultery—Condonation—Sexual intercourse as proof of reinstatement of wife—Summary Jurisdiction (Married Women) Act, 1895 (58 *&* 59 *Vict. c.* 39), *s.* 7 *as amended by the Summary Jurisdiction (Separation and Maintenance) Act,* 1925 (15 *&* 16 *Geo.* 5 *c.* 51), *s.* 2 (1).

Justices—Husband and wife—Maintenance order—Discharge—Resumption of cohabitation—Intention of parties—Sexual intercourse—Summary Jurisdiction (Married Women) Act, 1895 (58 *&* 59 *Vict. c.* 39), *s.* 7.

The parties were married in 1950 and there was one child of the marriage. In September, 1954, the wife left the matrimonial home and on Sept. 8, 1954, the justices made a maintenance order in her favour on the ground that the husband had wilfully neglected to provide reasonable maintenance for her and the child. Shortly afterwards the parties met again and from November, 1954 to March, 1955, the wife visited the husband on Saturday evenings when sexual intercourse often took place between them and he often gave her some money. There were arrears of payments under the maintenance order. On the evening of May 8, 1955, the husband saw the wife with a man at an inn; on leaving she told the husband that she was in love with someone else and he followed her and the man to some woods. Late that night the wife visited the husband at the matrimonial home, and told him again that she was in love with someone else; subsequently sexual intercourse took place between them. The husband applied under s. 7 of the Summary Jurisdiction (Married Women) Act, 1895*, for the discharge of the order of Sept. 8, 1954, on the grounds that the wife had voluntarily resumed cohabitation with the husband between November, 1954, and March, 1955, and that the wife had committed adultery on May 8, 1955. Before the justices the wife admitted having met R. on May 8, but denied having committed adultery with him. The justices on their own initiative adjourned the hearing to enable R. to give evidence, which he did. The justices found that adultery on May 8 had been proved and discharged the order, stating in their reasons that a prima facie case of guilt had been raised by the husband which had not been rebutted to their satisfaction by the evidence of the wife and R. On appeal,

Held: (i) the fact that the husband had sexual intercourse with the wife on May 8, when he knew her relations and intentions with regard to R., was proof of condonation by him of her adultery with R. earlier on that day, and

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* Sections 6 and 7 of the Summary Jurisdiction (Married Women) Act, 1895, as amended in the case of s. 7 by the Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 2 (1), are in the following terms:

"6. No orders shall be made under this Act on the application of a married woman if it shall be proved that such married woman has committed an act of adultery: Provided that the husband has not condoned, or connived at, or by his wilful neglect or misconduct conduced to such act of adultery."

"7. A court of summary jurisdiction acting within the city, borough, petty sessional or other division or district, in which any order under this Act or the Acts mentioned in the schedule hereto, or either of them, has been made, may, on the application of the married woman or of her husband, and upon cause being shown upon fresh evidence to the satisfaction of the court at any time, alter, vary, or discharge any such order, and may upon any such application from time to time increase or diminish the amount of any weekly payment ordered to be made . . . If any married woman upon whose application an order shall have been made under this Act, or the Acts mentioned in the schedule hereto, or either of them, shall voluntarily resume cohabitation with her husband, or shall commit an act of adultery, such order shall upon proof thereof be discharged. Provided that the court may, if the court think fit—(a) refuse to discharge the order if, in the opinion of the court, such act of adultery as aforesaid was conduced to by the failure of the husband to make such payments as in the opinion of the court he was able to make under the order . . ."

A left no room for argument whether the intercourse with the husband was
incidental to her reinstatement as wife (observations of SIR RAYMOND
EVERSHED, M.R., in *Perry* v. *Perry* ([1952] 1 All E.R. at p. 1082) applied);
but the wife's adultery with R. was not " an act of adultery " by her within
the meaning of that phrase in s. 7 of the Summary Jurisdiction (Married
Women) Act, 1895, because the husband could not rely on the adultery as he
B had condoned it, and accordingly the justices were not entitled to discharge
the maintenance order on the ground of that adultery (see p. 764, letter F,
and p. 767, letter D, post).

(ii) voluntary resumption of cohabitation by the wife with the husband
within s. 7 of the Act of 1895 was not established, because resumption of
cohabitation involved the intention of both parties to that end and was to
C be distinguished from condonation of adultery which did not involve such
an intention (*Perry* v. *Perry* ([1952] 1 All E.R. at pp. 1086, 1090) considered);
in the present case the wife had no intention of resuming cohabitation and
the primary purpose of her visits to the husband between November, 1954,
and March, 1955, was to get some of the money which was in arrears under
the maintenance order, and accordingly the order could not be discharged
D on the ground of resumption of cohabitation (see p. 768, letter A, and
p. 769, letter B, post).

(iii) objection to the course taken by the justices in adjourning the case
to enable R. to give evidence would not be sustained, as he was an important
witness and it was fair to give him an opportunity to answer the allegation
of adultery; moreover, as the justices had come to a determinate conclusion
E that adultery had been committed, and there had been evidence on which
such a conclusion could be reached, it was not necessary to consider the
question of onus of proof of adultery (dictum of VISCOUNT DUNEDIN in
Robins v. *National Trust Co.* ([1927] A.C. at p. 520) applied), and the court
would not interfere, on either of these grounds, with the finding of the
justices (see p. 761, letters F and I, post).

F Appeal allowed.

[**Editorial Note.** By common law, by ecclesiastical law and by the statute
law relating to matrimonial causes a husband is barred from relying on adultery
which he has condoned (see p. 766, letter I, post). Guided by this principle
the court in the present case adopted the construction of s. 7 of the Act of
1895 which is indicated in the latter part of para. (i) of the headnote, recognising
G nevertheless that they were bound by the decision in *Ruther* v. *Ruther* ([1903]
2 K.B 270) on the narrow point that the proviso to s. 6 of the Act of 1895 could
not be incorporated in s. 7* of that Act (see p. 766, letter A, post).

As to discharge of orders made under the Summary Jurisdiction (Separation
and Maintenance) Acts, 1895 to 1949, on the grounds of adultery by the wife or
of a resumption of cohabitation, see 12 HALSBURY'S LAWS (3rd Edn.) 490,
H para. 1089 note (h) and p. 491, para. 1090 note (r); and for cases on the subject,
see 27 DIGEST (Repl.) 724, *6922-6924*, 726, *6933* and 3rd Digest Supp.

For the Summary Jurisdiction (Married Women) Act, 1895, s. 6, s. 7, see
11 HALSBURY'S STATUTES (2nd Edn.) 852.

For the Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 2
(2), see 11 HALSBURY'S STATUTES (2nd Edn.) 865.]

I Cases referred to:

(1) *Churchman* v. *Churchman*, [1945] 2 All E.R. 190; [1945] P. 44; 114 L.J.P. 17; 173 L.T. 108; 27 Digest (Repl.) 379, *3131*.

(2) *Robins* v. *National Trust Co.*, [1927] A.C. 515; 96 L.J.P.C. 84; 137 L.T. 1; Digest Supp.

(3) *England* v. *England*, [1952] 2 All E.R. 784; [1953] P. 16; 116 J.P. 584; 3rd Digest Supp.

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* The relevant terms of s. 6 and s. 7 are printed in the footnote at p. 758, ante.

(4) *Henderson* v. *Henderson & Crellin*, [1944] 1 All E.R. 44; [1944] A.C. 49; 113 L.J.P. 1; 170 L.T. 84; 27 Digest (Repl.) 397, *3271*.

(5) *Perry* v. *Perry*, [1952] 1 All E.R. 1076; [1952] P. 203; 116 J.P. 258; 3rd Digest Supp.

(6) *Ruther* v. *Ruther*, [1903] 2 K.B. 270; 72 L.J.K.B. 826; 67 J.P. 359; 27 Digest (Repl.) 724, *6922*.

(7) *Read* v. *Read*, [1952] P. 119; 3rd Digest Supp.

(8) *Hope* v. *Hope*, (1858), 1 Sw. & Tr. 94; 27 L.J.P. & M. 43; 31 L.T.O.S. 138; 22 J.P. 308; 164 E.R. 644; 27 Digest (Repl.) 440, *3709*.

(9) *Herod* v. *Herod*, [1938] 3 All E.R. 722; [1939] P. 11; 108 L.J.P. 27; 159 L.T. 530; 27 Digest (Repl.) 360, *2978*.

(10) *Callister* v. *Callister*, (1947), 63 T.L.R. 503; 27 Digest (Repl.) 367, *3036*.

(11) *Cooper* v. *Lloyd*, (1859), 6 C.B.N.S. 519; 33 L.T.O.S. 149; 141 E.R. 559; 27 Digest (Repl.) 194, *1530*.

(12) *Wilson* v. *Glossop*, (1887), 19 Q.B.D. 379; *affd.* C.A. (1888), 20 Q.B.D. 354; 57 L.J.Q.B. 161; 58 L.T. 707; 52 J.P. 246; 27 Digest (Repl.) 193, *1527*.

(13) *Mummery* v. *Mummery*, [1942] 1 All E.R. 553; [1942] P. 107; 111 L.J.P. 58; 166 L.T. 343; 27 Digest (Repl.) 401, *3301*.

(14) *Abercrombie* v. *Abercrombie*, [1943] 2 All E.R. 465; 169 L.T. 340; 107 J.P. 200; 27 Digest (Repl.) 244, *1978*.

Appeal.

The wife appealed against an order of the Paignton justices dated June 28, 1955, whereby they revoked an order dated Sept. 8, 1954, for the maintenance of herself and the infant child of the marriage.

King Anningson for the wife.

P. Goodenday and *D. D. H. Sullivan* for the husband.

Cur. adv. vult.

Nov. 16. **LORD MERRIMAN, P.**, read the following judgment of the court. The husband's summons alleged two grounds in support of his application for the revocation of the order of Sept. 8, 1954; first, a resumption of cohabitation between about Nov. 8, 1954, and Mar. 21, 1955, and, secondly, that on or about May 8, 1955, and divers dates thereafter the wife committed adultery with a man unknown. The justices heard evidence in support of both charges, but did not hear any argument as to resumption of cohabitation, having made up their minds that the charge of adultery had been proved. The only evidence called in support of the husband's charge of adultery was that of the husband himself; and at the close of his case the wife's solicitor submitted that there was no case to answer. The submission was overruled and the case proceeded. Counsel for the wife has upheld that submission before us, as one of his grounds of appeal. The husband had given both clear and convincing evidence, assuming that it was true, of both inclination and opportunity to commit adultery, and there was obviously a case for the wife to answer. We consider that this submission was ill-judged. After the wife had given evidence on her own behalf and closed her case without calling any other witnesses, the court adjourned the hearing until June 28, 1955, in order that the unknown man with whom the wife had been charged with committing adultery might be called as a witness, it having become apparent from the wife's evidence that she was able to identify him. He was in fact identified as a man named Radford.

Although it is out of chronological order, we propose to deal first with the justices' finding that the wife committed adultery, and with the implications of that finding. It is argued that the statement of their reasons shows that the justices misdirected themselves in placing the burden of proof on the wife, inasmuch as they say that a prima facie case of guilt had been raised which they were not satisfied had been rebutted by the evidence tendered by the wife and on her behalf. It is also argued that the adjournment, apparently at the instance of the justices themselves, in order that evidence might be given by Mr. Radford, with whom she was alleged to have committed adultery, was consistent with this view of the matter. In our opinion, the statement of the justices' reasons is open to criticism in respect of the onus; for, of course, the burden of proof remained throughout on the husband, and the justices should have directed themselves that the question was whether, on the evidence as a whole, including that of the wife and Mr. Radford, the husband had satisfied them that the charge of adultery was proved. On the other hand, it is right to note that the attention of the justices was called to several authorities dealing with the onus of proof, in one of which, *Churchman* v. *Churchman* (1) ([1945] 2 All E.R. 190), the Court of Appeal called attention (at p. 195) to the point that

> ". . . the incidence of the burden of proof as a determining factor of the whole case is only of importance if the tribunal finds the evidence, pro and con, so evenly balanced that it can come to no definite conclusion. Then the onus will determine the matter. In *Robins* v. *National Trust Co.* (2) VISCOUNT DUNEDIN said ([1927] A.C. at p. 520): 'But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it, and need not be further considered'."

Moreover, they were also referred to *England* v. *England* (3) ([1952] 2 All E.R. 784), where it was held that although the combination of mutual attraction and opportunity was strong prima facie evidence that adultery had been committed, that evidence could be contradicted, and that there was nothing in the nature of an irrebuttable presumption that adultery had been committed. As to the adjournment to enable Mr. Radford to give evidence, it is true that there is no provision in the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, for obliging the husband to make the man with whom he alleges the wife to have committed adultery a party. This does not affect the consideration that the man must always be an important witness. Apart from the fact that it is only fair that he should have an opportunity of answering an allegation of adultery which may have serious consequences for him, Mr. Radford's evidence might have proved decisive in favour of the wife. We do not think that this criticism of the justices is well founded.

There remains, however, the question whether any substantial wrong or miscarriage of justice has been occasioned by the misdirection; for by r. 71 (6) of the Matrimonial Causes Rules, 1950:

> "No appeal shall succeed on the ground merely of misdirection . . . unless, in the opinion of the court, substantial wrong or miscarriage of justice has been thereby occasioned in the court below."

It is, in our opinion, clear that the justices appreciated the point that the proof of adultery in the present case depended, not on direct evidence, but on proof of what they call "a strong inclination, combined with the opportunity, to commit adultery". As to the inclination, the wife, as will appear, admitted that she was "infatuated with" Mr. Radford, but "would not say she was 'in love' with him". As to the opportunity, there was an acute conflict of evidence. The justices accepted the husband's evidence, and did not believe the alibi put forward by the wife and Mr. Radford, whose evidence they say was, in certain important points, contradictory. In our opinion it is clear that after hearing and weighing the evidence the justices, in LORD DUNEDIN's words ([1927] A.C. at p. 520), came to a determinate conclusion and the onus need not be further considered.

The material facts are shortly as follows. The parties were married on Jan. 25, 1950, the husband being a Pole by nationality. At all material times they lived together at 149, Winner Street, Paignton, and there is one child of the marriage, a girl born on Mar. 21, 1950. Early in September, 1954, the wife left the matrimonial home, and it is not unimportant to note, for reasons which will appear hereafter, that the wife stated that she left her husband because of his sexual demands. She caused a summons to be issued against him on the ground that he had wilfully neglected to provide her and the infant child with reasonable maintenance. The summons came on for hearing before the Paignton justices on Sept. 8, 1954, when they found the case proved, and ordered the husband to pay the wife £3 a week for herself and £1 per week for the child, of whom the wife was granted custody. There was no appeal from this order, and we must therefore assume that it was correctly made. The husband says that shortly after the order was made he met his wife by chance, and in the course of conversation she said that one day she would come back, and that thereafter she commenced to visit him on Saturday evenings at 149, Winner Street, arriving about 9 p.m. and leaving between 11 p.m. and 12 midnight, and that these regular visits continued until Mar. 21, 1955, when they ceased after a row. He further says that on these occasions he paid her money and they had sexual intercourse, but on some occasions he had no money to give her, and on those occasions she sometimes allowed him to have sexual intercourse with her and sometimes not. The wife, on the other hand, says that she visited her husband four times only since she left, and that no sexual intercourse took place.

The husband says that he next saw his wife on the evening of May 8, 1955, at the Falcon Inn, with a man, whom we now know to be Mr. Radford, that they left the inn separately, and that he then spoke to the wife, who told him that she was waiting for someone and that she was in love with him, and when he threatened to stop her money she said that she would go and live with the man because she was in love with him. The husband noticed that when the wife left him, after the conversation, she walked in the same direction as Mr. Radford. The husband followed her, and saw her again meet Mr. Radford at 9.45 p.m.; he followed them both and saw them enter Torre Station Woods, when he left them and went home. After 11 p.m. that same night the wife again visited him, and he noticed her muddy shoes. She again told him that she was in love, and took out a photograph and said: " Look, I'm happy here ", and when the husband wanted to see it she tore it in half, gave him the half showing herself only, but with a man's arm round her, and put the other half in her handbag. The husband produced at the hearing the torn half given him by the wife, together with a copy of the complete photograph showing the wife and Mr. Radford together. The wife went on to say that she wanted a divorce, and if he did not believe her she would put it in writing, which she subsequently did, and the husband produced this note at the hearing. When the husband accused her of having been in the woods, she said that she had been standing in the woods and talking to her friend, with whom she was in love. The husband says that the wife was in a temper and there was an angry scene, but that after a time she settled down and later asked him for money. He says that he gave her 10s. and after that they went to bed and settled down, and later she went home. Counsel for the husband conceded the fact that this evidence meant that they had had sexual intercourse as on the earlier occasions between November, 1954, and March, 1955. On June 4, 1955, the husband saw the wife with Mr. Radford in company with another man and woman in Torquay, and later that night he again saw the wife sitting on a seat with Mr. Radford at Paignton, although he does not appear to have recognised the man as Mr. Radford; but the wife in her evidence admits that she was sitting on the seat with Mr. Radford, and that they had been cuddling. Both the wife and Mr. Radford denied that they had committed adultery; and the wife denied that she had ever told her husband that she was in love with Mr. Radford, but she admitted that she was infatuated with him. She also admitted that she had known Mr. Radford for nine to ten weeks, and had met him once or twice a week.

Both the wife and Mr. Radford admitted that they had met on the evening of May 8, but not at the Falcon Inn, and both denied that they had been to Torre Station Woods. Their story was that they went in the opposite direction, hired a taxi from the rank and drove to Torquay sea front, and then went under Cockington railway arch for a talk. In cross-examination the wife was a little vague about this arch, and was unable to explain how she got mud on her shoes if she had stood there with Mr. Radford either on the pavement or the tarmac road, details about which the court would have local knowledge. Mr. Radford in cross-examination was most evasive when asked about the torn photograph. By way of criticism of the justices' reasons it was also pointed out that as evidence of the husband's belief that the wife had committed adultery on May 8 they say that he ceased as from that date to make her any further payments under the maintenance order; whereas he had said that the payments were not stopped until June 4, 1955. The husband says that he stopped the payments after seeing the wife and Mr. Radford together in Torquay on that date, albeit he did not identify Mr. Radford as the man with whom she was sitting that evening on a seat in Paignton. This error of recollection on the part of the justices, therefore, does not seem to be of great importance. A more important point, perhaps, is that the significance of the fact that sexual intercourse between husband and wife took place on May 8 appears to have escaped the attention of the justices, not only as to condonation but also in relation to the credibility of the husband about the earlier events of that evening. Nevertheless, we have come to the conclusion that there was ample evidence before the justices, if they accepted it, as they did, to justify a finding of adultery on May 8. Even if the justices misdirected themselves about the onus of proof, and have not fully appreciated the evidence in the respects we have just mentioned, we do not think that we ought to interfere with their finding.

The real difficulty begins on the assumption that the finding of adultery cannot be disturbed. Two questions arise: (i) Has the husband condoned the adultery of which he complains, and (ii) if so, what, if any, effect has such condonation on the operation of that part of s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, under which this application is made? It is right that we should say at once that the question of condonation does not appear to have been raised before the justices, and arose in this court in the most casual way. When we heard at the outset that the wife was appealing against a finding that she had committed adultery since the making of the order, we naturally inquired whether divorce proceedings had already been taken or were contemplated, for, if so, we should in the ordinary course have adjourned the appeal to enable that issue to be tried by a judge with the advantage of seeing and hearing the witnesses, instead of by this court on a paper record of the evidence. We were told that there were no such proceedings, and counsel for the wife added the comment that it was unlikely that there would be, because the husband had condoned the alleged adultery. Naturally he was anxious not to weaken the wife's case that the finding of adultery was entirely unjustified by contending that the adultery had been condoned. This, of course, did not absolve this court from considering this issue. Accordingly, without prejudice to the main contention, and at the request of the court, we had the benefit, after an adjournment, of a very helpful argument from counsel on both sides on the issue of condonation and its bearing on the right of the husband to rely on the act of adultery on which his application was based.

As to question (i), it was admitted that the evidence of the husband about the evening of May 8, read in the light of his evidence of earlier visits, means that the husband and the wife had sexual intercourse, and that she left directly afterwards. Nor is it disputed that when this occurred the husband knew all that there was to be known about the alleged act of adultery. According to the evidence already referred to, she had admitted guilty affection for the man in question, and had said that she intended to go to him if the husband did not fulfil his A obligations under the order. The evidence of opportunity to indulge that affection on the evening of May 8 was provided by the husband himself, and was accepted by the court. There was, it is true, some evidence of a continuation of the association thereafter, but without any evidence from which a later act of adultery could be inferred. That being so, there is, in our opinion, no substance in the argument that as the husband's complaint of the wife's adultery alleges B that it occurred on May 8 " and thereafter ", that is to say, up to the date of the summons, the justices may have found adultery between May 8 and the date of the summons, which, being unknown to the husband, could not have been the subject of condonation. The argument against condonation on the part of the husband was directed chiefly to distinguishing the present case from *Henderson* v. *Henderson & Crellin* (4) ([1944] 1 All E.R. 44). We were invited to say that, C against a husband, sexual intercourse is only decisive of condonation if it takes place as an incident in the reinstatement of the wife; whereas, it was argued, the events of the evening of May 8 could not possibly be so described, even if they were related to the similar incidents which occurred before Mar. 21.

In our opinion, this argument is inconsistent with the following passage in the opinion of VISCOUNT SIMON, L.C., in *Henderson* v. *Henderson* (4) ([1944] D 1 All E.R. at p. 45):

> " The essence of the matter is (taking the case where it is the wife who has been guilty of the matrimonial offence) that the husband with knowledge of the wife's offence should forgive her and should confirm his forgiveness by reinstating her as his wife. Whether this further reinstatement goes to E the length of connubial intercourse depends on circumstances, for there may be cases where it is enough to say that the wife has been received back into the position of wife in the home, though further intercourse has not taken place. But where it has taken place, this will, subject to one exception, amount to clear proof that the husband has carried his forgiveness into effect."

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The exception of the case where the intercourse has been induced by a fraudulent misstatement of fact by the wife is irrelevant here. The very fact, however, that LORD SIMON regarded this as the sole exception emphasises his opinion that where intercourse has taken place it amounts to clear proof that the husband has carried forgiveness into effect. This leaves no room for argument whether or not the sexual intercourse was incidental to reinstatement of the wife. It is G held to be conclusive of the reinstatement. It is clear that in *Perry* v. *Perry* (5) ([1952] 1 All E.R. 1076) this was the view of the Court of Appeal as to the effect of *Henderson* v. *Henderson* (4). In laying down that with the question whether there had been condonation on the part of the injured spouse intention has nothing to do, SIR RAYMOND EVERSHED, M.R., said ([1952] 1 All E.R. at p. 1082): H

> " As the House of Lords decided in *Henderson* v. *Henderson & Crellin* (4) sexual intercourse is conclusive proof of condonation of adultery by a husband who has knowledge of the adultery and in the absence of fraud by the wife, whatever may have been in fact the intention of either spouse."

(See also the passage in the judgment of JENKINS, L.J. (ibid., at p. 1086), which I is quoted in full later*).

With regard to question (ii), that is to say, what, if any, is the effect of condonation in the present case, the difficulty arises out of the fact that in two consecutive sections of the Act of 1895 proof that a married woman has committed an act of adultery is dealt with in different ways. Section 6, which limits the powers of the court to make any of the orders under the Act in favour of a married woman who has committed an act of adultery, includes the express proviso that the husband has not condoned or connived at or by his wilful neglect or misconduct conduced to such act of adultery; whereas s. 7, which deals with the power of the court to vary or discharge an order, enacts that

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* See p. 767, letter H, to p. 768, letter A, post.

> " If any married woman upon whose application an order shall have been made under this Act . . . shall commit an act of adultery, such order shall upon proof thereof be discharged "

without any qualification about connivance in, condonation of, or conduct conducing to such act of adultery. That section has been amended by s. 2 (1) (a) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, whereby the proviso is introduced that the court may if it thinks fit refuse to discharge the order if, in its opinion, such act of adultery as aforesaid was conduced to by the failure of the husband to make such payment as in the opinion of the court he was able to make under the order. This, it is suggested, leaves the whole area of conduct conducing to an act of adultery since the making of an order, and connivance at and condonation of such act of adultery, unqualified except by the express proviso itself.

Accordingly, it was argued for the husband that to introduce the qualification that the husband was barred from relying on the act of adultery in question if he had either connived at or condoned it, offended against the principle that it is not legitimate to insert words contrary to the plain meaning of a statute. Counsel for the wife, on the other hand, by way of illustrating the extreme absurdity that would result, gave the following example: A wife who is in possession of an order under the Act commits an act of adultery, but instead of making an application to discharge the order under s. 7, the husband brings a petition for divorce on that ground, on the hearing of which it is found that she has committed adultery, but that the husband had both connived at and subsequently condoned the act in question. The court would be bound to dismiss his petition for divorce, while at the same time, if the husband applied to revoke the order on the ground of the same act of adultery, the justices would have no option but to do so. Counsel for the husband did not shrink from supporting this view of the statute, and relied on *Ruther* v. *Ruther* (6) ([1903] 2 K.B. 270) which was followed by this court in *Read* v. *Read* (7) ([1952] P. 119), where it was recognised that the proviso in the amending Act of 1925 appeared to limit the area of conduct conducing which could be relied on to defeat the husband's right under s. 7. From this he argued that if it is impossible to import any other kind of conduct conducing to an act of adultery from s. 6 to s. 7, it is difficult to see how it is legitimate to import connivance at or condonation of adultery from one section to the other.

This view of the effect of *Read* v. *Read* (7) seems to be reflected in RAYDEN ON DIVORCE (6th Edn.), p. 534 note (d)), but we would point out that in the judgment of this court in that case ([1952] P. at p. 121) it was said that

> ". . . if the concluding sentence of s. 7, as amended by the proviso added in 1925, is intended to be absolute and unqualified, it leads apparently to the strange result that the husband can take advantage of an act of adultery which he himself has contrived and connived at for the very purpose of getting rid of the order."

We added:

> " But in this case it is neither necessary nor desirable, in our opinion, to consider the construction of this section in relation to matters which would be absolute bars to a petition for divorce on the ground of adultery. We are concerned solely with the question of conduct conducing to the adultery."

Then follows a sentence, which we need not read, which suggests that where a wife has obtained an order, as in that case, on the ground of adultery, it is not unreasonable that she should be unable to invoke the same adultery as conducing to adultery subsequently committed by her. Whereas if her subsequent adultery is brought about by wilful failure to comply with the order itself, the case is different. We do not think it necessary to deal with counsel for the wife's argument that *Ruther* v. *Ruther* (6) can be distinguished and does not bind us. On the narrow point that it is not legitimate to import the words of the proviso to s. 6 into s. 7 of the Act of 1895, we are clearly bound. In our opinion, the question is whether the right of a husband under s. 7 to rely on an act of adultery at which he has connived or which he has condoned (and it seems to us that it is difficult to distinguish between the two in this respect) does not fall to be determined on more general considerations.

It is plain that from the Matrimonial Causes Act, 1857, onwards, connivance at and condonation of adultery, relied on as a ground either for dissolution or for judicial separation, have been made absolute statutory bars to relief on the petition. It is also clear that the adultery of a spouse petitioning for restitution of conjugal rights affords no defence to the suit if that adultery has been either connived at or condoned by the other spouse: *Hope* v. *Hope* (8) (1858) (1 Sw. & Tr. at p. 104), per Sir Cresswell Cresswell. Moreover, adultery connived at cannot be regarded as a reasonable excuse for desertion: *Herod* v. *Herod* (9) ([1938] 3 All E.R. at p. 732), approved by the Court of Appeal in *Callister* v. *Callister* (10) (1947) (63 T.L.R. at p. 504). Nor, at common law, can adultery connived at or condoned avail as a defence to a claim for necessaries against a husband whose wife has pledged his credit: *Cooper* v. *Lloyd* (11) (1859) (6 C.B.N.S. at p. 524); *Wilson* v. *Glossop* (12) (1887) (19 Q.B.D. 379), affirmed by the Court of Appeal (1888) (20 Q.B.D. 354). In the latter case, in the Divisional Court, Cave, J., after considering some of the early authorities, said (19 Q.B.D. at p. 381):

> ". . . it is at all events admitted that a husband has no right to turn his wife out of doors under circumstances that would not disentitle her to succeed in an action for restitution of conjugal rights."

In the Court of Appeal Lord Esher, M.R., said (20 Q.B.D. at p. 356) that the argument to exonerate the husband who had connived at his wife's adultery from liability to maintain her would, if it was sound, establish that if he had forced his wife to prostitution and lived on the proceeds of her shame, he might still, whenever he pleased to do so, turn her out of doors for that very adultery, and declare that he was no longer liable for her maintenance. Lord Esher added (ibid.):

> "Nothing would induce me to declare that such was the law except a superior authority which would bind me",

and he said that there was not and could not be a symptom of authority in support of such a proposition. Although Lord Esher was referring to the right of a wife, at whose adultery the husband had connived, to pledge his credit, and we are considering the right of a wife whose adultery has been condoned, to keep her order under a code which has been said, however loosely, to be the statutory equivalent of the right of a wife to pledge her husband's credit for necessaries, it seems to us that Lord Esher would have approved of counsel for the wife's reductio ad absurdum above referred to.

Thus, by the common law, by the ecclesiastical law, and by the statute law relating to matrimonial causes, a husband is barred from reliance on adultery which he has condoned. But, it is said, granted all this, why should Parliament go out of its way to express in the proviso to s. 6 the qualification about condonation and connivance, if it goes without saying that the same qualification must necessarily be read into s. 7; and why does not the expression in the one section have the effect of exclusion from the other? It must be remembered that in 1895 Parliament was setting up an entirely new jurisdiction to deal with the maintenance of married women, and it may be that in introducing the common law principle that an act of adultery was a bar to relief Parliament thought it right to introduce the proviso that wilful neglect by or misconduct of the husband conducing to such act of adultery, although that would only be a discretionary bar to a petition for divorce or judicial separation, should be an absolute bar to his relying on an act of adultery, to which he had so conduced, in order to oust the jurisdiction of the court; and that having specified conduct conducing as an absolute bar, it was thought desirable to include a reference to condonation and connivance, which were recognised as being absolute bars, lest they should be thought to be excluded. Admittedly this does not explain the omission from s. 7 of any proviso about conduct conducing. It may well be, however, that as regards connivance and condonation Parliament was content to rely on the general law.

On the other hand, the introduction by the Act of 1925 of defiance of the court's own order as the only example of a discretionary bar constituted by conduct conducing may be explained by the desirability of getting rid of the decision in *Ruther* v. *Ruther* (6), in which the conduct conducing took that particular form. However that may be, and whether or not it is satisfactory that the remaining area of conduct conducing should be left unprovided for, we take the same view as LORD ESHER about the shocking result which would follow from ignoring condonation, which is a blotting out of the offence itself, or connivance, which assumes that the husband is at least an accomplice in, if not the actual promoter of, his wife's adultery, as an implied exception to the generality of the words in the last sentence of s. 7. In other words, we hold that the words " an act of adultery " in s. 7 must be qualified as meaning an act of adultery on which the husband is entitled to rely, and that the husband in the present case cannot rely on the act of adultery in question because he has condoned it.

Finally, there remains the question, first in point of time, whether there had been a resumption of cohabitation between November, 1954 and March, 1955, which rendered the order in the wife's favour non-effective. We were inclined to think that, as this matter had not been dealt with by the justices, we ought to send it back for determination, but we were pressed by both counsel to determine it ourselves. The facts have already been fully stated. Thus, for a period of about five months the parties were seeing each other more or less regularly on Saturday evenings, on many of which occasions sexual intercourse took place, until some quarrel about a card, the nature of which is not clear on the evidence, put an end to that series of visits. At that time, of course, there was no question of condonation. Indeed, it is doubtful whether the wife and Mr. Radford had even met before Mar. 21; at any rate, it is sufficient to say that the husband had no knowledge of anything between the wife and Mr. Radford at that time. On the footing that the husband is held conclusively to have condoned the adultery, the anomaly of the contrast between the issue of condonation and that of the resumption of cohabitation in circumstances such as the present is most clearly set out in the passage in the judgment of JENKINS, L.J., in *Perry* v. *Perry* (5) ([1952] 1 All E.R. at p. 1086), in which he expresses what would, apart from authority, have been his own view:

> " It seems to me, prima facie, unreasonable that an act which is accorded such a decisive effect as an affirmation by the injured party of the married state for the purposes of condonation should be able to take place consistently with the uninterrupted continuance of a state of desertion, which while it continues amounts to a negation of the married state. Suppose the case of a wife who is in desertion and has committed adultery. With knowledge of the adultery the husband seeks her out and has intercourse with her. This is decisive as a condonation of, and affirmation of, the marriage, notwithstanding the adultery. The husband, by his conduct, has taken his wife back as his wife, adulteress though she has been. How can it consistently

> be said that, although he has taken her back and reinstated her as his wife, she has not come back to him, but has been continuously, even during the decisive act of intercourse, in a state of desertion from him ? "

The learned lord justice, however, agreed with the rest of the court that they were bound by authority to draw a clear distinction between condonation and a resumption of cohabitation and to hold that the latter involved the mutual intention of both spouses; and HODSON, L.J., in rejecting, as being inconsistent with authority, the argument that *Mummery* v. *Mummery* (13) ([1942] 1 All E.R. 553) was wrongly decided because once the sexual act is proved the factum of separation has gone, said ([1952] 1 All E.R. at p. 1090):

> " It is now, I think, too late to say that acts of intercourse per se operate to terminate desertion."

The result is that, although the last act of intercourse on May 8 is decisive against the husband on the issue of condonation of the adultery found to have been committed earlier on that night, the nature of the course of sexual intercourse which occurred between the spouses in the five months between November and March is equivocal, and it is necessary for us to decide whether or not there was an intention on the part of both of them to resume cohabitation. It was argued on behalf of the wife that the justices have impliedly found that there was no resumption of cohabitation, because by virtue of s. 2 (2) of the Act of 1925 the resumption of cohabitation has the effect of putting an end to the order, and yet they refused to remit arrears under the order, which, if there had been a resumption of cohabitation, must, to some extent at any rate, have accrued due after the order had thus ceased to be effective. In our opinion it is impossible to imply such a finding in face of the express statement of the justices that the issue of the resumption of cohabitation was not argued. On the other hand, it was argued with some force that it is impossible for the husband to deny that he, for his part, intended to resume cohabitation, since the resumption of cohabitation is made the first ground of his application to discharge the order. If, therefore, the wife also intended to resume cohabitation the mutual intent would be established; and counsel relied on three points as showing that the wife did intend to resume cohabitation: in the first place, her saying, according to the husband, shortly after the parting, " I will come back one day "—a statement of intention which, it was argued, determined the character of her subsequent visits. He relied next on the fact that it was the wife who initiated the series of visits, and, finally, on the frequency with which they occurred and the period over which they lasted. Counsel for the husband suggested that these facts taken together were conclusive of the wife's intention.

No doubt it may be difficult to draw the line between a series of what have been described in the authorities as casual acts of sexual intercourse and intercourse so regular and frequent as to compel a finding of resumption of cohabitation, on the principle that there must come a point at which a number of individual grains becomes a heap. Nevertheless, recognising this, and although it may be difficult to draw the line, we think, on the authorities, that it is open to us to find that the present case is on the wrong side of any reasonable line that can be drawn. Without having seen the wife examined and cross-examined on this very issue, we do not feel that we are compelled by what admittedly happened to hold that she, at any rate, intended to resume cohabitation. Reliance was also placed on the decision of this court in *Abercrombie* v. *Abercrombie* (14) ([1943] 2 All E.R. 465), a decision which was, incidentally, approved by LORD SIMON in *Henderson* v. *Henderson & Crellin* (4). In our opinion, that case is distinguishable because there everything, except a resumption of actual residence in the same house, tended to show that the reconciliation was complete and was intended to be so by both spouses, until the wife attempted to go back on it for reasons which were held not to justify her in doing so. That seems to us to be the direct converse of the present case, where the only evidence of resumed cohabitation is the fact of sexual intercourse.

In our opinion, the reality of the matter is that the primary object of the wife's visits was to get some of the money which was in arrears under the order, albeit she knew that sexual intercourse might, or even probably would, take place. Except for the acts of sexual intercourse no other attribute of a resumption of married life is present. If the wife really intended to resume cohabitation, it is difficult to understand why in the case of each of these visits to the matrimonial home she departed as soon as sexual intercourse had taken place. We do not think, even if the intention to resume cohabitation ought to be imputed to the husband, that it would be right to draw the inference that the wife had any such intention. This ground of the husband's complaint, therefore, fails.

The result is that we dismiss the husband's complaint that the order ceased to be effective on the ground that cohabitation had been resumed between November and March. We support the finding of the justices that the wife committed adultery on May 8, and we hold that, as a matter of law, it is conclusively established that the husband condoned that adultery by sexual intercourse on May 8 with knowledge of the facts. And, finally, we hold that, having condoned that act of adultery, he is barred from relying on it by the fact that he condoned it. The result is that we hold that the order of Sept. 8, 1954, remains effective, and the order discharging it must be set aside.

Appeal allowed.

Solicitors: *Evelyn Jones & Co.*, agents for *Gowman, Easterbrook & Co.*, Paignton (for the wife); *Lucien A. Isaacs & Maxwell Simon*, agents for *Arthur Goldberg*, Plymouth (for the husband).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

BRITT *v.* BRITT.

[COURT OF APPEAL (Denning, Hodson and Morris, L.JJ.), November 18, 1955.]

Divorce—Cruelty—Assaults committed while parties living apart.

After the husband left the wife in 1950, he visited the former matrimonial home in August, 1952, and struck her a blow which gave her a black eye and injured her, and he hit her again on meeting her in an omnibus in September, 1952.

Held: these acts were sufficient to establish cruelty for the purposes of a petition for divorce, although committed when the parties were living apart.

Dictum of LORD MERRIVALE, P., in *Simcock* v. *Simcock* ([1932] P. at p. 96) distinguished (dissented from by DENNING, L.J.).

Appeal allowed.

[As to the consideration of the whole matrimonial relations in relation to a question of cruelty, see 12 HALSBURY'S LAWS (3rd Edn.) 270, para. 516; and for cases on the subject, see 27 DIGEST (Repl.) 299, 300, *2434-2449* and SUPPLEMENT.

As to the taking into consideration of acts committed after cohabitation has ceased for the purposes of an allegation of persistent cruelty, see 12 HALSBURY'S LAWS (3rd Edn.) 482, para. 1076.]

Cases referred to:

(1) *Simcock* v. *Simcock*, [1932] P. 94; 101 L.J.P. 38; 147 L.T. 17; 96 J.P. 226; 27 Digest (Repl.) 700, *6698*.

(2) *Kunski* v. *Kunski & Josephs*, (1907), 23 T.L.R. 615; 27 Digest (Repl.) 407, *3357*.

Appeal.

The wife appealed against an order made by His Honour JUDGE CHARLESWORTH, sitting as a special commissioner at Newcastle-on-Tyne, on Apr. 13, 1955, whereby he dismissed the wife's petition for divorce on the ground of cruelty, on the ground that the sole acts of cruelty proved to his satisfaction were committed when the parties were living apart and so were not within the ambit of the marital relationship.

A. B. Hollis for the wife.
The husband was not represented.

DENNING, L.J.: The parties married in 1938, when they were both very young, and they had two children, born in 1939 and 1941. They finally separated in 1950, when the husband left the home. The wife says he had been very cruel to her before they separated; but her evidence on that point was not corroborated and the commissioner was not prepared to act on it. After the husband had left the house, he came back in August, 1952, and he then struck her such a blow that it gave her a black eye and injured her. He hit her also on meeting her in an omnibus in September, 1952. Her evidence as to the assaults on those occasions was corroborated by an inspector of the Society for the Prevention of Cruelty to Children, who saw the marks on her. The inspector also interviewed the husband and wife together about the previous charges of cruelty which the husband then did not deny.

The commissioner said that he was not satisfied as to the cruelty before they separated in 1950, but he was satisfied that there were these assaults and blows in 1952, after they were separated. Nevertheless he held that that was not a sufficient ground for divorce. He based himself on a passage in RAYDEN ON DIVORCE (6th Edn.), p, 523 which reads:

> " Acts of cruelty which have taken place after cohabitation has ceased may be taken into account provided they are within the ambit of the marital relationship."

Taking that as an accurate statement of the law, the commissioner held that these two acts of cruelty took place outside the ambit of the marital relationship and dismissed the petition.

That passage in RAYDEN is based on observations made in *Simcock* v. *Simcock* (1) ([1932] P. 94)—observations which were obiter dicta, and thrown out as a suggestion without much consideration. I do not think they accurately represent the law. Indeed, there is a decision of BUCKNILL, J., in *Kunski* v. *Kunski & Josephs* (2) (1907) (23 T.L.R. 615), where a judicial separation was granted on the ground of acts of cruelty which had taken place while the parties were separated under a deed. I see no justification in law for introducing the qualification that the acts must take place within the ambit of the marital relationship. The court has simply to inquire, within the words of the statute, whether the husband has treated his wife with cruelty. It does not matter whether it takes place whilst they are living together or whilst they are living apart. If he has treated his wife with cruelty, she is entitled to her decree. In the present case that is subject to the fact that she has to admit that after he left she went and lived with another man and had a child by him. That is a matter for the court to consider in the exercise of its discretion, but in this case the commissioner said he would have exercised his discretion. I think he was quite right in doing so. This husband has disappeared and cannot be traced, and it is only proper that in all the circumstances of the case the discretion should be exercised in the wife's favour.

I think the appeal should be allowed and the decree nisi granted on the ground of the husband's cruelty, the court exercising its discretion in the wife's favour.

A **HODSON, L.J.:** I entirely agree. The commissioner was prepared to find cruelty in this case, but thought he ought not to do so because at the time the assaults concerned were committed the parties were living apart. He was led to take that course through a passage in RAYDEN ON DIVORCE (6th Edn), p. 523, which reads:

> B " Acts of cruelty which have taken place after cohabitation has ceased may be taken into account provided they are within the ambit of the marital relationship."

That passage is based on an observation of LORD MERRIVALE, P., in *Simcock* v. *Simcock* (1) ([1932] P. 94), in which the Divisional Court had to deal with an allegation of persistent cruelty. LORD MERRIVALE said (it was an obiter C dictum) (ibid., at p. 96):

> " It may well be that, if the husband and wife were living apart and as to some matter not concerned with the marital relationship there were acts of violence, it would have to be considered whether they were acts of violence within the statute, or whether they would support a charge of persistent cruelty within the statute; because the statute does undoubtedly D deal with, and is no doubt limited to, the relations of husband and wife."

As I read that dictum of LORD MERRIVALE, I think he had in mind the statute with which he was concerned, which had to do with persistent cruelty, and he was wondering whether, if a husband knocked his wife about in the street after he had left her, and had previously assaulted her while they were living together, the husband could then be regarded as persisting in the previous course of E conduct. It does not seem to me to support the wide proposition which is contended for here, that cruelty as such must be within what is called the ambit of marital relationship.

I agree that the appeal should be allowed, which involves the exercise of the discretion of the court in favour of the wife, which the learned commissioner said he was prepared to exercise, provided he was justified in finding cruelty in this F case.

MORRIS, L.J.: I entirely agree. The passage in RAYDEN ON DIVORCE to which reference has been made only comes under the heading " Persistent cruelty " in the part dealing with the Summary Jurisdiction Acts, and does not come in the part of the volume dealing with questions of dissolution.

G *Appeal allowed.*

Discretion exercised in favour of the wife and decree nisi granted.

Solicitors: *G. E. C. Dougherty*, agent for *J. M. Gregory-Jones*, Newcastle-on-Tyne (for the wife).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

HARVEY *v.* HARVEY.

[Court of Appeal (Denning, Hodson and Morris, L.JJ.), November 16, 17, 1955.]

Divorce—Desertion—Termination—Basis of constructive desertion removed by agreement—Return for only four days—Whether there was subsequent constructive desertion to be determined as a fresh question.

Owing to the bad behaviour of a grown-up son, and after abortive appeals to the husband to turn him out, the wife left the matrimonial home saying that she would return if the son went away. She brought proceedings against the husband for maintenance on the ground of desertion. At the hearing an agreement was arrived at that the son would leave, that the wife would return and that the husband would provide her with money, and the magistrates adjourned the summons sine die. The son left the matrimonial home and the wife returned but she remained only four days. She restored the summons for the original desertion and the magistrates found it proved, held that it had not been terminated by the wife's agreement to return and made an order for maintenance. On appeal the High Court held that the desertion had been terminated by the agreement to return and discharged the order, but it remitted the case to the magistrates for reconsideration, with liberty to the wife to issue a fresh summons alleging desertion and failure to maintain as from the commencement of the four days.

Held: assuming (Denning, L.J., not accepting) that the husband had constructively deserted the wife when she first left, that desertion was terminated (Morris, L.J., dubitante) by agreement when the husband procured the removal of the basis of the constructive desertion, viz., the son's presence in the matrimonial home, and the question whether the husband had been guilty of constructive desertion after the wife's return must be determined as a fresh question.

Appeal dismissed.

[As to the ways of terminating desertion, see 12 Halsbury's Laws (3rd Edn.) 263, para. 500; and for cases on the subject, see 27 Digest (Repl.) 360-367, *2978-3041*.]

Cases referred to:

(1) *Perry* v. *Perry*, [1952] 1 All E.R. 1076; [1952] P. 203; 116 J.P. 258; 3rd Digest Supp.

(2) *Lane* v. *Lane*, [1952] 1 All E.R. 223, n.; [1952] P. 34; 116 J.P. 72, n.; 3rd Digest Supp.

(3) *Mummery* v. *Mummery*, [1942] 1 All E.R. 553; [1942] P. 107; 111 L.J.P. 58; 166 L.T. 343; 2nd Digest Supp.

(4) *Bartram* v. *Bartram*, [1949] 2 All E.R. 270; [1950] P. 1; [1949] L.J.R. 1679; 113 J.P. 422; 2nd Digest Supp.

Appeal.

On Nov. 30, 1954, the wife issued a summons for maintenance on the ground of desertion by the husband from Nov. 16, 1954, under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949. Following a hearing by a magistrates' court at Cardiff on Dec. 21, 1954, an understanding was reached on Feb. 17, 1955, between the parties and their grown-up son, on account of whose bad behaviour the wife had left the matrimonial home, that the son should leave the home, that the wife should return, and that the husband should provide her with money. The magistrates on that day adjourned the hearing sine die. The son left and the wife returned, but she remained only four days, from Feb. 27 to Mar. 3, 1955. She restored the original summons and the magistrates, on Mar. 30, 1955, found that the desertion was proved and that it had not been terminated by the wife's return for four days and they made an order for maintenance. On May 12, 1955, a Divisional Court of the Probate, Divorce and

A Admiralty Division allowed the husband's appeal from that decision and set aside the order on the ground that the desertion found by the magistrates had been terminated by the agreement of the wife to return. But the court ordered that the wife should be at liberty to issue another summons alleging that the husband had wilfully neglected to provide reasonable maintenance for her from Feb. 27, 1955, and had deserted her from that date to Mar. 3, 1955. It remitted B the case to the magistrates for a re-hearing of the original complaints with the new complaints by a fresh panel of magistrates.

The wife appealed.

Elwyn Jones, Q.C., and *J. K. Wood* for the wife.
J. T. Molony, Q.C., and *A. S. Myerson* for the husband.

C **DENNING, L.J.:** I will ask HODSON, L.J., to deliver the first judgment.

HODSON, L.J.: This is an appeal by leave by a wife from an order of the Divisional Court dated May 12, 1955. The Divisional Court consisted of LORD MERRIMAN, P., and DAVIES, J., and by their order they allowed an appeal from the magistrates sitting at Cardiff on Mar. 30, 1955, and remitted the case for re-D hearing, setting aside the magistrates' order for maintenance made in favour of the wife on the grounds of desertion.

The case did not take quite a usual course and it caused some difficulty to the magistrates and to the Divisional Court. The parties had been married for a great many years (they married in 1928) and at the material time one of the sons of the marriage, who had been parted from his wife, had two of his three young E children living in the matrimonial home with his parents, the third being in a home. That had come about after the son's wife had left him. His children had been sent to a home, and that had upset the son's father, the husband, who got the children to his house with the son, and made a home for them there. The son's conduct in the house was bad. It was hostile to his mother, the wife, as was shown by his evidence before the magistrates which they rejected altogether, F because it was of an extravagant nature and exceedingly hostile to his mother, the wife.

The wife's case was that on Nov. 15 she had had to leave the house because her husband had taken the line that he was not going to turn out his son, his own flesh and blood, when he had nowhere else to go. The husband naturally had in mind the welfare of the grandchildren as well. The situation was a difficult G one, but the wife took a stand on this. She and her husband had not been living happily for many years. The household was perhaps only carried on under tolerable conditions. They had not occupied the same room together for a long time, and no doubt the whole atmosphere was depressing. When she left, she made it plain that it was the son living in the house which made her position intolerable.

H Immediately after leaving, she consulted solicitors, and on Nov. 19, 1954, a letter was written to her husband in which it was said:

> " You will appreciate that while your son is there making conditions for [the wife] untenable, it is impossible for her to remain in the house. You will further appreciate that you have a duty towards [the wife] and it is unreasonable to expect her to live in the house when there is constant bad I feeling on the part of your son Frederick Harvey towards her and when your son is expecting [the wife] to look after his three [that should be two] young children without receiving adequate maintenance from him so to do. Your wife will be ready and happy to return to the matrimonial home as soon as you assure her that your son is leaving. Alternatively she is quite prepared to live with you elsewhere if you are prepared to make a matrimonial home away from your son . . . We trust . . . that we or your wife will hear from you confirming that you are taking the necessary steps to cause your son to leave the house."

That was the position when the summons first came on before the magistrates, because the husband's solicitors had refused to agree to the course which was suggested and took the stand that the wife, by leaving the husband, was herself in desertion. The magistrates tried to see if some arrangement could be made to remove the cause of friction. On Dec. 21 the summons was adjourned and after a further hearing on Feb. 17, 1955, there was a second adjournment on an undertaking by the son to leave (which he did), by the wife to return to look after the two grandchildren, and by the husband to see that she had money.

In her evidence-in-chief on Dec. 21, the wife said:

> " Each time I asked defendant to get son out of house he said I was trying to put out my own flesh and blood . . . I am willing to live with defendant if son is not there."

In cross-examination she was asked further questions, in particular about the son, and in describing the past life she had lived with her husband she used this language:

> " Defendant has been indifferent and callous to me for years. He is too placid. He would get me in a temper by ignoring me. I thought he had no use for me."

There was a further adjournment of the summons on Feb. 17, 1955, but finally, on Feb. 27, 1955, the wife returned to the home, the undertaking that the son would leave having been carried out. She stayed only four days, and left early in March. She restored the summons and on Mar. 30, at a further hearing, the magistrates found that the desertion had been proved. The husband appealed from that finding against him. The effect of the finding was that he had deserted his wife on Nov. 15 and that desertion had continued thereafter without any break notwithstanding the events which had happened.

As regards the original parting, the Divisional Court assumed, I think, in the wife's favour that which the magistrates had found, viz., that, by acting as he did in refusing to get rid of his son, the husband had driven his wife away and put a barrier against her return so long as the son was there. It was argued that that alleged desertion had been terminated because the son had left the house, the wife's case having always been " If the son goes I will come back ", and she had gone back.

There has been much discussion of the various ways in which desertion can be terminated, with particular attention to termination by resumption of cohabitation, but that is not the only way in which desertion can be terminated. As this court pointed out in *Perry* v. *Perry* (1) ([1952] 1 All E.R. 1076) in my own judgment (at p. 1092):

> " Accordingly, in my opinion, as I ventured to suggest in *Lane* v. *Lane* (2) ([1952] 1 All E.R. 223, n.), when considering a current period of desertion the primary question is: Aye or No, ' is it terminated? '—not ' is it condoned? ' It can be terminated by a resumption of cohabitation involving a mutual or, as it has been called, a bilateral act, or it can be terminated by the deserter returning or even offering to return provided the offer is not one which for some reason the offeree is entitled to refuse, but it is not necessarily terminated as a matter of law by the sexual act."

In this case, in my view, the desertion, which was constructive desertion, was terminated when the basis of that constructive desertion had been removed by agreement. I do not think that it is necessary to consider whether there had been in this case a resumption of cohabitation in the full sense of the word, or reconciliation. The husband had refused to get rid of his son and the wife had said that she would not live with him unless he did. When he got rid of the son the desertion was terminated by agreement.

That is not an end of the case. The desertion having been charged from Nov. 15, it may well be that the appeal should have been allowed, and that point was taken by counsel for the husband. But there is no cross-appeal here, and, the Divisional Court having ordered that the original summons should be sent for further consideration to other magistrates, this court should not interfere with that part of the order. It should not interfere as it is relevant to go back into the history of the married life in considering the present position which it is open to the wife to set up, for it is quite impossible in dealing with a case of desertion to deal with the final parting in isolation from the history of the case. When the wife returned to the house on Feb. 27, it is clear that the first desertion was terminated, and the only question remaining is whether the wife is in a position to charge her husband with desertion now, having left him on Mar. 4. I do not propose to analyse those facts, because, as the Divisional Court pointed out, on a re-hearing the wife, either by amendment or by the issue of a fresh plaint, will be able to raise before the magistrates the real issue in the case, whether she was driven out on Mar. 3, and I have no intention of pre-judging that question. [HIS LORDSHIP referred to the facts of the wife's return and continued:] The way in which I respectfully differ from the magistrates is simply this, that I think the first desertion was at an end when the condition which the wife insisted on was complied with, and they must look at the matter afresh to see whether a new period of desertion started on the second occasion when she left on Mar. 3, 1955. The position then was entirely different from what it had been before. The son had gone. I do not for myself feel it is facing realities to regard the whole period as one continuous whole running from Nov. 15, 1954, until the hearing before the magistrates on Mar. 30. In my view, therefore, the appeal from the Divisional Court should be dismissed.

DENNING, L.J.: This husband and wife are now aged about fifty. They separated because of the troublesome conduct of their son. He was a married man of about twenty-five with three small children, and he and his wife came to live in the parents' house. His wife left and the grandmother had to look after two of the small children, both babies.

The son turned out to be a wastrel. He borrowed money from his mother, and was a spendthrift. He was a great thorn in her side; so much so that she appealed to her husband to turn out their own son. The husband, naturally said: " You cannot turn out your own flesh and blood ". Nevertheless, she felt so strongly about it that she said to him: " I have come to the end of my tether. I am going, but I will come back if you get the boy out ". She went, and her solicitors wrote a letter saying the same thing. They said:

> " Your wife will be ready and happy to return to the matrimonial home as soon as you assure her that your son is leaving."

After the hearing before the magistrates, the husband got the son to leave, and the wife came back.

I must say that on those facts I cannot see that the husband was guilty of constructive desertion. It seems to me that, if anyone did any driving out, it was the son who drove out his mother. It is quite unreal to say that the father drove out his wife simply because he said: " You cannot turn out your own flesh and blood ". However that may be, if there were constructive desertion by the husband in the first instance, it seems to me that it terminated when the wife returned in pursuance of the arrangement which they made. It is true that there was no resumption of cohabitation in the sense laid down in *Mummery* v. *Mummery* (3) ([1942] 1 All E.R. 553), *Bartram* v. *Bartram* (4) ([1949] 2 All E.R. 270) and *Perry* v. *Perry* (1) ([1952] 1 All E.R. 1076), but a resumption of cohabitation is not the only way of terminating a desertion. It can also be terminated by an agreement or an arrangement between the parties. When the wife here came back in pursuance of the arrangement, I am clearly of the opinion that if desertion there was, it was terminated.

[HIS LORDSHIP referred to the question whether the husband's conduct on the wife's return was such that he was guilty of constructive desertion, and concluded:] The magistrates must adjudicate as a whole whether there was constructive desertion early in March, 1955, after the wife went back. I agree with my Lord that this appeal should be dismissed.

MORRIS, L.J.: As my Lords have formed a clear view in regard to this matter, and as it must go back to the magistrates, I do not propose to say any more than to indicate some doubts that I had during the hearing. I feel, as my Lords have said, that this was a difficult case for the magistrates, and I do not in any way differ from the way in which the law has been stated by my Lords. The doubt that I have had is whether it does appear that the magistrates made a wrong approach. The case was argued before us on the assumption that there had been desertion in the initial period. That was not conceded. The question argued before us was whether there was a resumption of the marital relationship or, as the question ought, perhaps, to be stated, whether the desertion was terminated.

HODSON, L.J., in *Perry* v. *Perry* (1), said ([1952] 1 All E.R. at p. 1092):

> "Accordingly, in my opinion, as I ventured to suggest in *Lane* v. *Lane* (2), when considering a current period of desertion the primary question is: Aye or No, 'is it terminated?'—not 'is it condoned?' It can be terminated by a resumption of cohabitation involving a mutual or, as it has been called, a bilateral act, or it can be terminated by the deserter returning or even offering to return provided the offer is not one which for some reason the offeree is entitled to refuse, but it is not necessarily terminated as a matter of law by the sexual act . . . At the same time the facts in each case must be carefully considered because if it be found that there has really been a mutual coming together for however short a time it is clear that in such a case desertion has been terminated."

This being a case of constructive desertion, the matter was viewed by the magistrates on the basis that the husband by his conduct towards his wife had made it impossible for her to remain. That conduct manifested itself in the husband's attitude towards the son's presence, but the matter has to be viewed in the light of the husband's conduct vis-à-vis his wife. Was the husband making it impossible for the wife to stay? The doubt that I have had is whether the magistrates were not entitled to say that the husband continued during the few days when the wife was back in the house to make it impossible for her to stay, though he manifested his attitude to her in a different manner and by different conduct, and whether on that view it might be said that there had not been an end of the desertion, but that there was a continuing desertion. But, in view of the fact that my Lords have formed a clear view, having indicated this doubt, I do not dissent from what my Lords have said.

Appeal dismissed. Case remitted to the magistrates for reconsideration.

Solicitors: *Rhys Roberts & Co.*, agents for *Leo Abse & Cohen*, Cardiff (for the wife); *Wrentmore & Son*, agents for *H. Morgan Lloyd & Evans*, Cardiff (for the husband).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

A

LEE *v.* SHEARD.

[COURT OF APPEAL (Denning, Hodson and Morris, L.JJ.), November 23, 1955.]

Damage—Remoteness—Negligence—Plaintiff a company director and shareholder—Incapacitated for doing work for company—Reduced profits of B *company—Reduced distribution to plaintiff—Whether amount by which distribution to plaintiff reduced recoverable.*

The negligence of a car driver resulting in a motor accident caused an injury to the plaintiff who was one of the two directors and shareholders of a limited company and did the outside work of buying and selling linen goods for it. As a consequence of the accident the plaintiff was unable for C a time to do his work for the company, its profits were lower than they would otherwise have been and he received £1,500 less from it than he would otherwise have done. In an action for damages for negligence against the car driver,

Held: the plaintiff was entitled to recover the £1,500 as damages from the defendant, since the damage was not too remote and since the company D would not have been entitled to recover their loss as damages in an action per quod servitium amisit.

Per DENNING, L.J.: so, too, a partner in a partnership would be entitled to recover his real loss (see p. 778, letter D, post).

Appeal dismissed.

[As to remoteness of damages in tort, see 11 HALSBURY'S LAWS (3rd Edn.) E 277, 278, paras. 458, 459; and for cases on the subject, see 17 DIGEST (Repl.) 114, 115, 122-125, *268-276*, *325-355*.]

Case referred to:

(1) *A.-G. for New South Wales* v. *Perpetual Trustee Co.*, [1955] 1 All E.R. 846; [1955] A.C. 457.

F **Appeal.**

The defendant appealed against an order of HILBERY, J., dated July 8, 1955, whereby it was adjudged that the plaintiff should recover damages in the sum of £3,594, and costs in respect of injuries caused by the negligence of the defendant, when driving a car. The defendant asked that a lesser sum of damages should be substituted on the ground that an item of £1,500 was too remote. The G £1,500 represented the loss to the plaintiff in what he received from a company of which he was one of the two directors and shareholders arising from its reduced profits due to his inability for a time to do his work of buying and selling linen goods for the company.

P. M. O'Connor for the defendant.

Gerald Gardiner, Q.C., and *D. G. A. Lowe* for the plaintiff.

H

DENNING, L.J.: The plaintiff was injured in a motor car accident, and he sues the driver of the other car for damages in respect of the accident. The only issue in the case is as to one item of damage. The plaintiff was a shareholder and a director of a private limited company in which there was only one other director and shareholder, a Mr. Ableman. Mr. Ableman had 510 shares, and I the plaintiff 490 shares. The plaintiff did the outside work of buying and selling linen goods, Mr. Ableman doing the inside work of administration. As a result of his injuries, the plaintiff was unable for a time to do his work for the company. In consequence the profits of the company were much lower than they otherwise would have been, and consequently the distribution of the proceeds to the two persons interested was much less than it otherwise would have been. The learned judge was satisfied that, as a result of the injuries, the plaintiff received £1,500 less from the company than he otherwise would have done.

The question for determination is whether the item of £1,500 is recoverable in point of law from the defendant. On behalf of the plaintiff, it is said that this is damage which flows directly from the tortious act of the defendant. Counsel for the defendant has argued that that £1,500 is too remote in law to be recovered. He says that the party who suffered the loss was the company, and that the plaintiff is really seeking to recover part of the company's loss. He says that, if a man chooses to turn himself into a limited company for the sake of limiting his liabilities, then he has to put up with the consequences, one of which is that he cannot recover for the company's loss.

On considering these two arguments, I am of opinion that the plaintiff succeeds. The loss which he suffered is a real loss of £1,500. He is entitled to recover that sum from the wrongdoer unless it is too remote, or there is some other good reason why he should not get it. In some circumstances a company itself can recover for damage suffered by the company as a result of the loss of services of its servant. If the plaintiff had been a servant of the company*, the company might have recovered damages in an action per quod servitium amisit, and then, of course, the plaintiff could not also recover. That, however, is a cause of action which is now in disfavour and must be limited to cases of master and servant, and not extended to any new cases. That was so held by the Privy Council in *A.-G. for New South Wales* v. *Perpetual Trustee Co.* (1) ([1955] 1 All E.R. 846). In cases of that kind the company would be the party to recover such damages as are here in question, and not the servant. The plaintiff, however, was not a servant and the company are not entitled to recover their loss. In these circumstances I think that the plaintiff is entitled to recover his real loss. So, too, a partner in a partnership would be entitled to recover his own real loss and no more.

I find no flaw in the reasoning of the learned judge in this case, and I think that the appeal should be dismissed.

HODSON, L.J.: I agree.

MORRIS, L.J.: I also agree.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *White & Co.* (for the defendant); *Lees, Smith & Crabb* (for the plaintiff).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

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* As regards the position of director vis-à-vis the company, see 6 HALSBURY'S LAWS (3rd Edn.) 293, 294, para. 596.

ANGLO-FRENCH EXPLORATION CO., LTD. *v.* CLAYSON (INSPECTOR OF TAXES).

[CHANCERY DIVISION (Harman, J.), October 28, November 2, 23, 1955.]

Income Tax—Income—Payment of lump sum for relinquishing contract of services—Payment by third party—Simultaneous relinquishing of contract and of control in contracting company—Inflated sum paid in respect of contract—Sale of shares part of taxpayer's business—Whether sum taxable—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5 *c.* 40), *Sch. D, Case I.*

The taxpayer, a mining finance company whose stock in trade consisted of shares in other companies which it bought and sold, had as a branch of its business the performance of duties as secretary or agent of several other companies in return for fees, but did not carry on the buying and selling of such secretaryships as part of its day-to-day business. It held shares in some of these companies but not in others. With another friendly shareholder it held a majority of the shares of one of the companies, K. Co., and both of them had nominees on the board of directors. Following negotiations, it entered jointly with the friendly shareholder into an agreement with a third party under which it and the other shareholder sold their shares in K. Co. to the third party at a fair price, the representatives of the taxpayer and the friendly shareholder resigned their directorships in K. Co. in favour of representatives of the third party, and the taxpayer relinquished to the third party its contract for secretarial duties with K. Co. in return for a payment of £20,000 (shared with the friendly shareholder). This payment representing twelve years' purchase of the secretaryship contract compared with its value of six months' purchase if the taxpayer and the friendly shareholder had not held their shares. It was agreed that the £20,000 was not part of the consideration for the shares. The taxpayer was assessed to income tax in respect of £16,138, its share of the £20,000, as profits of its financial business assessed under Case I of Sch. D to the Income Tax Act, 1918, which included the receipts and outgoings of its agency and secretarial functions.

Held: the £20,000 was neither the purchase price on the sale of a capital asset nor compensation for the loss of an office (since the participating friendly shareholder held no office) but was a taxable receipt earned in the course of the taxpayer's trade, viz., the sale of shares, since it was earned by reason of the taxpayer's holding of shares and as an inducement to it to part with them.

Appeal dismissed.

[As to liability to tax of compensation for loss of office, see 17 HALSBURY'S LAWS (2nd Edn.) 217, para. 438; and for cases on the subject, see SUPPLEMENTS to 28 DIGEST 19, 20, *98*.]

Cases referred to:

(1) *Chibbett* v. *Robinson (J.) & Sons,* (1924), 132 L.T. 26; 9 Tax Cas. 48; 28 Digest 19, *98*.

(2) *Henley* v. *Murray,* [1950] 1 All E.R. 908; 31 Tax Cas. 351; 2nd Digest Supp.

(3) *Barr, Crombie & Co.* v. *Inland Revenue,* 1945 S.C. 271; 26 Tax Cas. 406; Digest Supp.

(4) *Inland Revenue Comrs.* v. *Northfleet Coal & Ballast Co., Ltd.,* (1927), 12 Tax Cas. 1102.

(5) *Bush, Beach & Gent, Ltd.* v. *Road,* [1939] 3 All E.R. 302; [1939] 2 K.B. 524; 108 L.J.K.B. 801; 161 L.T. 117; Digest Supp.

(6) *Van den Berghs, Ltd.* v. *Clark,* [1935] A.C. 431; 104 L.J.K.B. 345; 153 L.T. 171; 19 Tax Cas. 390; Digest Supp.

(7) *Kelsall Parsons & Co.* v. *Inland Revenue*, 1938 S.C. 238; 21 Tax Cas. 619; Digest Supp.

(8) *Henry* v. *Foster* (*A.*), *Henry* v. *Foster* (*J.*), *Hunter* v. *Dewhurst*, (1932), 16 Tax Cas. 605; sub nom. *Dewhurst* v. *Hunter*, 146 L.T. 510; Digest Supp.

Case Stated.

The taxpayer appealed to the General Commissioners of Income Tax for the City of London against an estimated assessment to income tax made on it under Sch. D to the Income Tax Act, 1918, in the sum of £50,000 less capital allowances, £100, in respect of the profits of its trade or business for the year ended Apr. 5, 1951. The question for determination was whether a sum of £16,138 (part of a total of £20,000) received from Philip Hill Securities Corpn., Ltd., was a trading receipt which should be included in the computation of the taxpayer's profits for income tax purposes.

The taxpayer company carried on business as a mining finance company the profits from which were assessed to tax under Case I of Sch. D. It had also for many years provided agency, secretarial and other similar services in London and Johannesburg for several companies, the receipts and outgoings from which were included in its Case I assessment. In 1949 it was providing such services for three companies in both South Africa and London and for a further five companies in London only. In some of these companies it held shares and in some it did not; it also held shares in companies for which it did not provide such services. Apart from three additions to the companies for which it acted there had been no change for over fifteen years. Fees and rents were received from the companies for the provision of secretarial services and office accommodation. Since 1931 the taxpayer had provided secretarial services in Johannesburg to Kleinfontein Estates and Township, Ltd., a public company incorporated and carrying on business in South Africa, under a formal agreement of 1931, modified in 1941, which was to continue in force from year to year until determined by either party by six months' notice, and under which it received £1,500 remuneration and £60 office rental per annum. It also provided similar services to the company in London for which it received £60 per annum. The total issued share capital of Kleinfontein Estates and Township, Ltd. (85,000 5s. shares fully paid, all of one class and carrying equal rights) was held as follows: by the taxpayer and its nominees 25,689; by the estate of the late Sir George Farrar and its nominees 27,930; by the estate of the late S. H. Farrar 16,872; by other shareholders 14,509. Following abortive negotiations in 1942 with one company, for the sale of the taxpayer's shareholding in Kleinfontein Estates and Township, Ltd., for which 35s. a share was offered to all shareholders (considered by the taxpayer's Johannesburg manager to be a fair price) and payment to the taxpayer of a lump sum in compensation for its relinquishing its office as secretary and agent of that company, the taxpayer in 1949 accepted an offer from Philip Hill Securities Corpn., Ltd., to purchase the taxpayer's shares in the company and other shares totalling not less than 70,000 altogether at 35s. a share and to pay the taxpayer £20,000 on its tendering its resignation as secretary of the company. The trustees of the estates of the late Sir George Farrar and the late S. H. Farrar agreed to participate by selling their shares at 35s. a share under an agreement under which they received also a portion of the £20,000, the taxpayer retaining £16,138 of it. Directors representing the taxpayer and the trustees of the estate of the late Sir George Farrar resigned and representatives of Philip Hill Securities Corpn., Ltd., were appointed directors. Some other shareholders also sold their shares to Philip Hill Securities Corpn., Ltd., at 35s. a share. The taxpayer credited the £16,138 to reserve account as " compensation for loss of office ". Evidence was given by the chairman and managing director of the taxpayer company of the close connection of the taxpayer with the late Sir George Farrar's estate and that there was no likelihood of the trustees of the estate accepting a third party's offer to purchase their shares without first consulting the taxpayer. It was agreed between the parties and accepted by the commissioners that the £20,000 was not part of the consideration for the shares.

The taxpayer contended that the £16,138 was part of the price paid by a third party to the taxpayer as consideration for its agreeing to give up an agency contract and the case was accordingly distinguishable from that of a payment received by an agent from his principal; that the agency contract with the right to exercise the duties thereunder was a capital asset of the taxpayer and its surrender was analogous to the sale of a capital asset; and that the sum was therefore a capital and not a trading receipt. The Crown contended that the £16,138 was received by the taxpayer as compensation for the loss of one of its agencies in the ordinary course of its business and not in consideration of a sale or any analogous transaction; that the agency contract and the right to perform the duties thereunder was not an asset which the taxpayer could or did sell and the payment of compensation for its loss by a third party was immaterial; that if any such sale or analogous transaction did take place, the proceeds were profits of a financial transaction of a mining finance company; and that in either event the sum was a revenue receipt and a taxable profit. The commissioners held that the sum was a trading receipt of the taxpayer and therefore taxable. The taxpayer appealed.

H. H. Monroe for the taxpayer.

Roy Borneman, Q.C., and *Sir Reginald Hills* for the Crown.

Cur. adv. vult.

Nov. 23. **HARMAN, J.**, read the following judgment: The facts of this case are not in dispute and are sufficiently set out in the Case Stated. The question is whether the inference which the commissioners drew from those facts is a right one. They concluded that the receipt in question was a trading receipt taxable as such. The taxpayer claims that this was a capital receipt immune from tax. I cannot, I think, do better by way of prelude than quote the observations of ROWLATT, J., at the beginning of his judgment in *Chibbett* v. *J. Robinson & Sons* (1) (1924) (9 Tax Cas. at p. 60):

> " This case, like all cases of a similar nature, is very troublesome; because all these cases turn upon nice questions of fact, and at least I find very great difficulty in apprehending any permanent and clear line of division between the cases which are within and the cases which are without the scope of the Income Tax Acts. I think everybody is agreed, and has been agreed for a long time, that in cases of this kind the circumstance that the payment in question is a voluntary one does not matter. As SIR RICHARD HENN COLLINS said, you must not look at the point of view of the person who pays and see whether he is compellable to pay or not; you have to look at the point of view of the person who receives, to see whether he receives it in respect of his services, if it is a question of an office, and in respect of his trade, if it is a question of trade, and so on. You have to look at his point of view to see whether he receives it in respect of those considerations. That is perfectly true. But when you look at that question from what is described as the point of view of the recipient, that sends you back again, looking, for that purpose, to the point of view of the payer; not from the point of view of compellability or liability, but from the point of view of a person inquiring what is this payment for; and you have to see whether the maker of the payment makes it for the services and the receiver receives it for the services."

To a like effect were the observations of JENKINS, L.J., twenty-five years later in *Henley* v. *Murray* (2) ([1950] 1 All E.R. at p. 911):

> " As the many cases on this topic show, it is often very difficult to determine the character of a payment made to the holder of an office when his tenure of the office is determined, or the terms on which he holds it are altered, and the question in each case is whether, on the facts of the case, the lump sum paid is in the nature of remuneration or profits in respect of the office, or is in the nature of a sum paid in consideration of the surrender by the recipient of his rights in respect of the office."

A number of cases were cited to me. In some the decision was in favour of the taxpayer and in others in favour of the Crown. It was suggested on both sides that one or other of these cases governed the present one. I do not take this view. Every case of this kind must in my judgment turn on the special facts appearing in it. This was evidently the view of LORD NORMAND (Lord President) in *Barr, Crombie & Co.* v. *Inland Revenue* (3) (1945) (26 Tax Cas. at p. 411), a case of this class, in these words:

> " It has been truly said that every case must be considered on its own facts, and that no legal criterion for distinguishing between capital payments and income payments is readily applicable."

Counsel for the taxpayer submitted to me that the real distinction was between a payment made under a contract, i.e., a compensation for the loss of advantages which the contract brought on the one side, and on the other payment made *for* the contract, i.e., the purchase price paid on its acquisition by a third party. This seems to be an echo of ROWLATT, J.'s judgment in *Inland Revenue Comrs.* v. *Northfleet Coal & Ballast Co., Ltd.* (4) (1927) (12 Tax Cas. at p. 1108), as to which LAWRENCE, J., in *Bush, Beach & Gent, Ltd.* v. *Road* (5) ([1939] 3 All E.R. 302) says this (at p. 305):

> " The sum paid, in my view, represented profits which the appellants would or might have made under the contract, and not the purchase price of the contract itself ",

and then he referred to ROWLATT, J.'s judgment in the *Northfleet* case (4). I do not think that this distinction, if it be a true one, is relevant to the facts of the present case.

On the one hand there is a line of cases such as *Van den Berghs, Ltd.* v. *Clark* (6) ([1935] A.C. 431) and *Barr, Crombie* (3), which seem to show that a sum of money paid to a company which puts an end to its trading or to a branch of its trading is a capital payment, whereas a sum paid such as those in *Kelsall Parsons & Co.* v. *Inland Revenue* (7) (1938) (21 Tax Cas. 619) and *Bush, Beach & Gent's* case (5), which do not alter the profit-making business of the company or its financial structure, is an income payment. I find it very difficult to understand this distinction, which seems to go at least very near to saying that the question depends on the importance to the company of the asset in question. I cannot suppose that the answer depends on a mere question of amount. Nor do I see why the duration of the contract should make any difference, though this has been suggested as a test,, e.g. in the *Barr, Crombie* case (3) (26 Tax Cas. at p. 412). ROWLATT, J., in his judgment in *Chibbett's* case (1), already referred to, says (9 Tax Cas. at p. 61):

> " If it was a payment in respect of the termination of their employment I do not think that is taxable. I do not think that is taxable as a profit. It seems to me that a payment to make up for the cessation for the future of annual taxable profits is not itself an annual profit at all. I do not know whether it has arisen or been discussed, and perhaps the less I say about it the better, but I should not have thought that either damages for wrongful dismissal or a payment in lieu of notice, at any rate if it was for a longish period—I will not say a payment in lieu of notice, I will say a voluntary

> A payment in respect of breaking an agreement which had some time to run—would be taxable profits. But at any rate it does seem to me that compensation for loss of an employment which need not continue, but which was likely to continue, is not an annual profit within the scope of the income tax at all ",

B If this were the law the question would perhaps be easier to answer, but this statement has been criticised in two later cases, namely, *Hunter* v. *Dewhurst* (8) (1932) (16 Tax Cas. 605) and *Bush, Beach & Gent, Ltd.* v. *Road* (5) ([1939] 3 All E.R. at p. 305) as going too far, so that it is not open to me to decide the case with that guide.

It seems to me that the task of the court is to analyse the real nature of the C payment and to judge by the result whether this is a trading receipt or no. It was pressed on me by the Crown that the taxpayer company itself had described the payment in its accounts as compensation for loss of office and that, as the loss of this office did not cripple the profit-making structure of the company, the cases showed that it must be treated as an income receipt. In my judgment it will not help merely to give the payment a name and decide on that ground—see D LORD MONCRIEFF's observations in the *Barr, Crombie* case (3) (26 Tax Cas. at p. 413). He says this:

> " And again, had it been the law that, whether the agreement contain a true record or a false record of the situation, anything set forth by the parties in their agreement could be fastened on by the Inland Revenue and taken as concluded against them, that again might conclusively have E supported the commissioners' decision upon the case. But that emphatically is not the law. Taxpayers when faced with demands for tax may put forward their view of their case as tabled in their private agreements by way of defence or by way of concession. Their defence as so supported will not avail them if the facts do not support it in substance, while their concession cannot be urged against them unless the concession is one which is supported by the F facts."

For the taxpayer it was argued that this was the purchase price paid by a third party on the sale by the company of a capital asset and was therefore capital. I do not think the true view lies here either. This was a mining finance company and its stock-in-trade consisted of shares in other companies which G it bought and sold. It also had another branch of its business which consisted in the performance of duties as secretary or registrar for a fee to a number of companies in some of which it held shares and in others it did not. It was no part of the day-to-day business of the taxpayer company to buy and sell these secretaryships. They are not indeed things which can be bought and sold in the ordinary sense. The reason why the company was able to realise this sum is to be found in its H peculiar situation. It held, together with another friendly shareholder (the estate of the late Sir George Farrar) a majority of the shares in this company. It also held a contract to act as secretary to the company. So long as the taxpayer and its ally held the majority of the shares and nominated the board of the company, this was a valuable asset as the directors would not terminate it, but, if either shareholder were to dispose of his holding, the contract was worth no I more than six months' purchase. How then was the taxpayer enabled to obtain something like twelve years' purchase? Simply by refusing to sell its shares except on the terms that it should receive this sum in addition to the purchase price. In other words, the accession of the taxpayer to the offer made by the acquiring concern was essential to that concern and the taxpayer was enabled to get more for its shares because of that fact. The same consideration applied to the other large shareholder, and it is significant that a proportion of the £20,000 paid by the acquiring concern and described as compensation for loss of office went not

A to the taxpayer but to the other shareholder. This alone makes it clear that the sum was not compensation for loss of the office of secretary, for the estate of Sir George Farrar had no part in that office. Part of the consideration was the resignation of the four directors who were nominees of these two shareholders and an agreed part of the sum was in fact paid to another director who resigned. When I look at the document set out as appendix 8 to the Case, it B appears that the offer was conditional on the delivery to the purchasing company of 70,000 shares, but that the directorships of the two main vendors and the secretaryship of the taxpayer were to be given up on delivery of 43,000 shares. A curious position might thus have arisen if more than 43,000 and less than 70,000 shares had been offered. This did not arise but it shows that the payment cannot be correctly described as compensation for loss of office. C

Thus in fact the two main shareholders were able to obtain something more than the 35s. a share which the other shareholders received. Both parties to the case, however, agreed that these moneys should not be treated as part of the consideration for the shares, and I think I must proceed on that footing. Even so, this payment was a sum which the taxpayer was able to exact from the D purchasers of the shares by reason of the fact that the taxpayer's concurrence in the scheme was essential to its success in that 70,000 shares were not available without it. Apart from the holding of the shares, the secretaryship was worth little or nothing. It was only the taxpayer's special position that enabled it to obtain this money. It was in fact a sum earned in the course of the company's trade, viz., the sale of shares, and, even though not part of the purchase price, E was earned only because of the holding of the shares and by way of inducement to part with them. On this analysis, as it seems to me, this was money earned by the company in the course of its trade and therefore a trading receipt and must be charged to tax accordingly. I am therefore of opinion that the commissioners came to a right conclusion and that this appeal should be dismissed.

Appeal dismissed. F

Solicitors: *Coward, Chance & Co.* (for the taxpayer); *Solicitor of Inland Revenue.*

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

NOTE.

BEZZI *v.* BEZZI.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sachs, J.), November 29, 30, 1955.]

Legal Aid—Costs—Costs awarded against assisted person—Issue as to domicil—Both parties assisted—Law Society Divorce Department entitled to profit costs—Recommendation for increased fee for counsel—Legal Aid (*General*) *Regulations*, 1950 (*S.I.* 1950 *No.* 1359), *reg.* 18 (5) *and schedule, as amended by Legal Aid* (*General*) (*Amendment No.* 1) *Regulations*, 1954 (*S.I.* 1954 *No.* 166), *reg.* 12, *reg.* 13.

[For the Legal Aid (General) Regulations, 1950, reg. 18 (5) and schedule, see 5 HALSBURY'S STATUTORY INSTRUMENTS 218, 220.

For the Legal Aid and Advice Act, 1949, s. 6 (7), see 18 HALSBURY'S STATUTES (2nd Edn.) 541.]

Application for costs.

On Feb. 5, 1948, the petitioner, Harold Gioacchino Roberto Bezzi, married the respondent, then Rosa Aleo, in Italy. The parties then lived together in Italy. There were two children of the marriage. On June 17, 1952, the husband came to England, leaving the wife and children in Italy. On July 13, 1953, the husband, who had been granted a civil aid certificate, presented in England a petition for divorce on the ground of the wife's cruelty. The wife entered an appearance under protest alleging that the husband was not domiciled in England, and applied for a civil aid certificate.

On June 15, 1954, the wife was granted legal aid and as her contribution was assessed as nil the conduct of her case passed to the Law Society Divorce Department*. An application was, however, made for security for the wife's costs, though no order was made. On Sept. 6, 1954, Mr. Registrar RUSSELL ordered that there be a separate trial of the issue as to the domicil of the husband. An area committee authorised the husband's solicitors to instruct more than one counsel under reg. 14 (3) of the Legal Aid (General) Regulations, 1950.

The issue as to domicil in which the husband was plaintiff and the wife defendant, was heard by SACHS, J., who found in favour of the wife. Counsel for the wife then applied for an order for costs, and this report deals solely with that question.

J. Stirling, Q.C., and *J. C. Mortimer* for the husband.
A. B. Hollis for the wife.

A. B. Hollis: I ask for costs in this matter. The wife is in receipt of legal aid and her contribution is nil.

SACHS, J.: You ask for costs taxed on the footing that it is an ordinary case, not a Divorce Department case. The result of the Legal Aid and Advice

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* Apparently under reg. 5 (10) of the Legal Aid (General) Regulations, 1950 (S.I. 1950 No. 1359), 5 HALSBURY'S STATUTORY INSTRUMENTS 207, which provides:

> " Where an application relates to a matrimonial cause and the maximum contribution payable by the applicant is not more than £10, the local committee shall inform the applicant that if he accepts the terms upon which they are prepared to issue a certificate they will arrange for the case to be conducted, in accordance with s. 6 (7) of the [Legal Aid and Advice Act, 1949], by a solicitor employed by the Law Society for a salary to act in connection with matrimonial causes:
>
> " Provided that this paragraph shall not apply where the applicant is a wife and it appears to the local committee that the husband might reasonably be expected, if ordered to do so, to provide such security for her costs as would, with her contribution, if any, amount to more than £10."

It was stated in argument that an order for security of costs was rarely made where the party against whom it would apply was legally assisted.

Act, 1949, and the regulations is that, although the Law Society Divorce Department conducts work on a footing which is regarded as a " cut price ", and does it on that basis extremely well, they are entitled, as against the litigant, to ask for costs to be taxed and paid on the footing that they act as a normal solicitor entitled to full profit costs. Whether or not that is a happy position is somewhat debatable.

J. Stirling, Q.C.: I resist that, so far as I am entitled to do so, for the sake of the wife and children. My instructions are that the husband is making a monthly allowance of £16 10s. for the benefit of the wife and the children. I think that the National Assistance Board's computation shows that there is no available capital, but only income. The result, put shortly, is that the husband's income will become reduced to £425 per annum from which £125 will be deducted by his employers for maintenance as his post will be an internal post. If a full order for profit costs were to be made against the husband it would become impossible for him to continue the monthly payments for the benefit of the wife and children. I appreciate the court's dilemma in deciding between the rights of the legal aid fund or of the Law Society Divorce Department on the one hand and the claims of the wife and children on the other hand. It seems inevitable, however, that whatever instalments may be ordered, they would be the sufferers.

As regards the husband's conduct my submission is that his conduct, as regards this case, has been unimpeachable and that his conduct towards his wife and children has been creditable throughout.

SACHS, J.: This is not an easy matter on which to come to the correct conclusion. The application made before me is for costs to be taxed, which would result in an order for costs to be taxed on the normal scale applicable where a solicitor was acting in the normal way. It would also result, as counsel for the wife has agreed, in a very considerable profit to the Law Society Divorce Department, which would be applied to other cases in that department. On the other hand, I have come to the conclusion that at any rate one of the husband's purposes in coming to England was in order to get a divorce; and he has taken such advantage under the Legal Aid and Advice Act, 1949, as the law entitles him to take. I propose to make an order against him for costs which I think will be reasonable in all the circumstances, viz., an order for £60, payable by instalments of £3 a month, the first instalment to be paid one month after the final instalment due to the Law Society for his own certificate.

The present case has rightly been adjudged by the area committee to be one of difficulty, which should be properly met by the briefing of two counsel on behalf of the husband. I am going to act on the footing that it is of equal difficulty from the point of view of those presenting the wife's case, and whereas the Law Society Divorce Department were entitled, if they got a full order for costs, to make a profit, counsel would have been paid at what on a previous occasion* I called a relatively token figure. I think that the present is a case for a recommendation under reg. 18 (5)† that they should receive a higher fee than that provided by the schedule to the Legal Aid (General) Regulations, 1950, as amended.

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* See *Chard* v. *Chard*, ante, at pp. 722, 723.

† A new para. (5) of reg. 18 of the Legal Aid (General) Regulations, 1950 (S.I. 1950 No. 1359) was substituted by the Legal Aid (General) (Amendment No. 1) Regulations, 1954 (S.I. 1954 No. 166) as from Mar. 1, 1954, and provides as follows:

> " Until the Lord Chancellor otherwise prescribes, the determination of the sums allowed to counsel retained by solicitors employed by the Law Society for salaries to act in connection with matrimonial causes concluded after the date upon which this regulation comes into force shall, having regard to the lack of means of assisted persons of that class (being persons from whom, had there not been legal aid, solicitors and barristers would have customarily accepted specially low remuneration), unless the Lord Chancellor in any particular case otherwise orders, be the amounts set out in the schedule to these regulations."

Order accordingly.

Solicitors: *Samuel Dalton* (for the husband); *G. E. C. Dougherty* (for the wife).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

FRIBANCE *v.* FRIBANCE.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Barnard, J.), November 30, 1955.]

Husband and Wife—Legal proceedings—Summary proceedings as to property—Summons issued after decree nisi—Hearing of summons after decree absolute—Whether court had jurisdiction—Married Women's Property Act, 1882 (45 *&* 46 *Vict. c.* 75), *s.* 17—*Matrimonial Causes Rules,* 1950 (*S.I.* 1950 *No.* 1940), *r.* 75.

On Sept. 8, 1955, the wife issued a summons under s. 17 of the Married Women's Property Act, 1882, for the determination of a dispute as to the title or possession of property. She had previously obtained a decree nisi of divorce which was made absolute on the husband's application on Oct. 4, 1955. On Oct. 17, 1955, the wife's summons under s. 17 came before the registrar who referred the matter to the judge in view of the fact that the parties were no longer husband and wife.

Held: as the court had jurisdiction to act under s. 17 of the Act of 1882 when the summons was issued, it had jurisdiction to determine the dispute notwithstanding that subsequently the relationship of husband and wife had ceased; accordingly the summons would be referred to the registrar to hear and determine the wife's application.

Principle stated by LORD GODDARD in *Hichens* v. *Hichens* ([1945] 1 All E.R. at p. 453) applied.

[As to the issue of a summons to decide a dispute between spouses in a matrimonial suit as to the ownership of property, see 12 HALSBURY'S LAWS (3rd Edn.) 353, para. 751, note (i); and for a case on the subject, see 27 DIGEST (Repl.) 263, *2120*.

For the Married Women's Property Act, 1882, s. 17, see 11 HALSBURY'S STATUTES (2nd Edn.) 804.]

Case referred to:

(1) *Hichens* v. *Hichens*, [1945] 1 All E.R. 451; [1945] P. 23; 114 L.J.P. 65; 172 L.T. 331; 27 Digest (Repl.) 263, *2120*.

Summons.

The wife applied to the registrar by summons under s. 17 of the Married Women's Property Act, 1882, for the determination of a dispute as to property. On Oct. 17, 1955, Mr. Registrar WILKINSON referred the matter to the judge.

The summons was heard by BARNARD, J., who adjourned it into open court for judgment.

The facts appear in the judgment.

H. S. Ruttle and *I. A. Kennedy* for the wife.

D. Tolstoy for the husband.

Cur. adv. vult.

Nov. 30. **BARNARD, J.**, read the following judgment: The question before me is whether the court has jurisdiction under s. 17 of the Married Women's Property Act, 1882, to hear and determine when the parties have ceased to be husband and wife, a summons issued when they were husband and wife. On May 10, 1955, the wife obtained a decree nisi of divorce, on the ground of the husband's cruelty. On Sept. 8, 1955, the wife issued a summons under s. 17 of the Married Women's Property Act, 1882, claiming that (i) the husband held in trust for himself and herself certain leasehold premises and that (ii) certain specified furniture was her sole property or alternatively the joint property of the husband and herself. The summons was returnable for Oct. 3, 1955. On the same day as the wife issued her summons she filed an affidavit in support thereof and on Sept. 30, 1955, the husband filed his affidavit in reply. The husband also filed an affidavit on Sept. 30, 1955, in support of a summons he had taken out on Sept. 22, 1955, to show cause why the decree nisi should not be made absolute. On Oct. 3, 1955, owing to the illness of the registrar, the wife's summons was postponed from that date to Oct. 17, 1955. On Oct. 4, 1955, the husband's summons came before the senior registrar (Mr. Registrar LONG) and he ordered that the decree nisi be made absolute. When the wife's summons came on for hearing on Oct. 17, 1955, the registrar (Mr. Registrar WILKINSON) referred the matter to the judge, in view of the fact that the parties were no longer husband and wife by reason of the decree absolute of divorce. Counsel for the wife argued that provided that the parties were husband and wife when the summons was issued the court had jurisdiction to hear and determine the matter in dispute notwithstanding the fact that at some time after the issue of the summons they ceased to be husband and wife and referred to *Hichens* v. *Hichens* (1) ([1945] 1 All E.R. 451), as an authority for that proposition. Counsel for the husband contended that the court had jurisdiction only if there was an order directing an inquiry and he also relied on *Hichens* v. *Hichens* (1). RAYDEN ON DIVORCE (6th Edn.), p. 326, para. 21, note (d) supports this view of *Hichens* v. *Hichens* (1). He further stressed the point that, assuming that the court had no jurisdiction, the wife still had her remedy at common law.

LORD GODDARD, in the course of his judgment in *Hichens* v. *Hichens* (1) in the Court of Appeal said ([1945] 1 All E.R. at p. 452):

> " It seems to me that the answer to the question is this. If the parties are husband and wife when the question arises they can apply to the court, and once they have applied to the court the court can, if it sees fit, order an inquiry . . . If at the time when they apply the parties are husband and wife, as they were in this case, then it seems to me that the court has power to do that which the section gives it power to do, that is to say, either to make an order at once or to direct an inquiry. If it does direct an inquiry . . . I do not see that there is anything which forces us to say that that inquiry comes to a standstill if a decree absolute intervenes. The inquiry is on foot, it can be carried out . . . "

LORD GODDARD also said (ibid. at p. 453):

> " On the other hand, I think as the court has jurisdiction to become seised of the case and seised of this matter when the application was made, it must be that the court has got power to carry it to a conclusion. That, I think, seems to have been the view of the judge below [DENNING, J.], and

A I think it is the right view. The court had power on the application of the husband at a time when the marriage still subsisted to make this order."

It must be borne in mind that when *Hichens* v. *Hichens* (1) was decided the practice was to take out a summons before the judge who almost invariably made an order referring the matter to one of the registrars to inquire and report, B although of course the judge could if he thought fit make an order then and there with respect to the property in dispute. Now, however, by virtue of the Matrimonial Causes Rules, 1950, r. 75* the summons is taken out before a registrar who may exercise all the jurisdiction and powers conferred on a judge by s. 17 of the Married Women's Property Act, 1882. Thus a registrar could then and there make an order with respect to the property in dispute or he could C adjourn the summons and fix a date for the parties to attend before him to be cross-examined or he could order discovery to be given. Assuming that counsel for the husband's argument was correct, and applying that argument to the new practice, the jurisdiction of the court to hear and determine the summons under s. 17 might depend solely on whether or not the registrar had made some preliminary order on the summons such as an order for discovery. I cannot believe D that this is the law nor do I believe that LORD GODDARD intended any such construction to be put on his judgment. I have come to the conclusion that where LORD GODDARD referred to the judge directing an inquiry, he was only stating the facts in that particular case; the ratio decidendi of his judgment is to be found where he states ([1945] 1 All E.R. at p. 453) that as the court had jurisdiction to act under the section when the application was made it must have E power to carry the matter to a conclusion.

The court has jurisdiction to dispose of the matter if the parties were husband and wife when the summons was issued, notwithstanding the fact that at some time thereafter the relationship has ceased. I, therefore, refer this summons back to the registrar to be heard and determined.

Summons referred accordingly.

F Solicitors: *Edwin Coe & Calder Woods* (for the wife); *Hillearys* (for the husband).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

G

McDONALD *v.* BRITISH TRANSPORT COMMISSION.

H [DURHAM ASSIZES (Pilcher, J.), October 27, 28, 1955.]

Master and Servant—Duty of master—Provision of safe plant—Onus of proof—Railway wagon in dangerous condition—Knowledge of state of wagon—Contributory negligence.

I The plaintiff, who was employed by the defendants as a dock foreman, stepped on to the floor of a railway wagon which was in a dangerous condition due to a hole about two feet long and one foot wide. His leg went through the hole and he was injured. The wagon in question was a " Dock use only " wagon and, owing to the heavy demand for wagons at certain times of the year and economic difficulties, it was customary to defer minor repairs such as a hole of this type until congestion at the docks had subsided.

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* See 10 HALSBURY'S STATUTORY INSTRUMENTS 235.

Both the defendants and the dock workers knew that it was not uncommon to find a wagon of which the floor was seriously damaged and sometimes holed. In an action for negligence at common law against the defendants,

Held: once it had been established that the defendants had provided equipment which was dangerous the onus shifted to the defendants to satisfy the court that they had in fact exercised reasonable care for the plaintiff's safety, and in the circumstances the defendants had not discharged that onus and were liable accordingly; but the plaintiff had been guilty of contributory negligence and the damages to which he would otherwise be entitled would be reduced by fifty per cent.

[As to the duty of a master towards his servants at common law, see 22 Halsbury's Laws (2nd Edn.) 187, para. 313; and for cases on the subject, see 34 Digest 194, *1583*, et seq.

As to the burden of proof and the burden of adducing evidence, see 13 Halsbury's Laws (2nd Edn.) 543, 544, paras. 613, 614; and for cases on the subject, see 22 Digest (Repl.) 37, *170-179*, 42, *238*, *239*.]

Cases referred to:

(1) *Callaghan* v. *Fred Kidd & Son (Engineers), Ltd.*, [1944] 1 All E.R. 525: [1944] K.B. 560; 113 L.J.K.B. 381; 170 L.T. 368; 2nd Digest Supp.

(2) *Taylor* v. *R. & H. Green & Silley Weir, Ltd.*, (1951), 1 Lloyd's Rep. 345.

(3) *McCarthy* v. *Coldair, Ltd.*, [1951] 2 T.L.R. 1226; 2nd Digest Supp.

(4) *Edwards* v. *National Coal Board*, [1949] 1 All E.R. 743; [1949] 1 K.B. 704; 2nd Digest Supp.

Action.

The plaintiff, Kenneth McDonald, was a dock foreman who for a very long time had been employed by the defendants or their predecessors. On Sept. 11, 1953, a wagon was drawn up at a platform or " keep " in the defendants' warehouse at the West Hartlepool docks and the plaintiff in the course of his employment stepped over a gangway leading from the keep to the wagon and took two or three steps on the floor of the wagon. He put his left foot down on to what he expected to be the solid floor of the wagon, but there was a large hole about two feet long and one foot wide through which his leg went and he sustained certain injuries. His Lordship found that the wagon was clearly in a dangerous condition.

The wagon was one of about 2,600 " Dock use only " wagons in use at these docks. Such a wagon had finished its useful life on the ordinary railway system of the country and was then appropriated to a dock. The fact that the floor might be out of repair was not an important matter so far as the carriage of freight was concerned, and between June and September when the port was very busy " Dock use only " wagons were in perpetual demand and it was customary to defer minor repairs, such as a hole in the floor of the type described, until the congestion brought about by the arrival of timber ships had subsided. The defendants also called evidence that it would be economically difficult for them to pick out all wagons which needed minor repairs during the busy period. Such wagons would be much more likely to be allowed to continue in circulation during the busy period than during the slack period of the year. It was not disclosed when this wagon had last been examined, reported on or sent to the works for inspection. The hole in the floor of the wagon might have been made either months before, or only a few days before, the wagon was last loaded. The defendants and their officials in the docks and the dock workers knew that it was by no means uncommon to find a wagon of which the bottom planking was seriously damaged and sometimes holed in the fashion in which the bottom of this wagon was holed.

The plaintiff claimed damages for the negligence of the defendants in failing to provide a safe place of work and safe equipment for him.

A *R. R. Rawden-Smith* for the plaintiff.
A. B. Boyle for the defendants.

PILCHER, J., stated the facts and continued: Once a condition of danger is established, the onus then shifts in a case of this kind on to the employer to satisfy the court that he has in fact fulfilled those duties which by law B fall on an employer of labour in regard to the safety of his servants. Under certain sections of the Factories Act, 1937, an employer is required to take such steps as are "reasonably practicable" to ensure the safety of his servants. The onus in that matter rests on him. I am not quite sure that the matter has ever been directly decided where an employer's common law obligation is in question, but in the case of *Callaghan* v. *Fred Kidd & Son* (*Engineers*), *Ltd.* (1) C SCOTT, L.J., said ([1944] 1 All E.R. at p. 527):

> "If it were necessary to decide the question of onus, the obvious fact that the difficulty or ease of doing what is necessary to maintain safety is so much more within the knowledge of the management than of their work-people, makes us disposed to hold that it is for the defence, whether in a D prosecution or an action, to establish the proposition of fact involved in the words of limitation of the section",

the words there being "reasonably practicable". I have read this passage from MUNKMAN ON EMPLOYER'S LIABILITY AT COMMON LAW (2nd Edn.), at pp. 154, 155, because I have not been referred to these cases. It is there said that in *Taylor* v. *R. & H. Green & Silley Weir, Ltd.* (2) (1951) (1 Lloyd's Rep. 345) E and in *McCarthy* v. *Coldair, Ltd.* (3) ([1951] 2 T.L.R. 1226) the Court of Appeal has taken a similar view to that expressed by SCOTT, L.J., in regard to the onus resting on an employer under the Factories Act, 1937. If a situation of danger is shown to exist and the onus rests under the Factories Act, 1937, on an employer to show that he has done what was reasonably practicable to obviate F it, I do not see why the same onus should not rest on an employer at common law to show in parallel circumstances that he has exercised due care for the safety of his servants.

The question which is really before me in this case is whether or not the evidence called on behalf of the plaintiff here is sufficient to discharge that onus. The defendants have a system of inspection and repair. The ordinary working G of that system, for economic reasons, results in the fact that dangerous trucks in a dangerous condition are allowed to circulate during the busy period of the year, and it is said that, without incurring great expense, it is impossible for the defendants to remedy that situation. ASQUITH, L.J., in *Edwards* v. *National Coal Board* (4) ([1949] 1 All E.R. 743), dealt with this matter under the Coal Mines Act, 1911, and said (ibid., at p. 747):

H

> "'Reasonably practicable' is a narrower term than 'physically possible' and seems to me to imply that a computation must be made by the owner in which the quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other, and that, if it be shown that there is a gross I disproportion between them—the risk being insignificant in relation to the sacrifice—the defendants discharge the onus on them."

I have to make up my mind here whether the difficulties which the defendants would encounter and the expense which they would incur in keeping up the same standard of inspection and repair during the busy months as they do during the slack months justify them in saying that they have in all the circumstances exercised reasonable care for the safety of their servants. There is one other point. I do not know what the defendants had done in regard to this particular wagon. I understand that they are in possession of documents which might throw some light on the history of this wagon with regard to repairs; I was told that they would be difficult and troublesome to get at, and that I can well believe, but it seems to me that the defendants (who are found to have exposed their servant to danger and risk) should satisfy the court that they have taken all reasonable steps with regard to the safety of their servants, and they should produce all the documents and evidence in their possession in order that the court may determine whether they have fulfilled or possibly failed in their duty. Here, I have not all the available information on that point. One can sympathise with the defendants. No doubt it is more economical for them to allow wagons to go about during the busy period with less inspection and repair than to maintain during such period the closer system of inspection and repair which prevails during the slack period.

In my view, the defendants have not discharged the onus which lies on them of satisfying me that closer inspection and more frequent repair during the busy period was on balance practically or economically unreasonable to expect. They are, therefore, liable.

[His Lordship then found that the plaintiff knew all the dangers which might attend an inadvertent step on the floor of a wagon of this kind and that he was not looking where he was going or taking any care, that he was guilty of contributory negligence and that the damages to which he would otherwise be entitled should be reduced by fifty per cent.

His Lordship then assessed damages. The plaintiff was sixty years of age. In the accident he broke no bones. He suffered from bruising of his back, on the left thigh and on the outer and inner sides of his left calf. He was not detained in hospital but was in bed for seven weeks after the accident. The agreed medical report concluded that he would be fit for light work wearing a brace, with which he was in fact to be fitted. His occupation as a dock foreman was light work. His normal retiring age would be sixty-five, and his weekly wage was about £9. His Lordship assessed the general damages at £500. The special damage was £30.]

Judgment for the plaintiff for £265.

Solicitors: *Pattinson & Brewer* (for the plaintiff); *M. H. B. Gilmour* (for the defendants).

[*Reported by* G. M. Smailes, Esq., *Barrister-at-Law.*]

TRESEDER-GRIFFIN AND ANOTHER *v.* CO-OPERATIVE INSURANCE SOCIETY, LTD.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J.), December 1, 6, 1955.]

Money—Covenant to pay on gold basis—Rent—Payment to be either in gold sterling or Bank of England notes to the equivalent value in gold sterling of a specified sum.

Landlord and Tenant—Rent—Reddendum for payment in gold or equivalent in Bank of England notes.

By a lease, dated Dec. 30, 1938, certain premises in Cardiff were demised to tenants for a term of ninety-nine years from June 24, 1930. The reddendum clause in the lease was in these terms: " Paying therefor yearly during the said term either in gold sterling or Bank of England notes to the equivalent value in gold sterling the rent of £1,900 to be paid . . . by equal quarterly payments ". At the date of the lease, bank notes had become, in effect, the only currency in the country (apart from silver and bronze) by reason of the Gold Standard (Amendment) Act, 1931. By the Exchange Control Act, 1947, all gold had to be surrendered to the Treasury and only a dealer authorised by the Treasury could buy or sell gold. On June 23, 1953, the lease was assigned to the defendants for the remainder of the term. Until Michaelmas, 1953, the landlords had been willing to receive the sum of £475 as a quarterly payment, but without prejudice to their claim for future rent under the clause relating to payments in gold or the equivalent value in Bank of England notes. In an action against the defendants for five quarters' rent owing under the lease, the landlords now claimed, in respect of each quarter's rent, the amount which would be required in bank notes to purchase £475 in sovereigns if sovereigns were obtainable.

Held: the plaintiffs were entitled to receive by way of rent each quarter such an amount in bank notes as would be required to buy from an authorised dealer gold coins to the value of £475, because the " gold clause " contained in the reddendum was to be regarded as defining the means by which the amount of the rent was to be ascertained and, its object being to protect the landlords against depreciation of the currency, the words " gold sterling " therein should be read as meaning " gold coin ".

Feist v. *Société Intercommunale Belge D'Electricité* ([1934] A.C. 161) and dictum of LORD WRIGHT in *New Brunswick Ry. Co.* v. *British & French Trust Corpn., Ltd.* ([1938] 4 All E.R. at p. 761) applied.

[**Editorial Note.** Fluctuating rents have long been recognised as valid; see *Re Knight, Ex p. Voisey* (1882), 21 Ch.D. 442. In the present case the reddendum did not offend against the Coinage Act, 1870, s. 6, which provides that every contract involving the payment of money shall be made and executed according to coins which are current legal tender, because the lease was at its date in accordance with currency that was legal tender (see p. 796, letter F, post). The requirement of s. 6 of the Act of 1870, read with s. 4, results in s. 6 not preventing paper currency being legal tender, and the obligation under the reddendum in the lease was either to pay in gold coin or to pay the equivalent in notes.

As to payment on a gold basis, see 23 HALSBURY'S LAWS (2nd Edn.) 173, para. 251; and for cases on the subject, see DIGEST Supp., " Money ", *17a-17c, 17n.*

As to legal money, see 7 HALSBURY'S LAWS (3rd Edn.) 303-305, paras. 646, 647; and as to the note issue, see 2 HALSBURY'S LAWS (3rd Edn.) 153-155, paras. 282, 283.

For the Coinage Act, 1870, s. 3, s. 4, and s. 6, see 4 HALSBURY'S STATUTES (2nd Edn.) 575, 576.

For the Gold Standard Act, 1925, and the Gold Standard (Amendment) Act, 1931, see 2 HALSBURY'S STATUTES (2nd Edn.) 260, 266.

For the Currency and Bank Notes Act, 1928, see 2 HALSBURY'S STATUTES A
(2nd Edn.) 261.

For the Exchange Control Act, 1947, s. 1 and s. 2, see 16 HALSBURY'S STATUTES
(2nd Edn.) 560, 562.]

Cases referred to:

(1) *Feist* v. *Société Intercommunale Belge D'Electricité*, [1934] A.C. 161; 103
L.J.Ch. 41; sub nom. *Re Société Intercommunale Belge D'Electricité*, B
Feist v. *Société Intercommunale Belge D'Electricité*, 150 L.T. 41; Digest
Supp.

(2) *New Brunswick Ry. Co.* v. *British & French Trust Corpn., Ltd.*, [1938]
4 All E.R. 747; [1939] A.C. 1; 108 L.J.K.B. 115; 160 L.T. 137;
Digest Supp.

Action. C

This was a claim by landlords for five quarters' rent due under a lease, dated
Dec. 30, 1938, and for a declaration that

> "upon the true construction of the . . . covenant to pay rent contained
> in the said lease the plaintiffs are entitled as lessors to receive from the
> defendants four hundred and seventy-five gold sovereigns on each quarter D
> day during the said term or alternatively to receive such sum in Bank of
> England notes as represents the value of four hundred and seventy-five gold
> sovereigns in sterling in London calculated at the date upon which payment
> is due."

The facts appear in the judgment.

Eustace Roskill, Q.C., and *W. H. Griffiths* for the plaintiffs. E

Neville Gray, Q.C., and *R. C. Seddon* for the defendants.

Cur. adv. vult.

Dec. 6. **LORD GODDARD, C.J.**, read the following judgment: By a lease
dated Dec. 30, 1938, the then trustees of the estate of H. A. Griffin deceased
demised to Montague Burton, Ltd. certain premises in the City of Cardiff for
a term of ninety-nine years computed from June 24, 1930. On June 23, 1953, F
the said lease was assigned to the defendants for the remainder of the term.
The plaintiffs are the present trustees of the estate and no question arises as to
their title to sue for rent. The reddendum clause in the lease is in these terms:

> "Paying therefor yearly during the said term either in gold sterling
> or Bank of England notes to the equivalent value in gold sterling the rent G
> of £1,900 to be paid without any deduction except for landlord's property
> tax, land tax and tithe redemption annuity by equal quarterly payments."

Until Michaelmas, 1953, the plaintiffs had always been willing to receive the sum
of £475 as a quarterly payment, but each demand and each receipt was stated
to be without prejudice to their claim for future quarters' rent under the clauses
of the lease relating to payments in gold or the equivalent in Bank of England H
notes. The present claim is for five quarters' rent, and they seek to bring the
clause which I have mentioned into operation by claiming the amount which
would be required in bank notes to purchase £475 in sovereigns if sovereigns
could be obtained.

The clause in the lease to which I have referred is, or at least would obviously
seem to have been, intended to be what is commonly known as a gold clause, I
which since the decision of the House of Lords in *Feist* v. *Société Intercommunale
Belge D'Electricité* (1) ([1934] A.C. 161) must be regarded as a definition of the
means by which a debt is to be measured and ascertained, not a definition of
the means by which the debt is to be discharged, and as giving rise to an obligation
to pay in legal tender of the stipulated currency an amount which, on the day
of payment, will be sufficient to buy gold coins corresponding to the nominal
amount of the debt. I take this definition from r. 162 of DICEY'S CONFLICT OF
LAWS (6th Edn.), at p. 727, as accurately and compendiously stating the result of

Feist v. *Société Intercommunale Belge D'Electricité* (1) and other decisions which followed it, in particular *New Brunswick Ry. Co.* v. *British & French Trust Corpn., Ltd.* (2) ([1938] 4 All E.R. 747). So far as I am aware, this is the first time that this class of clause has been the subject of litigation between the parties to what I may call a domestic contract, by which I mean parties who are both British subjects and domiciled in Great Britain. Hitherto the cases on gold clauses have been between parties who were subjects of different states, or at least domiciled in different jurisdictions, but this cannot, in my opinion, make any difference to the construction of the clause, the object of which is to guard a creditor against the risk of depreciation of currency. The clause which I have to construe refers to "gold sterling", a somewhat unusual expression, and I therefore turn at once to the various statutes relating to coinage and currency, for it is common knowledge that gold is no longer used, and cannot be, as currency in this country.

The Coinage Act, 1870, prescribed the standard of both gold and silver coins to be issued by Her Majesty's Royal Mint, and provided that gold coins of that standard should be legal tender for any amount, but preserved as legal tender any paper currency which under any Act or otherwise was legal tender*. Section 6 of this Act provided that every contract and certain other transactions involving the payment of money should be made and executed according to the coins which were current and legal tender in pursuance of the Act. At the outbreak of war in 1914 the Currency and Bank Notes Act, 1914, authorised the issue of currency notes of the denomination of £1 and 10s.† These notes were issued by the Treasury, and the Act in no way restricted the Bank of England from issuing their notes which continued to be legal tender. By the Gold Standard Act, 1925, s. 1, the issue of gold coins was suspended, but the Bank of England was obliged to sell gold bullion in the form of bars of the weight of four hundred ounces of pure gold at the price of £3 17s. 10½d. an ounce, which at that time had always been the price of gold of the standard fineness. The Currency and Bank Notes Act, 1928, in effect, transferred the issue of currency notes of £1 and 10s. from the Treasury to the Bank of England‡. In 1931 this country went off the gold standard, and by the Gold Standard (Amendment) Act, 1931, the Bank of England was relieved of any obligation to pay in gold. This, in effect, made Bank of England notes the only currency (I am not referring to silver or bronze) and thenceforward this country had what is commonly known as a managed currency independent of gold. Though gold could still, no doubt, be tendered, yet the gold pound if tendered would only have the value of 20s., while the price of gold in the market was by then considerably in excess of the statutory price of gold coins fixed in 1925. Finally, by the Exchange Control Act, 1947, no one other than a dealer authorised by the Treasury could buy or sell gold and all gold had to be surrendered to the Treasury**.

From this brief résumé of the various statutes it appears that at the date of the lease bank notes had, in effect, become the only currency in this country, and, if the word "sterling" means, as in my opinion it does in this context, current English money, it follows that in strictness there was no gold sterling then in existence. I do not think, however, that anyone could doubt that the object of the clause was to protect the creditor, in this case the landlords, against depreciation of the currency which at the date of the lease consisted of bank notes. It was intended to put the landlords in the same position as if the quarterly payments of £475 had been made in gold coin, as bank notes of £1 and 10s. were of the same denomination as sovereigns and half sovereigns when the pound sterling was a gold pound. In my opinion, therefore, gold sterling should be read as meaning gold coin.

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* See s. 3 and s. 4 of the Act of 1870; 4 HALSBURY'S STATUTES (2nd Edn.) 575.

† Section 1 (1) of the Act of 1914. This Act, except for s. 1 (5) and s. 5, was repealed by the Currency and Bank Notes Act, 1928.

‡ See s. 4 and s. 5 of the Act of 1928; 2 HALSBURY'S STATUTES (2nd Edn.) 263.

** See s. 1 (1) and s. 2 of the Act of 1947; 16 HALSBURY'S STATUTES (2nd Edn.) 560, 562.

New Brunswick Ry. Co. v. *British & French Trust Corpn., Ltd.* (2) concerned bonds which were issued by the appellant company by each of which the company promised to pay to the bearer or registered holder thereof " the sum of £100 sterling gold coin of Great Britain of the present standard of weight and fineness." LORD WRIGHT said ([1938] 4 All E.R. at p. 761) that the clause in that case was governed, as regards the principal obligation, by the same construction as that applied by the House of Lords to the obligation in *Feist* v. *Société Intercommunale Belge D'Electricité* (1), which was, in effect, that the bonds were not contracts for payment in gold coin as a commodity or in bullion, but were contracts for the payment of money, the amount of which was to be measured by the value in sterling at the due date of one hundred gold coins of Great Britain of the standard weight and fineness existing at the date of the bond. He went on to say (ibid.):

> " . . . £100 only defines the sum due so long as English sterling should remain equal in value to the stipulated gold coin. If sterling should depreciate, as it has done, relatively to the specified gold coin, £100 merely provides a measuring point or yardstick from which to determine how many units of currency will have to be paid to correspond to the gold value at the due date."

Applying that to this case, I am of opinion that the plaintiffs' contentions are correct and that they are entitled to receive each quarter the number of bank notes which would be required to buy from an authorised dealer gold coins to the value of £475. I ought to say that, in my opinion, s. 6 of the Coinage Act, 1870, does not render this lease unlawful. The contract was, I think, made in accordance with the currency which was then legal tender. It follows, in my opinion, that the plaintiffs are entitled to judgment for £7,505, which, I understand, is an agreed sum if the plaintiffs' contentions are accepted, and for a declaration as claimed, though if there is any point arising on the terms of the latter, I will hear counsel further on it. I am happy to think that this judgment can and, no doubt, will be considered by the Court of Appeal, and perhaps the House of Lords, as in view of the present falling rate of the pound and the length of the lease the amount of money involved is truly formidable.

Judgment for the plaintiffs.

Solicitors: *Wrentmore & Son,* agents for *Ewan G. Davies,* Cardiff (for the plaintiffs); *N. C. Wright* (for the defendants).

[*Reported by* A. P. PRINGLE, ESQ., *Barrister-at-Law.*]

BRITISH TRANSPORT COMMISSION *v.* GOURLEY.

[HOUSE OF LORDS (Earl Jowitt, Lord Goddard, Lord Reid, Lord Radcliffe, Lord Tucker, Lord Keith of Avonholm and Lord Somervell of Harrow), October 4, 5, 6, December 8, 1955.]

Damages—Measure of damages—Loss of earnings—Whether assessment to be based on gross earnings or net earnings after payment of tax.

When assessing damages, in actions for personal injuries or wrongful dismissal, for the loss of actual or prospective earnings, allowance must be made for any incidence of income tax (including surtax) on the earnings, where the damages themselves are not taxable in the hands of the recipient.

In 1951 the respondent, senior partner in a firm of civil engineers, was seriously injured in a railway accident, for which the appellants admitted

A liability. Although able to carry on his professional work, the respondent's earnings were much reduced. The trial judge awarded the respondent £37,720 as damages in respect of loss of earnings, actual or prospective. In assessing this sum the trial judge did not take into consideration that, if the respondent had been able by his activities in his profession to achieve the earnings represented by that sum, he would have had to pay income B tax and surtax in respect of them. The trial judge made an alternative award of £6,695 being the sum which he would have awarded if the respondent's liability to income tax and surtax on the earnings were taken into account and the estimated amount of tax payable by him in respect of those earnings were deducted. The sole question before the House was whether the respondent's tax liability ought to have been taken into account C in assessing that part of the damages attributable to loss of earnings.

Held: (LORD KEITH OF AVONHOLM dissenting) liability to income tax was not so remote that it should be disregarded in assessing damages for loss of earnings, though the estimate of tax liability need not be elaborate; the damages to which the respondent was entitled were, therefore, such as would compensate him for the loss of taxed earnings, which were the D measure of his real loss, and accordingly £6,695 was the proper sum to be awarded as damages.

Billingham v. *Hughes* ([1949] 1 All E.R. 684), and *Blackwood* v. *Andre* (1947 S.C. 333) disapproved.

Per LORD GODDARD (LORD RADCLIFFE and LORD SOMERVELL OF HARROW concurring): in considering the assessment of damages for loss of earnings, E the rate of tax to be taken must be the effective rate of income tax and, if necessary, surtax, which would have been applicable to the sums in question if they had been earned (see p. 805, letter I, post).

Observations on directions to juries in assessing damages where allowance is to be made for the incidence of tax; see p. 806, letters F to I, post.

Appeal allowed.

F

[**Editorial Note.** The principle decided in the present case, viz., that allowance must be made for the plaintiff's tax liability when assessing damages for loss of earnings, is decided only in relation to damages in actions for personal injuries or for wrongful dismissal (see per LORD GODDARD at p. 807, letter A, post, with whose opinion LORD RADCLIFFE and LORD SOMERVELL OF HARROW G concurred). Yet the principle seems to be of general application where damages are assessed for loss of earnings which, if earned, would have been taxable. The damages in the present case were themselves not taxable in the hands of the recipient (see, e.g., p. 799, letter C, post). It seems possible, however, that cases may arise where damages or compensation for loss of earnings are taxable (cf. *Wiseburgh* v. *Domville* (*Inspector of Taxes*) at p. 551, letters A-D, ante) H and to such cases the principle of the present case may be thought to be inapplicable.

As to collateral liabilities and benefits in assessing the measure of damages, see 11 HALSBURY'S LAWS (3rd Edn.) 240, para. 408; and for cases on the subject, see 17 DIGEST (Repl.) 80, 81, *27-38*.]

Cases referred to:

I (1) *Livingstone* v. *Rawyards Coal Co.*, (1880), 5 App. Cas. 25; 42 L.T. 334; 44 J.P. 392; 17 Digest (Repl.) 80, *30*.

(2) *Liebosch, Dredger* v. *Edison S.S.*, [1933] A.C. 449; 102 L.J.P. 73; sub nom. *The Edison*, 149 L.T. 49; 17 Digest (Repl.) 93, *103*.

(3) *Admiralty Comrs.* v. *S.S. Chekiang*, [1926] A.C. 637; 95 L.J.P. 119; sub nom. *The Chekiang*, 135 L.T. 450; 41 Digest 805, *6663*.

(4) *Fairholme* v. *Firth & Brown, Ltd.*, (1933), 149 L.T. 332; Digest Supp.

(5) *M'Daid* v. *Clyde Navigation Trustees*, 1946 S.C. 462; 2nd Digest Supp.

(6) *Jordan* v. *Limmer & Trinidad Lake Asphalt Co., Ltd.*, [1946] 1 All E.R. 527; [1946] K.B. 356; 115 L.J.K.B. 379; 175 L.T. 89; 2nd Digest Supp.

(7) *Davies* v. *Adelaide Chemical & Fertilizer Co., Ltd.* (*No.* 2), [1947] S.A.S.R. 67; 2nd Digest Supp.

(8) *Blackwood* v. *Andre*, 1947 S.C. 333; 2nd Digest Supp.

(9) *Billingham* v. *Hughes*, [1949] 1 All E.R. 684; [1949] 1 K.B. 643; [1949] L.J.R. 1147; 17 Digest (Repl.) 80, *32*.

(10) *Comyn* v. *A.-G.*, [1950] I.R. 142.

(11) *W. Rought, Ltd.* v. *West Suffolk County Council*, [1955] 2 All E.R. 337; [1955] 2 Q.B. 338.

(12) *Isherwood* v. *Oldknow*, (1815), 3 M. & S. 382; 105 E.R. 654; 40 Digest 715, *2486*.

(13) *Phillips* v. *London & South Western Ry. Co.*, (1879), 5 C.P.D. 280; 17 Digest (Repl.) 190, *860*.

(14) *Admiralty Comrs.* v. *Susquehanna* (*Owners*), *The Susquehanna*, [1926] A.C. 655; 95 L.J.P. 128; 135 L.T. 456; 41 Digest 802, *6624*.

(15) *Armsworth* v. *South Eastern Ry. Co.*, (1847), 11 Jur. 758; 36 Digest (Repl.) 222, *1188*.

(16) *Rowley* v. *London & North Western Ry. Co.*, (1873), L.R. 8 Exch. 221; 42 L.J.Ex. 153; 29 L.T. 180; 17 Digest (Repl.) 185, *808*.

Appeal.

Appeal by the British Transport Commission from an order of the Court of Appeal, dated July 8, 1954, affirming an order of PEARCE, J., dated Apr. 1, 1954.

On Sept. 21, 1951, the respondent, Harold John Frederick Gourley, was a passenger in a train from Liverpool to London, which became derailed at Weedon, Northamptonshire. As a result of this accident, which was caused by the negligence of the appellants' servants or agents, the respondent suffered severe personal injuries. At the time of the accident, the respondent was aged sixty-five, and was physically fit and young for his age. He was an eminent civil engineer who specialised in water schemes, and was senior partner in a firm of civil engineers. From the date of the accident until some time in 1952, the respondent was disabled by his injuries from taking any effective part in his business and, though he returned to work during 1952, his earning capacity and, consequently, his income, was much reduced. PEARCE, J., awarded him £47,720 as damages, made up of £9,000 for pain and suffering, £1,000 for out of pocket expenses, £15,220 for actual loss of earnings before the end of 1953, and £22,500 for estimated future loss of earnings. The sum of £37,720 in respect of loss of earnings was awarded on the basis that the incidence of income tax and surtax was not taken into account. On the basis that liability to tax had to be taken into account, PEARCE, J., made an alternative award of £6,695, made up of £4,945 for actual loss of earnings before the end of 1953, and £1,750 for estimated future loss of earnings. The sole question before the House was whether liability to tax should be taken into account in assessing that part of the damages attributable to actual or prospective loss of earnings.

Sir Andrew Clark, Q.C., *Sir Frank Soskice, Q.C.*, and *Humfrey Edmunds* for the appellants.

Gilbert Paull, Q.C., *D. M. Wacher* and *C. N. Beattie* for the respondent.

The House took time for consideration.

Dec. 8. The following opinions were read.

EARL JOWITT: My Lords, the respondent who is an eminent civil engineer suffered severe injuries whilst travelling in a railway train owing to the negligence of the appellants' servants, and brought his action to recover damages.

A The trial judge awarded him £9,000 for pain and suffering and loss of amenities, and £1,000 in respect of out of pocket expenses. No question arose in this appeal as to this part of the award. The trial judge further awarded the respondent the sum of £37,720 in respect of loss of earnings actual and prospective, and in arriving at this sum paid no regard to the fact that, had the respondent been able by his activities in his profession as a civil engineer to achieve the earnings represented B by the sum of £37,720, he would have had to pay a large amount in respect of income tax and surtax on the amount of such earnings. The trial judge, at the request of the appellants, made an alternative assessment of £6,695, which represented the sum he would have awarded if he ought to have taken into account in assessing damages the tax which the respondent would have had to pay if he had, in fact, earned by his professional activities the sums lost. It was C agreed by counsel on both sides—and I think rightly agreed—that the respondent would incur no tax liability in respect of the award of £37,720, or alternatively of £6,695.

The question for determination in this appeal is whether the judge ought to have taken the tax position into account in assessing that part of the damages attributable to loss of earnings actual or prospective.

D The broad general principle which should govern the assessment of damages in cases such as this is that the tribunal should award the injured party such a sum of money as will put him in the same position as he would have been in if he had not sustained the injuries (see per LORD BLACKBURN in *Livingstone* v. *Rawyards Coal Co.* (1) (1880), 5 App. Cas. at p. 39). The principle is sometimes referred to as the principle of restitutio in integrum; but it is manifest that no award of E money can possibly compensate a man for such grievous injuries as the respondent in this case has suffered. The principle, therefore, affords little guidance in the assessment of damages for the pain and suffering undergone and for the impairment which results from the injuries; and, in fixing such damages, the judge can do no more than endeavour to arrive at a fair estimate, taking into account all the relevant considerations.

F The principle can, however, afford some guidance to the tribunal in assessing compensation for the financial loss resulting from an accident, and in such cases it has been referred to as " the dominant rule of law " (see per LORD WRIGHT in *Liebosch, Dredger* v. *Edison S.S.* (2), [1933] A.C. at p. 463). There are, no doubt, instances to be found in the books of exceptional cases in which this dominant rule does not apply, as, for instance, in cases of insurance, or cases calling for G exemplary or punitive damages, or in certain cases dealing with the loss of use of a chattel. But, as LORD SUMNER said in *Admiralty Comrs.* v. *S.S. Chekiang* (3) ([1926] A.C. at p. 643):

> " The measure of damages ought never to be governed by mere rules of practice, nor can such rules override the principles of the law on this subject."

H It was argued for the respondent that no consideration of the tax which would have resulted had he not been prevented from earning the sums for the loss of which he claims compensation was legitimate, as this consideration was too remote. It was pointed out that the tax under Sch. D (which was the relevant schedule in this case) is not payable until some time after the money has been earned, and in no sense constitutes a charge on the moneys themselves. If the I tax fell to be assessed under the system of P.A.Y.E. or under Sch. E, different considerations would arise, for in that case the tax would be deducted before the money was paid. I do not think that we should draw a distinction between cases in which the money is deducted before the payment of tax is made, and those cases in which the tax falls to be paid after the money has been received.

It is a strange fact that, until 1933, the question, whether the tax position of the injured person should be taken into account in assessing damages, had, so far as I can ascertain, never been raised. No doubt in the old days tax was so small that it may have been thought not worth while to take account of it. In the great majority of running-down cases the question would not have arisen, and in those days the amount of damages was assessed by a jury under appropriate directions from the judge. However, for many years before 1933, the amount of tax had been assessed at a figure by no means negligible, and there is no record of the point ever having been raised.

The first case in which this question arose for decision was *Fairholme* v. *Firth & Brown, Ltd.* (4) (1933) (149 L.T. 332). That was a case in which a company had wrongfully dismissed their managing director. The damages were assessed at £18,000, and the issues for determination were (a) Whether any sum awarded to the plaintiff by way of damages would be subject to British income tax and/or surtax. (b) If not, whether this fact and the fact that the plaintiff would have been liable for income tax and surtax if the money had been paid under the agreement, should be taken into account in assessing damages. Point (a) was not, in fact, argued, it being agreed by counsel on both sides that the damages would not be subject to tax; and, accordingly, du Parcq, J., assumed, without deciding the point, that no tax would be exigible on the amount of the damages, and pointed out that this was the foundation for the argument on point (b). I express no opinion what the answer to point (a) would have been if it had been the subject of a judicial decision. There may well be a difference between actions for personal injuries and actions for wrongful dismissal in regard to the obligation of the plaintiff to pay tax on the amount of damages received; and cases on the one topic may, therefore, be a dangerous guide to follow on the other.

du Parcq, J., in the course of his judgment, said (149 L.T. at p. 333):

> ". . . I should be reluctant to give a decision which would seek to alter an inveterate practice unless I were convinced that the practice is inconsistent with principle, and unjust, and I am not so convinced in this case. On the contrary, I am of opinion that it is right in principle, to have no regard, in assessing damages as between master and servant, to the servant's liability to the Crown, which is truly res inter alios acta."

The only ground, apart from the reference to inveterate practice on which du Parcq, J., based his judgment, rests on the maxim res inter alios acta. I confess to some difficulty in defining the limits of this principle in cases concerning the assessment of damages in personal injury cases.

The contract which the injured person has made, which gives him the right to the salary for the loss of which he claims to recover damages, may surely also be said to be res inter alios acta from the point of view of the wrongdoer; and yet this contract obviously forms the basis on which damages for loss of earnings are to be assessed. In all such cases the real issue seems to be whether the facts relied on as affecting the measure of damages are too remote to be taken into consideration.

The next case in which the point arose for decision was *M'Daid* v. *Clyde Navigation Trustees* (5) (1946 S.C. 462). In that case, a workman was injured in unloading a vessel. He was in receipt of a weekly wage from which tax was deducted under the P.A.Y.E. scheme. The question for determination was whether, in awarding damages for loss of earnings, the judge should have regard to the gross sum which the workman earned or to the net sum which was paid to him after payment of tax. Lord Sorn (Lord Ordinary) decided that the lower sum should be the factor to be taken into account in assessing damages. He said that, in his opinion, to ignore the tax position at the present day would be to act in a manner which was out of touch with reality. He put the following case (1946 S.C. at p. 464):

> "Suppose the case of a pursuer whose potential earnings have been proved at about £2,000 a year. Suppose, further, that he has already lost one year's work, and that the medical evidence establishes that he may be expected to

> A lose another before becoming fit to resume. Is the pursuer's counsel entitled to ask the presiding judge for a direction to the jury that, in making good this loss of income to the pursuer, they must not take into account the fact that he would have had to pay tax upon it? With income tax at 10s. in the £ (to say nothing of surtax) such a direction would seem to a jury just like telling them to give the pursuer twice the amount of his loss, and it is difficult to B suppose that such a direction, apparently ignoring realities, could be received or given with any sense of satisfaction. It seems to me that, when you get a liability to which all earnings are subject and which depends not upon any circumstances peculiar to the individual but upon a general law of the land universal in its application, it would be wrong to ignore the existence of that liability."

C The attention of LORD SORN was not called to *Fairholme* v. *Firth & Brown, Ltd.* (4).

In 1946, a similar question arose before ATKINSON, J., in *Jordan* v. *Limmer & Trinidad Lake Asphalt Co., Ltd.* (6) ([1946] 1 All E.R. 527). That learned judge followed the decision in *Fairholme* v. *Firth & Brown, Ltd.* (4). It does not D appear that *M'Daid* v. *Clyde Navigation Trustees* (5) was brought to his attention.

Fairholme v. *Firth & Brown, Ltd.* (4) and *Jordan* v. *Limmer & Trinidad Lake Asphalt Co., Ltd.* (6) were followed and applied in a case arising in South Australia (*Davies* v. *Adelaide Chemical & Fertilizer Co., Ltd.* (*No.* 2) (7), [1947] S.A.S.R. 67).

Shortly afterwards, LORD KEITH, in *Blackwood* v. *Andre* (8) (1947 S.C. 333), decided that no deduction should be made from the amount awarded in respect E of loss of earnings on the ground that these earnings would have been liable to income tax. LORD KEITH expressed disagreement with the reasoning of LORD SORN in *M'Daid* v. *Clyde Navigation Trustees* (5). He gave his reasons for disagreement in the following terms (1947 S.C. at p. 333):

> "The basis upon which the argument proceeds is that a pursuer is entitled to restitution as far as possible of the loss which he has sustained as F the result of the injury for which the defender is liable. The suggestion is that what he has lost is only the net sum which he would receive after the deduction of income tax. That argument has a certain speciousness, particularly if tax is regarded as tax deducted at the source. It must be remembered that not all tax is deducted at the source and that the same argument would apply to a person who received certain income for which he G had himself to account to the Revenue, but, apart altogether from that, the consideration appears to me to be quite an illegitimate one. It would apply on the same grounds where a person had come under obligation to pay a proportion of his income away to somebody else. The fact that he would then be left with a net sum does not appear to me to be any reason for basing the assessment of damages upon the net sum which he would receive or H retain and not upon the gross sum which should be paid to him and from which he would make the conventional deduction to which he had become bound. Further, the argument seems to ignore the fact that the only person who is going to benefit is the person who is liable in damages. There is no suggestion that he will account to the Revenue for the capitalised income tax which ex hypothesi has been taken into account in assessing damages. I The court, in my opinion, has no concern with the incidence of taxation in assessing the damages of an injured taxpayer. The argument rests upon a consideration of facts that really are res inter alios acta, and for these reasons the argument must, in my opinion, be rejected."

There being this difference of opinion between the judges of first instance, the matter came before the Court of Appeal in *Billingham* v. *Hughes* (9) ([1949] 1 All E.R. 684). That was a case in which a doctor had been knocked down and seriously injured by an army vehicle and was thus prevented from continuing his activities as a general practitioner. The court decided that the fact that the plaintiff would have been liable to pay tax in respect of the income which he would have earned but for the accident ought to be disregarded in assessing damages. The question whether a similar result should follow if the tax was payable under the P.A.Y.E. scheme, as in *M'Daid* v. *Clyde Navigation Trustees* (5), was left open.

Our attention was also called to *Comyn* v. *A.-G.* (10) ([1950] I.R. 142). This was a case in which the question arose as to the compensation for compulsory acquisition of property. It was, therefore, necessary for the court to determine the fair valuation of a capital asset. In such a case I should have thought it questionable whether a reduction of the amount to be paid as compensation for that capital asset based on the prospective tax liability of its owner was in accordance with the true principle of valuation.

In *W. Rought, Ltd.* v. *West Suffolk County Council* (11) ([1955] 2 All E.R. 337), the Court of Appeal had to consider whether or not, in claiming compensation for loss of profit in respect of specific orders during the interruption of manufacturing operations, regard should be had to the tax which the company in question would have had to pay, had they been enabled to complete these orders. It was assumed that the company would have been liable to pay tax in respect of the profit earned on these contracts, and it was further assumed that the compensation awarded would not be liable to tax. It was held that it was not legitimate to make any deduction from the compensation awarded for loss of profits by any consideration of the company's possible tax liability. The facts in *W. Rought, Ltd.* v. *West Suffolk County Council* (11) were widely different from those in the present case, and it is not necessary for the present purpose to express any final opinion on either *W. Rought, Ltd.* v. *West Suffolk County Council* (11) or *Comyn* v. *A.-G.* (10).

I have now referred to all the relevant authorities bearing on the point, and the question remains whether *Billingham* v. *Hughes* (9), which the trial judge and the Court of Appeal in this case followed, was rightly decided.

My Lords, it is, I think, if I may say so with the utmost respect, fallacious to consider the problem as though a benefit were being conferred on a wrongdoer by allowing him to abate the damages for which he would otherwise be liable. The problem is rather for what damages is he liable; and, if we apply the dominant rule, we should answer, " He is liable for such damages as, by reason of his wrongdoing, the plaintiff has sustained ". I cannot think that the risk of confusion arising if the tax position be taken into consideration should make us hesitate to apply the rule of law if we can ascertain what that rule is. Nor should we be deterred from applying that rule by the consistent or inveterate practice of the courts in not taking the tax position into consideration in those cases in which the courts were never invited to do so.

My Lords, I agree with Lord Sorn in thinking that to ignore the tax element at the present day would be to act in a manner which is out of touch with reality. Nor can I regard the tax element as so remote that it should be disregarded in assessing damages. The obligation to pay tax—save for those in possession of exiguous incomes—is almost universal in its application. That obligation is ever present in the minds of those who are called on to pay taxes, and no sensible person any longer regards the net earnings from his trade or profession as the equivalent of his available income. Indeed, save for the fact that in many cases—though by no means in all cases—the tax only becomes payable after the money has been received, there is, I think, no element of remoteness or uncertainty about its incidence.

Counsel for the appellants, in the course of his argument, put the case of two men each enjoying a salary of £2,500 a year, the one as a servant of an international body being exempted from all tax on his salary, the other having to pay income tax and surtax in the ordinary way. He pointed out that, if each of these men met with an accident and each was deprived of a year's salary, for which he succeeded in recovering damages, it would be quite unreal to treat them as though they were in receipt of the same income; for, in the absence of special and unusual circumstances, the one whose salary was tax free would enjoy an income almost double the income of his fellow who had to pay taxes.

My Lords, I agree with this contention. I see no reason why in this case we should depart from the dominant rule, or why the respondent should not have his damages assessed on the basis of what he has really lost; and I consider that, in determining what he has really lost, the judge ought to have considered the tax liability of the respondent.

It would, I think, be unfortunate if, as the result of our decision, the fixation of damages in a running-down case were to involve an elaborate assessment of tax liability. It will, no doubt, become necessary for the tribunal assessing damages to form an estimate of what the tax would have been if the money had been earned, but such an estimate will be none the worse if it is formed on broad lines, even though it may be described as rough and ready. It is impossible to assess with mathematical accuracy what reduction should be made by reason of the tax position, just as it is impossible to assess with mathematical accuracy the amount of damages which should be awarded for the injury itself and for the pain and suffering endured.

In the present case, the judge has made an elaborate and detailed survey of the position and has fixed two sums; and it was agreed between the parties that we should award as damages one or other of these sums. We were, therefore, in no way concerned to consider the precise method which the trial judge employed in arriving at these figures. In my opinion, in these circumstances we should substitute the sum of £6,695 for the sum of £37,720.

For the reasons I have given, I would allow this appeal and reduce the amount of damages to be recovered by the respondent from £47,720 to £16,695. Allowance must, of course, be made for the sum of £7,000 which has already been paid. It has been agreed that the appellants should pay the costs of this appeal.

LORD GODDARD: My Lords, on Sept. 21, 1951, the respondent to this appeal was gravely and permanently injured in a railway accident for which it is conceded the appellants must accept liability. The respondent was a partner in a firm of civil engineers; he was, and is, eminent in his profession and was earning a large professional income. Until some time in the year following the accident he was unable to take any effective part in the business of the firm. On his return to work, on account of his physical condition a reduction was made in the apportionment of the profits he was entitled to receive, and the learned trial judge also found that the earnings of the partnership were likely to be reduced in the future owing to his inability to take a full part in the business. It is unnecessary to set out the provisions of the original partnership deed and the subsequent alterations agreed on owing to the respondent's disability, because the sums awarded by the learned judge under the various heads of damage are accepted by the parties, and the sole question raised in this appeal is whether, in assessing the loss of income up to the date of trial and the prospective future loss, the tax paid on his income, or which would have had to be paid had it been earned, is to be taken into account. For pain and suffering, loss of amenities and actual out of pocket expenses incurred, or to be incurred, the respondent was awarded £10,000, and no question arises as to this amount which would not in any case be subject to tax. On the basis that income tax and surtax are to be ignored, PEARCE, J., awarded the respondent £37,720 in respect of the loss of earnings to the date of the trial and his prospective future loss. He then, in the course of a full and careful judgment, set out the sums he would award if he had to take the tax position into account. He found that, in that event, the sum would be £6,695. Holding that he was bound by the decision of the

Court of Appeal in *Billingham* v. *Hughes* (9) ([1949] 1 All E.R. 684) to ignore all questions relating to tax, he entered judgment for a total of £47,720 less £7,000 already paid by the appellants on account. The alternative sum found by the learned judge was accepted by the parties, and it is conceded by the appellants that this case is indistinguishable from *Billingham* v. *Hughes* (9), so the question for your Lordships is whether or not that case was rightly decided. The parties agreed that, under the present law, no part of the sum awarded as damages was subject to income tax or surtax and the appeal proceeded on this footing.

It is remarkable how little authority there is on this subject. It has never been before this House, nor does there seem to be any decision in the appellate courts of the other Commonwealth countries, or of the United States of America on the matter. The first reported case in which it appears to have been raised is *Fairholme* v. *Firth & Brown, Ltd.* (4) (1933) (149 L.T. 332), where du Parcq, J., decided that no deduction of tax on earnings was to be made and this was followed by Atkinson, J., in *Jordan* v. *Limmer & Trinidad Lake Asphalt Co., Ltd.* (6) ([1946] 1 All E.R. 527). In assessing in the latter case the amount of wages lost by an injured plaintiff, the learned judge refused to take into account the weekly amount deducted for tax commonly referred to as P.A.Y.E. Both these cases were considered and approved by the Court of Appeal in *Billingham* v. *Hughes* (9). There have been two cases in the Court of Session on this subject. In the first, *M'Daid* v. *Clyde Navigation Trustees* (5) (1946 S.C. 462), the Lord Ordinary (Lord Sorn) decided that the incidence of tax should be taken into account, while in *Blackwood* v. *Andre* (8) (1947 S.C. 333), Lord Keith, as Lord Ordinary, came to the same conclusion as had du Parcq and Atkinson, JJ. That the contention now put forward by the appellants was never raised before 1933, despite the heavy taxation that had obtained since the first war, is, no doubt, a point in favour of the respondent. Communis opinio, said Lord Ellenborough, C.J., in *Isherwood* v. *Oldknow* (12) (1815) (3 M. & S. at p. 396), is evidence of what the law is, and it would certainly appear as if the opinion of the profession and of those specially affected by these matters, like insurance companies, was that tax should be left out of account in the assessment of damages. At the same time, it must be remembered that in very many, I think it may be said in most, accident cases, the plaintiffs are persons whose tax liability would make but little difference to the amounts awarded and taxation is now far higher than it was before the last war. Moreover, the sums awarded in these cases are generally on a considerably higher scale than formerly. This is, no doubt, due partly to the fall in the value of money but in road accident cases also to the fact that fast-moving motor cars are apt to inflict much greater damage than did horse drawn vehicles. Probably the highest sum ever awarded in an accident case in the last century was £16,000 which Dr. Phillips was awarded against the London and South Western Railway Co. in 1879 (*Phillips* v. *London & South Western Ry. Co.* (13) (1879), 5 C.P.D. 280). In those happy days, the income tax was 3d. in the £ and there was no surtax. With income tax and surtax at present rates, and with damages on the high scale that so often has to be applied nowadays, the question of principle raised in the present case is one of the greatest importance.

In an action for personal injuries, the damages are always divided into two main parts. First, there is what is referred to as special damage which has to be specially pleaded and proved. This consists of out of pocket expenses and loss of earnings incurred down to the date of trial, and is generally capable of substantially exact calculation. Secondly, there is general damage which the law implies and which is not specially pleaded. This includes compensation for pain and suffering and the like and, if the injuries suffered are such as to lead to continuing or permanent disability, compensation for loss of earning power in the future. The basic principle, so far as loss of earnings and out of pocket expenses are concerned, is that the injured person should be placed in the same financial position so far as can be done by an award of money as he would have been had the accident not happened, and I will endeavour to apply this in the first place to the special damage claimed in respect of the loss of earnings. Hitherto the decisions, other than that of LORD SORN in *M'Daid* v. *Clyde Navigation Trustees* (5), have treated the incidence of tax on a man's earnings as res inter alios acta. This expression in this context is, I think, misleading. A plaintiff may seek to increase, or a defendant to diminish, damages by items which are held to be too remote. The mere fact that the item arises as between plaintiff and a third party would not seem to be the test. In a wrongful dismissal or personal injuries action, the fact that a plaintiff has obtained remunerative employment with a third party is normally relevant, though it would fall within the words res inter alios acta. The question is whether taxation is, or is not, too remote to be taken into account. A plaintiff claims loss of earnings because he has been prevented from fulfilling a contract of service or earning wages, or, if a professional man, earning fees from clients or, if a trader, from dealing with customers. Tax is imposed by law; the state exacts a certain proportion of income which varies with the amount of the taxable income. There is a standard rate of income tax, but there are allowances, and no one pays the standard rate on each pound of his income. Surtax is graded according to the amount of income. The taxpayer must pay and, in my opinion, it cannot make any difference whether he receives the gross income and pays his tax later, as he does if assessed under Sch. D, or whether it is deducted before he receives it, as is the case with tax under Sch. E or P.A.Y.E. In either case, to say that a taxpayer has the benefit of his full income is, in my opinion, to be out of touch with reality, to use the words of LORD SORN in *M'Daid* v. *Clyde Navigation Trustees* (5). As he said, with income tax at 10s. in the £ (to say nothing of surtax) to award a person damages without regard to tax would be like giving him just double the amount of his loss*. The simplest case to take, no doubt, is that of a person assessed under Sch. E. A certain salary is attached to the office, but that which he will receive is, at the present rate of taxation, the salary less a very substantial percentage which is deducted for tax before payment. If, therefore, he is disabled by an accident from earning his salary, I cannot see on what principle of justice the defendants should be called on to pay him more than he would have received if he had remained able to carry out his duties. A taxpayer assessed under Sch. D can, no doubt, make provision for payment as he pleases. It may be that from time to time he has to sell capital to enable him to pay his tax if he has spent his income before the tax becomes due, but I cannot see any principle on which the amount he is to receive as damages should depend on whether he is assessed under one schedule or another. Though the tax is not payable till a year after the income is earned, the liability, which is common to all except those who, by reason of the smallness of their income are exempt altogether, always remains and must be discharged. Damages which have to be paid for personal injuries are not punitive, still less are they a reward. They are simply compensation, and this is as true with regard to special damage as it is with general damage.

As a result of allowing this appeal, the damage claimed for loss of earnings must be the sum of £4,945, and for future earnings £1,750, this being the sum which the trial judge awarded on the basis of the figures agreed by the parties if tax had to be taken into account. We were not informed what the calculations were which had resulted in this figure. But, in considering special damage in these cases, the rate of tax to be taken must, as it seems to me, be the effective rate of income tax and, if necessary, surtax, which would have been applicable to the sums in question if they had been earned. That rate depends on the combination of a number of factors that may vary with each case—allowances, reduced rates, surtax rates, other income of the claimant or his wife, charges or reliefs. The task of determining it may not always be an easy one, but, in complicated cases, it is to be hoped that the parties, with the help of accountants, will be able to agree figures. If not, the court must do its best to arrive at a reasonable figure, even though it cannot be said to be an exact one.

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* See p. 801, letter A, ante.

The assessment of general damages in these cases is always a matter of difficulty. I do not think that " restitutio in integrum " has any application to general damages. The plaintiff receives compensation and not restitution. If he has lost an eye or a limb he can be compensated by money, but that will not restore what he has lost. So, too, if his earning capacity is lessened or destroyed, the loss cannot be measured so as to ensure that he is no worse off in the future than he was in the past and, indeed, if it turned out that the amount of his disability was less than was anticipated at the trial, he might even be over-compensated. On this matter, I would quote VISCOUNT DUNEDIN in *Admiralty Comrs.* v. *Susquehanna (Owners), The Susquehanna* (14) ([1926] A.C. at p. 661):

> " If the damage be general . . . the quantification of such damage is a jury question. For a jury question no rigid rules, or rules that apply to all cases, can be laid down, but in each set of circumstances certain relevant considerations will arise which . . . it would be the duty of the judge in the case to bring before the jury."

A judge sitting without a jury must act on the same principles, and bear in mind the same considerations, as he would direct a jury to do as to the fair amount to award both for pain and suffering, and for loss of earning capacity, and I think it would be well to remember that it has always been laid down that damages cannot be a perfect compensation. LORD WENSLEYDALE, when one of the judges of the King's Bench as he was for six years, so charged the jury in *Armsworth* v. *South Eastern Ry. Co.* (15) (1847) (11 Jur. 758), and his direction was approved by the Exchequer Chamber in *Rowley* v. *London & North Western Ry. Co.* (16) (1873) (L.R. 8 Exch. 221). In cases where surtax is payable, and the rate has been affected by private income, the nature of that private income will be relevant. If it is a life annuity under a will or settlement, it may well be expected to continue. If it is disposable investments, which might be sold at any time or transferred to a child, less, perhaps little, regard should be had to it. Apart from this surtax complication, I think I should direct a jury somewhat in this way: " You know what the plaintiff was earning before the accident and what he had left to support himself and his family after tax was paid. You know his age. It is for you to consider for how long he would be likely to earn at the present rate. If he is a member of a partnership take into consideration his position in the firm at the time of the accident. If a junior partner, you may well think that his earnings would have increased as time goes on, while, if a senior partner, they might well decrease as he ceases to give the same amount of time to the business of the firm. Remember that whatever he earned would be subject to tax, and that you will already have in mind when assessing his pre-accident income. No one can foresee whether tax will go up or down, and I advise you not to speculate on the subject but to deal with it as matters are at present. You cannot tell what his health would have been had he not been injured, nor what fortune, good or bad, he might have met with. You know he had, when he was injured, a spendable income of so much (adding, if the plaintiff was in partnership, ' you have heard the provisions of his partnership deed providing for an alteration in the shares, and you may consider whether his injury may affect the earnings of the partnership '). Taking all these matters into consideration, you will consider what it is fair that a man of this age should receive in respect of the amount of disability which you find this accident has imposed on him, remembering also that what you give is given once and for all ". My Lords, I do not pretend that such direction is scientific, and there may well be other considerations in particular cases of which to remind oneself or a jury, but, generally, damages must be decided by the application of reasonable common sense. The principles set out above would be applicable in wrongful dismissal actions, in which the court has to calculate damages for loss of earnings which would have been subject to tax had they been earned. It was suggested that the principles might apply in certain computations of compensation under compulsory purchase orders. We were referred to an Irish case, *Comyn* v. *A.-G.* (10) ([1950] I.R. 142), and *W. Rought, Ltd.* v. *West Suffolk County Council* (11) ([1955] 2 All E.R. 337). In this opinion, I am dealing solely with damages in personal injury and wrongful dismissal cases. In the present case, all we are concerned with is whether, in calculating the damages, the incidence of tax should be taken into account, and whether it is an element to be considered in assessing general damage. In my opinion, it is, and I would, therefore, allow the appeal and vary the judgment of PEARCE, J., by substituting the sum of £16,695 for that of £47,720, directing that credit be given for the sum of £7,000 already paid by the appellants. The costs are the subject of agreement between the parties and no order need be made concerning them.

LORD REID: My Lords, the respondent was very seriously injured in a railway accident on Sept. 21, 1951, for which the appellants admit liability. He was senior partner in a firm of civil engineers, and before the accident he was earning a very large income. Although he was sixty-five years of age he made a remarkable recovery. He is still very much handicapped, but he is able to carry on his professional work, though on a reduced scale. His earnings have been much reduced but he still earns a large income, and damages have been assessed on the basis that he will probably be able to continue to do that for a number of years.

The action was tried in March, 1954, and PEARCE, J., awarded a sum of £47,720 as damages. Authorities binding on him, and on the Court of Appeal, required him to assess damages on the diminution of gross income suffered, and to be suffered, by the respondent as a result of the accident, and to leave out of account the incidence of income tax and surtax. The appellants, wishing to bring this matter before this House, requested PEARCE, J., to analyse his award and to make alternative findings of the sums which he would have awarded if the incidence of income tax and surtax were taken into account. The learned judge did this, and all his assessments are accepted as correct. In respect of out of pocket expenses, pain and suffering and loss of amenities (including the fact that the respondent now requires the assistance of a manservant) he awarded £10,000; and there is no appeal against that part of his award. In respect of actual loss of earnings before the end of 1953 he awarded £15,220 if the incidence of tax is not taken into account, and found that, in respect of those additional earnings, the respondent would have had to pay £10,275 more in income tax and surtax. He therefore awarded £4,945 if those taxes have to be taken into account. In respect of estimated future loss of earnings he awarded £22,500 if tax is not to be taken into account, but only £1,750 if tax is to be taken into account. That great disparity is accounted for by the fact that, in spite of his serious handicap, the respondent will still receive a large share of the profits of his firm, so that he will probably still pay surtax at the highest rate. The result is that, if this appeal succeeds, the respondent's damages will be £16,695. It is not disputed that, whatever sum is awarded as damages, it will not be subject to income tax or surtax.

Leaving aside the award of £10,000 which is not challenged, the question before your Lordships is whether the appellants must pay £37,720 based on neglecting the incidence of tax, or £6,695 based on taking that into account. As regards loss of earnings suffered before the end of 1953, it is an ascertained fact that, if the respondent had earned the additional sum of £15,220, he would only have benefited from that to the extent of £4,945 because he would have had to pay the rest in tax. £4,945 represents his real loss for that period. Prospective loss in respect of future earnings can never be a matter of exact calculation, whether one takes gross earnings or the net benefit to the plaintiff remaining after allowing for additional tax liability. But it is accepted in this case that £22,500 is a fair estimate of the present value of the respondent's future loss of gross earnings, and that £1,750 is a fair estimate of the present value of the net benefit which he would have retained after paying tax. So, although the respondent has been awarded £37,720 in respect of loss of earnings caused by the accident, in fact if the accident had not happened he would only have been better off in this respect to an extent represented by an award of £6,695.

It is true that there are several authorities and a long course of practice against taking tax liability into account in assessing damages, but this is not the type of case in which vested interests may have accrued or in which people may have ordered their affairs relying on the validity of existing practice. In my opinion, this is a case in which it is proper for your Lordships to consider the question on its merits as one of principle.

The general principle on which damages are assessed is not in doubt. A successful plaintiff is entitled to have awarded to him such a sum as will, so far as possible, make good to him the financial loss which he has suffered, and will probably suffer, as a result of the wrong done to him for which the defendant is responsible. It is sometimes said that he is entitled to restitutio in integrum, but I do not think that that is a very accurate or helpful way of stating his right. He cannot in any real sense be restored, even financially, to his position before the accident. If he had not been injured he would have had the prospect of earning a continuing income, it may be for many years, but there can be no certainty as to what would have happened. In many cases, the amount of that income may be doubtful, even if he had remained in good health, and there is always the possibility that he might have died or suffered from some incapacity at any time. The loss which he has suffered between the date of the accident and the date of the trial may be certain, but his prospective loss is not. Yet damages must be assessed as a lump sum once and for all, not only in respect of loss accrued before the trial but also in respect of prospective loss. Such damages can only be an estimate, often a very rough estimate, of the present value of his prospective loss.

But the general principle is subject to one qualification. A loss which the plaintiff has suffered, or will suffer, or a compensatory gain which has come, or will come, to him, following on the accident may be of a kind which the law regards as too remote to be taken into account. In my judgment, the real question in this case is whether the plaintiff's liability to pay taxes is something which the law must regard as too remote when determining or estimating what he has lost as a result of the accident. The defendant is only bound to pay damages based on an assessment of the plaintiff's actual and prospective loss taking into account all those factors which are not in law too remote.

It has sometimes been said that tax liability should not be taken into account because it is res inter alios. That appears to me to be a wrong approach. Let me take the case of a professional man who is injured so that he can no longer earn an income. Before his accident he earned fees and he paid rent and rates for his office, the salaries of clerks, the expenses of running a car and other outgoings, and he would have continued to do so if he had not been injured. Apart from one matter to which I shall refer later, I cannot see why these expenses are any less res inter alios than his payments of income tax in respect of his net earnings. Indeed, he could not avoid liability to pay tax, but he might have been able to diminish his outgoings if he had chosen to spend more time and effort himself on his work, or in travelling in the course of his work. Yet no one would suggest that it is improper to take into account expenditure genuinely and reasonably incurred, or that the plaintiff's damages should be assessed on the fees which he would have continued to receive without regard to the outgoings which he would have continued to incur.

In *Billingham* v. *Hughes* (9) ([1949] 1 All E.R. 684), the leading authority on which the respondent relies, I think that this fact was not fully appreciated. For example, it was said that the doctor in that case was entitled to restitutio vis-à-vis his patients, i.e., to receive his fees in full, but it cannot have been intended that his outgoings should be disregarded in assessing damages. And it was also said that a man's income is his own to do what he likes with it and that the defendant has no concern with what happens to his income. But that argument goes much too far. The gross fees which the doctor receives are his own to do what he likes with them. He is not bound to spend them in paying his rent or rates or other outgoings, any more than he is bound to spend them in paying his taxes. But, if he does not meet any of these obligations either out of his fees or from some other source, he will ultimately be made bankrupt. The defendant has no more concern with whether or how he pays his rent than with whether or how he pays his taxes. What the defendant is concerned with is how much the plaintiff has lost.

In a case where the wrongdoer is the plaintiff's employer, it has sometimes been said that he would have had to continue to pay the plaintiff's full wages or salary if there had been no accident or wrongful dismissal, so why should he take advantage of his own wrong to diminish his liability. That argument has lost some of its force since the introduction of the system of P.A.Y.E., but it would be strange if the introduction of a new method of collecting tax altered the legal position and, in any event, the argument would remain for surtax. The real answer is, I think, that before the wrong the employer was paying for the plaintiff's services, whereas now he is paying the plaintiff's loss, and he will have to pay someone else to perform the services. And this argument also if valid would go too far, for it would seem to involve the proposition that, if a dismissed employee gets other work, the employer ought not to be able to take advantage of that.

I return to the question whether the fact that the plaintiff now has to pay less tax than he would have done is a factor too remote to be taken into consideration. Taxation is not something purely personal to the plaintiff. The obligation arises from Acts of Parliament and applies to all, and if those Acts directly related the amount of tax to the amount of income I should have no doubt about the matter at all. My only difficulty arises from the fact that the exact amount by which the plaintiff's liability for tax has diminished may depend, and sometimes largely depend, on other matters besides the amount of the diminution of his earned income. Let me take, for example, a man with an earned income of £1,000 per annum, and suppose that he has an unearned income of £2,000 or that his wife has an income of £2,000 per annum. If, by reason of an accident, he can no longer earn an income, his future tax liability is diminished by a much greater amount than it would have been if his only income had been the £1,000, and, therefore, his real loss is less than it would have been in that case. Other instances could be taken, but the difficulties are similar to those in the case which I have supposed.

I do not think that it is possible to formulate any principle by which it can be determined what is and what is not too remote. MAYNE ON DAMAGES (11th Edn.), p. 151, refers to " Matter completely collateral ", and for a general description of what is too remote I cannot find better words, but I do not think that every case can be solved merely by applying those words to it. Taking this description, however, and applying it to the present case I do not think that the respondent's personal position is completely collateral. It is not something brought in as a separate factor, but only something which helps to quantify an obligation which is imposed by an Act of Parliament as a consequence of earning income, and I cannot regard that obligation as in itself collateral—certainly not completely collateral.

Another element to be considered is whether bringing in the matter of liability to tax would seriously increase the duration and expense of trials; for practical, as well as theoretical, considerations weigh in determining what is too remote. But I do not think that there would be serious practical effects. In the great majority of cases the matter would be simple, and even in more complicated cases it would not cause very much difficulty. It has caused little difficulty in the present case. No doubt some detailed examination is, or may be, necessary as regards actual loss suffered between the date of the accident and the date of the trial, but, as regards prospective loss, examination in full detail would be of little assistance and, indeed, would generally not be possible, because, as I have said, there can only be an estimate of loss of future earnings, and there can only be an estimate of the plaintiff's other future income, and, therefore, there can only be an estimate, and probably only a rough estimate, of what the future tax position of the plaintiff would have been, and will be. In considering the importance of practical difficulties, I would weigh them against the importance of the element of tax liability, with tax at modern levels, in determining the real loss which the plaintiff has suffered. I cannot find any sufficient reason, theoretical or practical, for excluding the element of tax liability and I am, therefore, of opinion that this appeal should be allowed.

LORD RADCLIFFE: My Lords, I have had an opportunity of considering in advance the speech of my noble and learned friend, LORD GODDARD. I agree with it, as I agree with the motion which is to be proposed.

LORD TUCKER: My Lords, having now heard this point argued three times—twice in your Lordships' House and once in the Court of Appeal—I am persuaded that the decision in *Billingham* v. *Hughes* (9) ([1949] 1 All E.R. 684), to which I was a party in the Court of Appeal, was erroneous.

I agree that the phrase res inter alios acta does not assist in the solution of the problem, but the difficulty is, I feel, in deciding what items of expenditure which follow the earning of profits are to be taken into consideration and which are to be ignored. Such items are clearly distinguishable from those which are incurred in the process of earning the profits and which have to be deducted in the computation thereof. I think the true answer is that expenditure which—although not actually a charge on earnings—is imposed by law as a necessary consequence of their receipt is relevant to the ascertainment of the loss suffered by the party injured.

In the present case, the figures have been agreed and have been set out by the trial judge in detail in a manner which has been most helpful, but it should not, I think, be assumed that your Lordships are giving tacit approval to the sums awarded under the different heads, or to the method of arriving at them. Nor should it be thought that it is always incumbent on judges who have to apply your Lordships' decision in the present case to itemise the damages they award in such detail. I agree that the appeal succeeds.

LORD KEITH OF AVONHOLM: My Lords, after listening to the full and able arguments for both sides in this case, I have considered afresh the opinion I expressed in *Blackwood* v. *Andre* (8) (1947 S.C. 333). With some regret, knowing the views of your Lordships, I have found myself unable to change my opinion. I propose to explain my reasons very briefly.

I feel great difficulty in the view that the incidence of taxation on an injured taxpayer should be any concern of the wrongdoer and should be used to minimise an award of damages in his favour. To many it may seem somewhat hard that the more tax a man has paid before he meets with an accident the less damages relatively will he recover from the person who has injured him. Two men, each earning £2,000 a year, are injured in the same accident and are totally disabled for life. A has income from investments of £5,000 a year, or a wife with income of that amount. B is a single man with no independent income. It would be no answer for the wrongdoer to say, A has got a wealthy wife, or a large independent income, and, therefore, he does not need, and ought not to recover, any damages except for pain and suffering, loss of amenities and out of pocket expenses. The law would say the wealthy wife and the independent income are not his concern. But, by taking net income after payment of tax as the measure of damages, the wrongdoer achieves by a back door precisely what is refused to him by the direct entrance. In such an event, B will receive full compensation for loss of his earning capacity of £2,000 a year so far as judge or jury with the limitations of human foresight and possibilities of human error can assess it. A will receive insignificant and, some may think, derisive damages for loss of exactly the same income. I do not ignore the fact that B may need the damages more than A, and the difference may seem to introduce a measure of equity as between A and B, to the advantage of the wrongdoer, but the law has not yet reached the stage of assessing damages for a legal wrong on the basis of need.

The whole issue in this case boils down to the question whether a man is to be compensated for loss of wage-earning capacity on the basis of gross earnings, or net earnings after deduction of tax. The first alternative provides a simple rule which has been adopted for generations and creates the minimum of trouble. The second alternative must, I think, give rise to serious difficulties and complications. Nor is the matter confined to British income tax. It was conceded in argument and is, I think, inevitable that, under the second alternative, if a foreigner is injured in this country, the courts will have to pay regard to the incidence of his foreign income tax, if any. It is a strange turn of fortune's wheel that the intricacies and accidents of fiscal legislation should have its repercussions in the assessment of damages in the civil courts.

Nor does the matter end there. A man may be content to earn a large income with a high rate of tax, with a view to prospective benefits or advantages. He may propose to make payments under covenants to relatives and others, with consequent taxation reliefs, or to maintain and possibly increase insurance premiums on life and endowment policies, or be content to enjoy the minimal benefits of earning a large salary under a system of high taxation with a view to enjoying in retirement a better pension. To take account of his existing tax position at the date of the accident will make no allowance for these contingencies. They may be very real intentions, the opportunity of realising which may depend on a man's maintaining his earning capacity. It may be said they can be taken account of by judge or jury. If so, new and difficult factors will be introduced into the computation of damages which would be unnecessary if damages were assessed on the basis of gross earnings.

There is, I think, a deceptive simplicity in looking at the matter from the point of view of loss of earnings down to the date of trial. It is, of course, obvious that, if the injured man had been able to work, he would have paid tax on his earnings, and it is attractive to say that his damages for ascertained loss of earnings should be calculated on net earnings after deduction of tax. But, if an award of damages for loss of earnings is not subject to tax, to deduct tax before assessing damages seems to me singularly like exercising taxing powers in an indirect way. It must be remembered also that income tax is an annual tax imposed by the will of Parliament. To fix damages on an estimate of future taxation is impossible, and to assess them de futuro on the basis of existing taxation savours of legislation by the judiciary. Further, to fix them on the basis of existing taxation without any knowledge of what the future commitments and obligations and personal status of the injured person will be, or would have been, seems to me to be unreal. On all counts the safe and simple rule, in my opinion, is to exclude the element of taxation from the assessment of damages. If there is a case for thinking that assessing damages on a basis of gross earnings in actions for personal injuries, or for wrongful dismissal, enables the individual to escape his fair contribution to the national revenue, the position, in my opinion, should be rectified by legislation.

I would dismiss the appeal.

LORD SOMERVELL OF HARROW: My Lords, I agree with the opinion which has just been delivered by my noble and learned friend, LORD GODDARD, and there is nothing which I wish to add to it. I agree that the appeal succeeds.

Appeal allowed.

Solicitors: *M. H. B. Gilmour* (for the appellants); *Wilkinson, Howlett & Moorhouse* (for the respondent).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

BAMBRIDGE *v.* INLAND REVENUE COMMISSIONERS.

[HOUSE OF LORDS (Lord Morton of Henryton, Lord MacDermott, Lord Tucker and Lord Cohen), November 7, 8, December 8, 1955.]

Income Tax—Avoidance—Transfer of assets to company in Canada—" Associated operations "—Whether in relation to any transfer of assets—Residuary bequest in will—Finance Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8 *c.* 34), *s.* 18 (1), (2).

In December, 1933, the taxpayer's parents respectively sold to a Canadian company all their Canadian and United States investments, receiving as consideration therefor shares and debentures of that company. On Jan. 12, 1934, the taxpayer's father settled his shares and debentures in the Canadian company on trusts under which he himself received a first life interest with remainder to the taxpayer's mother for life with remainder to the taxpayer for life. The settlement contained a power of revocation which was never exercised. On the same date, the taxpayer's mother made a similar settlement of her shares and debentures in the Canadian company, but in 1937 she revoked it. On Jan. 18, 1936, the taxpayer's father died and on Dec. 6, 1938, the taxpayer's mother made a will containing a residuary gift under which her residuary estate was to be held on trusts which included a first life interest to the taxpayer. The will contained no specific reference to the Canadian shares and debentures. On Dec. 19, 1939, the taxpayer's mother died and her will was proved on Feb. 19, 1940, in the Principal Probate Registry. For the years 1948-49 and 1949-50, the taxpayer was assessed to income tax and surtax under the Finance Act, 1936, s. 18, as amended by the Finance Act, 1938, s. 28, in respect of income from the Canadian shares and debentures both under her father's settlement of 1933 and her mother's will. It was common ground that the sales to the Canadian company were transfers to which s. 18 of the Act of 1936* applied, and also that the settlements of January, 1934, were " associated operations " within that section.

Held: the taxpayer was properly assessed to income tax and surtax because (i) she acquired her right to the income under her father's settlement by means of the transfer of December, 1933, and the settlement, and not by virtue of the death of her father in her lifetime without having revoked the settlement; and (ii) as regards the income enjoyed by the taxpayer under her mother's will the taxpayer's right to the income was acquired by means of the will, which was an associated operation, and not by virtue

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* The material terms of s. 18 of the Finance Act, 1936, as amended by the Finance Act, 1938, s. 55 (7) and Sch. 5, are printed at pp. 813, 814, post.

A of her mother's dying in the taxpayer's lifetime without having revoked her will, that being merely the event the fulfilment of which made the gift effective; moreover (a) the will was made "in relation to" the Canadian shares and debentures notwithstanding that they were not specifically referred to, and (b) the taxpayer's title to the income from the Canadian shares and debentures was derived from the will, not from the probate B thereof, so that it was immaterial whether the probate was or was not an associated operation.

Cooper v. *Cooper* (1874) (L.R. 7 H.L. 53) applied.

Decision of the COURT OF APPEAL ([1954] 3 All E.R. 682) affirmed.

[For the Finance Act, 1936, s. 18, see 12 HALSBURY'S STATUTES (2nd Edn.) 354; see now the Income Tax Act, 1952, s. 412, 31 HALSBURY'S STATUTES C (2nd Edn.) 390.]

Cases referred to:

(1) *Congreve* v. *Inland Revenue Comrs.*, [1948] 1 All E.R. 948; [1948] L.J.R. 1229; 30 Tax Cas. 163; 2nd Digest Supp.

(2) *Meyappa Chetty* v. *Supramanian Chetty*, [1916] 1 A.C. 603; 114 L.T. D 1002; L.R. 43 Ind. App. 113; sub nom. *Chetty* v. *Chetty*, 85 L.J.P.C. 179; 23 Digest 84, *721*.

(3) *Cooper* v. *Cooper*, (1874), L.R. 7 H.L. 53; 44 L.J.Ch. 6; 30 L.T. 409; 23 Digest 468, *5375*.

Appeal.

Appeal by the taxpayer from an order of the Court of Appeal, dated Nov. 18, E 1954, and reported [1954] 3 All E.R. 682, affirming in part and reversing in part an order of HARMAN, J., dated June 16, 1954, and reported [1954] 3 All E.R. 86. The taxpayer had appealed to HARMAN, J., by way of Case Stated from a decision of the Special Commissioners of Income Tax.

The facts appear in the opinion of LORD COHEN.

F *Sir Andrew Clark, Q.C.*, *Roy Borneman, Q.C.*, and *R. A. Watson* for the appellant. *J. Pennycuick, Q.C.*, *Sir Reginald Hills* and *E. B. Stamp* for the respondents.

The House took time for consideration.

Dec. 8. The following opinions were read.

LORD MORTON OF HENRYTON: My Lords, I am entirely in agree- G ment with the speech which is about to be delivered by my noble and learned friend, LORD COHEN, and I do not desire to add anything to it.

LORD TUCKER: My Lords, I have had the advantage of reading in print the speech which is about to be delivered by my noble and learned friend, LORD COHEN. I agree with it and have nothing which I wish to add.

H **LORD COHEN:** My Lords, the appellant, who is the daughter of the late Mr. and Mrs. Rudyard Kipling, appeals against assessments to income tax and surtax made on her in respect of the income tax years 1948-49 and 1949-50, pursuant to s. 18 of the Finance Act, 1936, as amended by s. 28 of the Finance Act, 1938. That section, the sidenote of which is:

> "Provisions for preventing avoidance of income tax by transactions I resulting in the transfer of income to persons abroad",

is, so far as material to the question at issue on this appeal, in the following terms:

> "For the purpose of preventing the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax by means of transfers of assets by virtue or in consequence whereof, either alone or in conjunction with associated operations, income becomes payable to persons resident or domiciled out of the United Kingdom, it is hereby enacted as follows:—(1) Where such an individual has by means of any such transfer,

> either alone or in conjunction with associated operations, acquired any rights by virtue of which he has, within the meaning of this section, power to enjoy, whether forthwith or in the future, any income of a person resident or domiciled out of the United Kingdom which, if it were income of that individual received by him in the United Kingdom, would be chargeable to income tax by deduction or otherwise, that income shall, whether it would or would not have been chargeable to income tax apart from the provisions of this section, be deemed to be income of that individual for all the purposes of the Income Tax Acts . . . *(2) For the purposes of this section an associated operation means, in relation to any transfer, an operation of any kind effected by any person in relation to any of the assets transferred or any assets representing, whether directly or indirectly, any of the assets transferred, or to the income arising from any such assets, or to any assets representing, whether directly or indirectly, the accumulations of income arising from any such assets."

Sub-section (3) lays down rules for the determination of the question whether an individual has, for the purposes of the section, power to enjoy income of a person resident or domiciled out of the United Kingdom, but, as the appellant admits that she has that power, it is unnecessary to set out the terms of that sub-section, or of sub-s. (4), which contains further directions as to how that question is to be determined.

The facts which gave rise to the assessments in the present case can be shortly stated as follows: On Dec. 14, 1933, Mr. and Mrs. Kipling respectively sold to a Canadian company called Kamouraska Investments, Ltd. (hereinafter called "Kamouraska") all their Canadian and United States investments, receiving as consideration therefor capital shares and debentures of Kamouraska. On Jan. 12, 1934, Mr. Kipling settled his shares and debentures in Kamouraska on trusts whereunder, so far as material, Mr. Kipling received a first life interest with remainder to Mrs. Kipling for life with remainder to the appellant for life. The settlement contained a power of revocation reserved to Mr. Kipling which was never exercised. On the same date Mrs. Kipling made a similar settlement of her holding of shares and debentures in Kamouraska, but it is unnecessary to set out the effect of that settlement since it was revoked by Mrs. Kipling on June 16, 1937. Mr. Kipling died on Jan. 18, 1936. On Dec. 6, 1938, Mrs. Kipling made a will containing a residuary gift under which her residuary estate was to be held on trusts which included a first life interest to the appellant. The said will contained no specific reference to Mrs. Kipling's shares and debentures in Kamouraska. She died on Dec. 19, 1939, without having revoked or altered her will, which was duly proved in the Principal Probate Registry on Feb. 19, 1940.

No claim under s. 18 was made by the Inland Revenue authorities in respect of any year prior to the financial year 1948-49, but in respect of that year the assessment which I have mentioned was made. This was, no doubt, the result of the decision of this House in *Congreve* v. *Inland Revenue Comrs.* (1) ([1948] 1 All E.R. 948), which decided that s. 18 applied, notwithstanding that the taxpayer whom it was sought to charge was not a party to the transfer.

The appellant appealed against the assessments for this and the next following year, and, on Dec. 30, 1952, the commissioners dismissed her appeal, but, at the request of the appellant, stated a Case for the opinion of the High Court, pursuant to the Income Tax Act, 1952. The matter came before HARMAN, J., on June 16, 1954. He dismissed the appeal so far as it related to the securities formerly the property of Mr. Kipling, but allowed it so far as Mrs. Kipling's securities were concerned, because there was no specific reference to the securities in the will and, in his view, therefore, the will could not be said to have been made *in relation to* any of the assets transferred. From this decision, so far as it affected the property derived by the appellant from her mother, the respondents appealed, and the appellant lodged a cross-appeal so far as the property derived by her from her father was concerned. The matter came before the Court of Appeal on Nov. 18, 1954. That court allowed the respondents' appeal and dismissed the appellant's appeal. It is from this decision that the appellant now appeals.

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* The words omitted were repealed by s. 55 (7) of and Sch. 5 to the Finance Act, 1938, which, by s. 28, also added sub-sections (1A) (1B), which are not relevant for the purposes of this case.

It is common ground between the parties that the sales to Kamouraska by Mr. and Mrs. Kipling on Dec. 14, 1933, were transfers, to which s. 18 of the Finance Act, 1936, applied. It is also common ground that the settlements of Jan. 12, 1934, by Mr. and Mrs. Kipling were " associated operations " within the meaning of s. 18. But the appellant alleges that, to make her liable under s. 18, the respondents must establish that her power to enjoy the income of Kamouraska was wholly the result of the transfer either alone, or in conjunction with, associated operations. She claims that the respondents have failed to establish that this was the position in her case. So far as Mr. Kipling's holdings in Kamouraska are concerned, she says that her power to enjoy the income of Kamouraska was not wholly derived from the transfer of Dec. 14, 1933, and the settlement of Jan. 12, 1934, but was attributable also to the death of Mr. Kipling in her lifetime without having revoked the settlement. It being admitted that Mr. Kipling's death could not be said to be an associated operation, she says that it follows that her power to receive the income was not derived wholly from the transfer and associated operation. As regards Mrs. Kipling's holdings in Kamouraska, she says that her title depends on the will of Mrs. Kipling, and that the making of that will is not an associated operation within the meaning of s. 18, (a) because her power to enjoy the income was dependent on Mrs. Kipling dying in her lifetime without having revoked her will, and (b) because the will contained no specific reference to Mrs. Kipling's holdings in Kamouraska, and, accordingly, the will could not be said to be, in the words of sub-s. (2) " effected . . . in relation to any of the assets transferred ". The appellant adds that, even if your Lordships are against her on this point, still she should succeed in her appeal because the appellant's power to enjoy the income of Kamouraska was derived not only from the will but also from the probate thereof.

My Lords, the leading judgment in the Court of Appeal was given by JENKINS, L.J. On the points with which he deals I find myself in such complete agreement with his reasons for rejecting the appellant's submissions that I am content to adopt his reasoning as my own and to say only that it seems to me as clear as it did to him ([1954] 3 All E.R. at p. 686) that, (i)

> " An interest in remainder, or, for that matter a contingent interest, given by settlement, is given by means of the settlement and not by means of the happening of the event which brings the interest into possession or, as the case may be, fulfils the contingency ",

and (ibid., at p. 687) (ii)

> " I fail to see how a will which disposes of property can reasonably be said not to have been made ' in relation to ' the property of which it disposes; nor can I see any justification for distinguishing between property specifically disposed of and property comprised in a residuary gift, and holding that the will relates to the former but not to the latter."

The first of these citations is sufficient to dispose of the appellant's argument so far as her interest under her father's settlement is concerned. The combined effect of the two citations would suffice to dispose of her arguments as regards her interest under her mother's will, but for two points, apparently not taken in the Court of Appeal, to which I must refer shortly—(i) that the will was not, and could not, be an associated operation because it could be revoked and, even while unrevoked, had no operative effect during the lifetime of the testatrix, and

(ii) that the appellant's power to enjoy the income of Kamouraska was derived not only from the will but also from the probate thereof.

As regards the first point, I am unable to accept the view that, pending the death of a testator, a will is not an operation of any kind effected by a person in relation to any of the assets comprised therein. No further action by the testator is required to make it effective after his death in relation to the assets comprised in his estate, and the fact that it is impossible in his lifetime to be sure what assets will be affected by its provisions seems to me immaterial. On his death, the assets affected are identified and the will is an operation effected by the testator in relation to the assets so ascertained (see in this connection s. 24 of the Wills Act, 1837). If, as in this case, those assets included assets transferred, or assets representing assets transferred, it necessarily follows that the will is an associated operation within the meaning of s. 18 (2).

I turn now to the second point. Counsel for the appellant said that probate is not an associated operation because it is done by the High Court and not by any person and, under the section, an operation cannot be an associated operation unless it is effected by some person. I do not think this argument helps him since, as counsel for the respondents said, the probate was no part of the appellant's title to enjoy the income of Kamouraska. He called our attention to a passage in Williams on Executors and Administrators (13th Edn.), p. 57*, and to a decision of the Privy Council in *Meyappa Chetty* v. *Supramanian Chetty* (2) ([1916] 1 A.C. at p. 608), where the judgment was given by Lord Parker of Waddington, which clearly established that an executor derives his title and authority from the will of a testator and not from any grant of probate. He also referred us to the decision of this House in *Cooper* v. *Cooper* (3) (1874) (L.R. 7 H.L. 53), which shows that the interest of beneficiaries under a will and the interest of next of kin in an intestacy both vest at death, subject only to the payment of the debts and the administration expenses of the testator or intestate.

We are not concerned here with the title of the executor, but the case last mentioned, in my opinion, establishes that the appellant's power to enjoy the income depends on the will of the testatrix and not on the probate of that will. She might have difficulty without production of probate in proving her right if it was disputed, but, as was said in the passage I have cited from Williams on Executors, though an executor cannot rely on his title in any court without production of the probate, probate is merely operative as the authenticated evidence of the executor's title. So, too, if a beneficiary has to prove her title, it seems to me that probate is merely a question of evidence and not of title.

My Lords, for the reasons given by Jenkins, L.J., and for those I have added above on the points which were not taken in the Court of Appeal, I would dismiss this appeal with costs.

I am asked by the noble and learned Lord, **LORD MACDERMOTT**, to say that he agrees with the conclusion I have reached and the reasons I have given therefor.

Appeal dismissed.

Solicitors: *Field, Roscoe & Co.* (for the appellant); *Solicitor of Inland Revenue.*

[*Reported by* G. A. Kidner, Esq., *Barrister-at-Law.*]

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* "Where an executor is appointed by a will, he derives title from the will, and the property of the deceased vests in him from the moment of the testator's death, so that probate is said to have relation to the time of the testator's death. Thus, though he cannot rely on his title in any court without production of probate, probate is merely operative as the authenticated evidence of the executor's title."

R. *v.* COTTRELL.

[Cardiff Assizes (McNair, J.), November 16, 1955.]

Street Traffic—Disqualification for holding licence -Disqualification for driving motor vehicles of all classes for five years —Whether disqualification removable in part on subsequent good behaviour—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5 *c.* 43), *s.* 7 (3).

The applicant pleaded guilty in 1954 to a charge of dangerous driving and was sentenced to a fine and was disqualified for driving motor vehicles of any class for five years. On imposing sentence the court intimated that to vary the disqualification after one year so as to permit the applicant to drive a motor cycle would be in keeping with the sentence if he were of good behaviour meanwhile. After a year had elapsed the applicant, who had been of good behaviour, applied under s. 7 (3) of the Road Traffic Act, 1930, for the disqualification to be removed so as to enable him to ride a motor cycle.

Held: the Road Traffic Act, 1930, s. 7 (3), did not empower the court to vary the disqualification by removing it in part, although the disqualification could be removed altogether; and accordingly the application must be refused.

[For the Road Traffic Act, 1930, s. 7 (3), see 24 Halsbury's Statutes (2nd Edn.) 580.]

Application.

The applicant, having pleaded guilty to a charge of dangerous driving, was sentenced at Swansea Assizes in 1954 to a fine and was disqualified for driving any class of motor vehicle for a period of five years. In imposing the disqualification the court intimated that if after one year had elapsed the court were satisfied with the applicant's behaviour it would not be out of keeping with the sentence that his disqualification should be varied to permit the applicant to ride a motor cycle. After a year had elapsed the applicant, who had been of good behaviour since the time of his sentence, applied to the court to have the disqualification imposed on him varied so as to permit him to drive a motor cycle.

John Rutter for the applicant.
J. F. Coplestone-Boughey for the respondent.

McNAIR, J., having referred to the imposing of the disqualification, to the court's intimation and to the applicant's subsequent good behaviour, continued: In the circumstances if I felt that I had power to accede to the application, I should have been prepared to accede to it. It is an application for varying the disqualification so as to permit the applicant to ride a motor cycle whilst maintaining the general disqualification; it is not an application for the removal of the whole disqualification. The application is made under s. 7 (3) of the Road Traffic Act, 1930, which empowers a person who by virtue of a conviction is disqualified for holding or obtaining a licence to apply after the expiration of six months for its removal. The sub-section further provides:

> "on any such application the court may, as it thinks proper, having regard to the character of the person disqualified and his conduct subsequent to the conviction or order, the nature of the offence, and any other circumstances of the case, either by order remove the disqualification as from such date as may be specified in the order or refuse the application."

In that provision only two powers appear to be given to the court, viz., a power of removing the disqualification, and a power to refuse the application.

Under s. 6 of the Road Traffic Act, 1930, however, under which the original disqualification was imposed, there is an express power for the court, if it thinks fit, to limit the disqualification imposed to the driving of a motor vehicle of the same class or description as the vehicle in relation to which the offence was committed. Although I think that the facts would justify the exercise of discretion in favour of varying the disqualification in the way in which the applicant asks—at any rate it would be in line with the views of the learned judge who imposed the disqualification—I do not feel that I have power to do anything other than remove the disqualification or refuse the application. Seeing that I do not think that the facts justify the removal of the whole disqualification, I exercise the alternative power given under the enactment and refuse the application.

There may be cases where it may be convenient that the court should have power to vary a disqualification. On the construction of s. 7 (3) of the Road Traffic Act, 1930, it is my opinion, however, as at present advised, that the section does not give a power of variation. It is, however, a question on which other minds might reach a different conclusion.

Application refused.

Solicitors: *Edward Lewis, James & Possart,* Cardiff (for the applicant); *Director of Public Prosecutions.*

[*Reported by* SEYS LLEWELLYN, ESQ., *Barrister-at-Law.*]

Re SIMMONS' TRUSTS. SIMMONS *v.* PUBLIC TRUSTEE AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), November 30, 1955.]

Settlement—Variation of trusts—Jurisdiction of court to authorise transaction not authorised by settlement or by law—Land held by trustees of settlement on trust for sale—Settled Land Act, 1925 (15 & 16 *Geo.* 5 c. 18), *s.* 64—*Law of Property Act,* 1925 (15 & 16 *Geo.* 5 *c.* 20), *s.* 28 (1).

Trust and Trustee—Trustee for sale—Trust property including land—Power to effect, under order of court, transaction not authorised by settlement or by law—Settled Land Act, 1925 (15 & 16 *Geo.* 5 *c.* 18), *s.* 64—*Law of Property Act,* 1925 (15 & 16 *Geo.* 5 *c.* 20), *s.* 28 (1).

By a settlement, dated Oct. 15, 1923, the trust fund was to be held, in three equal shares, for the benefit of the settlor and her two brothers. Under the trusts relating to her share, the settlor took a protected life interest in the income of the share which was held on trusts after her death for her children. Subject to these trusts the settlor had a general power of appointment, exercisable by will or codicil, over her share, and, in default of and subject to any such appointment, the share, on the settlor's death, was to accrue to the other shares which were settled on similar trusts, mutatis mutandis, for the settlor's brothers. The trust fund included certain land which was vested in the trustees of the settlement on trust for sale. The settlor was now over sixty-three years of age and had not married. She applied to the court, under s. 28 (1) of the Law of Property Act, 1925, and s. 64 of the Settled Land Act, 1925,* for an order authorising the trustees to give effect to a scheme whereby she would receive half the capital of her share absolutely and would release her general power of appointment over the other half.

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* The terms of s. 28 (1) of the Law of Property Act, 1925, are set out at p. 820, letter F, post, and those of s. 64 of the Settled Land Act, 1925, at pp. 820, 821, post.

Held: (i) the power conferred by s. 64 (1) of the Settled Land Act, 1925, on a tenant for life to effect under an order of the court a transaction (not otherwise authorised by the settlement) if in the opinion of the court it were for the benefit of the persons interested under the settlement was among the powers conferred on trustees for sale of land by s. 28 (1) of the Law of Property Act, 1925.

Re Wellsted's Will Trusts ([1949] 1 All E.R. 577) applied.

(ii) the scheme was a " transaction " within the terms of s. 64 (2) of the Settled Land Act, 1925 (*Re Downshire's Settled Estates* ([1953] 1 All E.R. 103) applied); in the opinion of the court the transaction was one which would be for the benefit of the persons interested under the settlement and, accordingly, the court would authorise it under s. 64 (1).

[As to the statutory powers of trustees for sale of land, see 29 HALSBURY'S LAWS (2nd Edn.) 765, para. 1067.

As to the general power to effect transactions under orders of the court, see 29 HALSBURY'S LAWS (2nd Edn.) 745, para. 1037.]

Cases referred to:

(1) *Re Wellsted's Will Trusts*, [1949] 1 All E.R. 577; [1949] Ch. 296; [1949] L.J.R. 1153; 2nd Digest Supp.

(2) *Re Downshire's Settled Estates*, [1953] 1 All E.R. 103; [1953] Ch. 218.

Adjourned Summons.

The plaintiff, Miss Alice Maud Mary Simmons, as a person interested under the trusts of a settlement, dated Oct. 15, 1923, and made by her, applied to the court by originating summons asking that the defendants, the Public Trustee and John Elliott Brooks, as trustees of the settlement, might be authorised and directed under the general jurisdiction of the court or, alternatively, empowered under the combined effect of s. 28 of the Law of Property Act, 1925, and s. 64 of the Settled Land Act, 1925, to effect with or without modification a certain transaction in respect of the plaintiff's settled share of the trust fund.

Under the settlement, the trust fund was settled on trust for the benefit of the settlor (the plaintiff) and her two brothers, in equal shares. The income of the settlor's share was to be held on protective trusts for her during her life, and after her death the share was to go to her children as she should by will or codicil appoint, and, in default of appointment, to all her children equally. The settlor was empowered to appoint, by deed or will or codicil, a life interest in her share to a husband who might survive her, and, if the trusts relating to her children should fail, she had a general power of appointment exercisable by will or codicil. In default of and subject to any such appointment, the settlor's share was to accrue to the other shares or share of the trust fund. Those shares were settled, mutatis mutandis, on similar trusts for the settlor's two brothers, one of whom died in 1937. The other brother was living and had married, but there were no children of the marriage.

The trust fund included freehold and leasehold properties which were vested in the trustees on trust for sale, with power to postpone sale. The settlor was now about sixty-three years of age and had never married. Under the proposed scheme one-half of her share of the trust fund would be paid and transferred to her for her own use and benefit absolutely and the other half would be retained by the trustees subject to the settlement but released from her general power of appointment. The trustees of the settlement, the surviving brother, and the personal representatives of the deceased brother, were defendants to the summons.

Raymond Jennings, Q.C., and *T. L. Dewhurst* for the plaintiff.

E. I. Goulding for the trustees of the settlement.

J. Willcock for the remaining defendants (persons interested under the settlement).

DANCKWERTS, J.: This is an application by a person who is interested in the income of property under a settlement for authority to be given to the trustees to carry out certain proposals which have been made—I carefully use the word " proposals " so as not to prejudge one of the matters for consideration in this case. The effect of the proposals, shortly, is that the plaintiff, who at present is only interested in income, will be given a sum of capital for her absolute benefit and other persons who may have an interest under the settlement will be compensated in certain ways. The settlement was dated Oct. 15, 1923, and was made by the plaintiff, Miss Alice Maud Mary Simmons, and by it she settled certain land to which she was entitled in reversion or certain shares in land to which she was so entitled (she becoming entitled ultimately to all the shares in the land) and also settled certain investments. Thus there was in one settlement, it may be said, both a settlement of land and a settlement of personalty.

This present application is concerned primarily with the settlement of land, not with the settlement of personalty. The scheme of the settlement was that the property settled was divided into three shares. One share was to be the plaintiff's share; she took a protected life interest under the trusts of that share, and after her death it was to go to her children. She had power to appoint a life interest to a husband, and there was a general power of appointment by will or codicil if the trusts previously declared in regard to her share should fail. In the event of her not exercising that power, the share was to go and accrue to the other two shares, which were settled on similar trusts for the benefit of her brothers Eric and Donald and their issue and wives.

The form of settlement of the land is that there is a trust for sale of the land, and the interests under the settlement are not interests in the land itself, but interests following on that trust for sale. Thus it is not a case where there is any tenant for life, or person who would have the powers of the tenant for life under the Settled Land Act, 1925, but it is a case where there is a trust for sale. It is suggested that the proposals can be authorised by the court under s. 64 of the Settled Land Act, 1925, that section being rendered applicable by the provisions of s. 28 (1) of the Law of Property Act, 1925. By virtue of s. 28 (1) of the Law of Property Act, 1925, the powers given under the Settled Land Act, 1925, are given to trustees for sale.

With that preliminary observation, I turn to s. 28 (1), which provides:

> " Trustees for sale shall, in relation to land or to manorial incidents and to the proceeds of sale, have all the powers of a tenant for life and the trustees of a settlement under the Settled Land Act, 1925, including in relation to the land the powers of management conferred by that Act during a minority . . ."

I do not think that the rest of the sub-section is material for the purposes of the present question. It is to be observed that the section says the trustees are to have " all the powers ".

Turning to the Settled Land Act, 1925, one finds that the powers of a tenant for life are set out in Part 2, which is entitled " Powers of a tenant for life ". It appears from *Re Wellsted's Will Trusts* (1) ([1949] 1 All E.R. 577) that there are also other powers of a tenant for life besides those set out in Part 2, but, s. 64 is one of the sections which appear in Part 2. There cannot be any doubt, therefore, that that section would be among the powers referred to, save for the question whether a power which is not exercisable by a tenant for life without the authority of the court, such as the power in s. 64, is included among the powers to which s. 28 (1) of the Law of Property Act, 1925, refers.

Section 64 (1) of the Settled Land Act, 1925, is in the following terms:

> " Any transaction affecting or concerning the settled land, or any part thereof, or any other land (not being a transaction otherwise authorised by this Act, or by the settlement) which in the opinion of the court would be for the benefit of the settled land, or any part thereof, or the persons

> interested under the settlement, may, under an order of the court, be effected by a tenant for life, if it is one which could have been validly effected by an absolute owner."

By s. 64 (2), as amended by the Settled Land and Trustee Acts (Court's General Powers) Act, 1943, s. 2, it is provided:

> "In this section 'transaction' includes any sale, extinguishment of manorial incidents, exchange, assurance, grant, lease, surrender, reconveyance, release, reservation, or other disposition, and any purchase or other acquisition, and any covenant, contract, or option, and any application of capital money . . . and any compromise or other dealing, or arrangement . . ."

The first question is whether the power conferred by s. 64 of the Settled Land Act, 1925, on the tenant for life but exercisable only under the authority of the court is one of the powers of a tenant for life conferred on trustees for sale by virtue of s. 28 (1) of the Law of Property Act, 1925. Section 28 (1) confers on trustees for sale all the powers of a tenant for life, and when the section says "all", one would suppose that it meant what it said. If there were any doubt about the matter, that doubt was resolved by the decision of the Court of Appeal in *Re Wellsted's Will Trusts* (1), which was concerned with the powers conferred on a tenant for life by s. 73 of the Settled Land Act, 1925, which is not in Part 2 of that Act. It seems to me quite plain that the power conferred by s. 64 of the Settled Land Act 1925, is one of the powers conferred by s. 28 (1) of the Law of Property Act, 1925, on trustees for sale of land, because it is one of the powers conferred on a tenant for life by the Settled Land Act, 1925, even though it requires the authority of the court to render it available and so bring it into action. The Settled Land and Trustee Acts (Court's General Powers) Act, 1943, s. 1, affects s. 64 of the Settled Land Act, 1925, but the provisions of the Act of 1943 are not material for present purposes.

The remaining question is whether a proposal of the kind which is put forward in the present case is within the authority conferred on the court by s. 64 of the Settled Land Act, 1925. For that purpose it is necessary to refer to the judgment of the Court of Appeal in *Re Downshire's Settled Estates* (2) ([1953] 1 All E.R. at pp. 121-123, per SIR RAYMOND EVERSHED, M.R., and ROMER, L.J.). In that case the Court of Appeal authorised a transaction resembling, in some ways, the transaction proposed in the present case, and it is plain from the judgment of the Court of Appeal that the powers conferred by s. 64 of the Settled Land Act, 1925, are wider than those conferred by s. 57 of the Trustee Act, 1925, and that a proposal of the present type may be included as being a transaction within the meaning of s. 64 (1) of the Settled Land Act, 1925. In the opinion of the court this transaction could be for the benefit of the persons interested under the settlement within the meaning of s. 64 (1), and is a transaction within the terms of s. 64 (2). Accordingly I have power to confer on the trustees for sale the authority to carry out these proposals. That disposes of the question of jurisdiction. I am satisfied that the proposals are for the benefit of the persons interested under the settlement, and accordingly I authorise them.

Order accordingly.

Solicitors: *Theodore Goddard & Co.* (for all parties).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

BURNELL *v.* BRITISH TRANSPORT COMMISSION.

[COURT OF APPEAL (Denning, Hodson and Morris, L.JJ.), November 30, December 1, 1955.]

Practice—Cross-examination—Witness cross-examined on statement signed by him and made to other party—Statement held by cross-examining counsel but not put in evidence—Statement privileged—Waiver of privilege—Right of party calling witness to inspection of statement and to have it put in evidence.

During the trial of an action for damages for negligence, counsel for the defendants, holding a signed statement previously given by a witness for the plaintiff to the defendants, asked the witness in cross-examination whether he had not given a statement to the defendants and had said certain things in it. The witness agreed.

Held: by using the statement in cross-examination in this way, counsel waived the privilege of the statement from production and discovery and counsel for the plaintiff was entitled to call for it and to require it to be put in evidence.

[As to cross-examination of a witness concerning part of a document, see 13 HALSBURY'S LAWS (2nd Edn.) 762, para. 837; and for cases on the subject, see 22 DIGEST (Repl.) 462, *5066-5070*.]

Appeal.

The plaintiff brought an action for damages for negligence against the defendants, who obtained a signed statement from a Mr. Anzani, who at the trial was called as a witness for the plaintiff. With the statement in his hands, counsel for the defendants asked the witness in cross-examination whether he had not given the statement and whether he had said certain things in it. The witness agreed. Counsel for the plaintiff claimed the right to call for the statement and to require it to be put in evidence, and SELLERS, J., ruled that he was entitled to do so. On July 11, 1955, SELLERS, J., gave judgment for the defendants. The plaintiff appealed and in the course of the hearing of the appeal the question arose whether the statement was an admissible document. The case is reported only on that question.

H. I. Nelson, Q.C., and *Meurig Evans* for the plaintiff.
Norman Richards, Q.C., and *R. E. G. Howe* for the defendants.

DENNING, L.J.: A point of practice has arisen because Mr. Anzani, a witness, was called for the plaintiff, and then counsel on the other side, rising to cross-examine him, had a written statement in his hands on which he cross-examined Mr. Anzani. He asked him whether he had not given a statement beforehand to the defendants and signed it, and he asked him whether he had not said certain things in that statement. The witness agreed that he had. The question (and it was the question which SELLERS, J., had to decide) is whether, in those circumstances, the examining counsel had a right to call for the statement and to insist on its being put in evidence. SELLERS, J., ruled that he had that right. It seems to me that SELLERS, J., was correct, because, although this statement may well have been privileged from production and discovery in the hands of the defendants at one stage, nevertheless, when it was used by cross-examining counsel in this way, he waived the privilege, certainly for that part which was used; and in a case of this kind, if the privilege is waived as to the part, I think it must be waived also as to the whole. It would be most unfair that cross-examining counsel should use part of the document which was to his advantage and not allow anyone, not even the judge or the opposing counsel, a sight of the rest of the document, much of which might have been against him. So it seems to me that the ruling of SELLERS, J., was correct. It was in accordance with the practice as I have always understood it. Since the Evidence Act, 1938, once the document was legitimately

A in the presence of the court, it would be admissible as evidence under that Act also. I think, therefore, that SELLERS, J., was right and that we should look at the document, just as he did.

HODSON, L.J.: I agree on the question of waiver and on the question of privilege. I only add this, that there is no suggestion in this case that anything B unfair was done or sought to be done. A stand has been taken on a question of principle, as it was thought, on behalf of the defendants, not necessarily having in mind this case, but other cases in which this sort of problem arises.

MORRIS, L.J.: I agree with what has been said by my Lords.

[The court subsequently dismissed the appeal.]

C *Document put in evidence.*

Solicitors: *Murray Napier & Co.*, agents for *W. Francis Ryan*, Cardiff (for the plaintiff); *M. H. B. Gilmour* (for the defendants).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

D

EDMISTON *v.* BRITISH TRANSPORT COMMISSION.

[COURT OF APPEAL (Singleton and Jenkins, L.JJ.), November 23, 1955.]

E *Discovery—Action for damages for negligence—Master and servant—Application for discovery of documents concerning accidents of the same type—R.S.C., Ord.* 31, *r.* 12.

The plaintiff, who was employed by the defendants on the repair of locomotives, sustained injuries from falling from the top of a locomotive on which he was working in the course of his employment and brought an F action against the defendants for damages for negligence. An order for discovery was made by which the defendants were ordered to make an affidavit of documents " limited to relevant documents since Nov. 7, 1948." Having regard to the course of proceedings this order envisaged that the documents in question would be such as related to any accidents sustained by other workmen when required to work on the tops of locomotives. G The defendants appealed against the order, offering in effect such discovery as was envisaged by it but limited to the region of British Railways in which the accident occurred and to locomotives of the type on which the plaintiff had been working when the accident occurred. Ultimately the appeal was dismissed by consent, the defendants withdrew their offer and filed an affidavit setting out certain documents and deposing that there was H no other relevant document. The plaintiff applied for an order for a further affidavit of documents extending to all documents relating to accidents in which persons employed by the defendants or by the Railway Executive had since Jan. 1, 1947, fallen from the tops of locomotives, and, in support, filed an affidavit in which the deponent, the plaintiff's solicitor, deposed that in his belief the defendants had or had had at some time in their I possession or power documents such as those to which the application related.

Held: the plaintiff was not entitled to the discovery for which he asked because (i) the evidence filed in support of the application for further discovery did not specify any document which was shown to be in the possession of the defendants and was not such as enabled the court to go behind the affidavit filed pursuant to the order for discovery, and (ii) the field of inquiry over which discovery was asked was too wide; accordingly, no order for a further affidavit of documents would be made.

Per Curiam: if there were good ground for saying that there were reports of cases of accidents which had occurred within a reasonable time and a reasonable distance of the accident to the plaintiff, a plaintiff might be able to obtain discovery concerning those accidents, as being relevant to the issue whether his employer had taken proper care to avoid unnecessary risk to his workmen (cf. p. 826, letter C, post).

Appeal dismissed.

[As to what documents are relevant for the purposes of discovery, see 12 Halsbury's Laws (3rd Edn.) 26, para. 36; as to the affidavit of documents being conclusive, see 12 Halsbury's Laws (3rd Edn.) 30, para. 44; and as to the oppressiveness of an application for discovery as a defence thereto, see 12 Halsbury's Laws (3rd Edn.) 60, para. 79.

For cases on these subjects, see 18 Digest 72-74, *286-295*, 76, 77, *321-327*.]

Interlocutory Appeal.

The plaintiff appealed from an order of Devlin, J., made on Oct. 24, 1955, upholding an order of Master Baker made on Sept. 29, 1955, dismissing an application by the plaintiff for a further affidavit of documents to be made by the defendants in answer to an order for discovery made on Mar. 21, 1955. The facts appear in the judgment of Singleton, L.J.

Rose Heilbron, Q.C., and *J. F. F. Platts-Mills* for the plaintiff.
N. R. Fox-Andrews, Q.C., and *Stephen Chapman, Q.C.*, for the defendants.

SINGLETON, L.J.: This is an appeal from an interlocutory order of Devlin, J., made on Oct. 24, 1955. The plaintiff, Mr. Andrew Edmiston, brings his action against the British Transport Commission in respect of an accident which took place at Hamilton West Station, in the County of Lanark, on Nov. 7, 1951. It is alleged on behalf of the plaintiff that he was injured through the negligence of the defendants when he was employed by them in their motive power department. He was doing some work of repair to a locomotive engine. In para. 4 of the statement of claim it is pleaded:

> " In order to carry out the said work the plaintiff had to stand upon the narrow ledge provided by the top of the tank of the said engine which was at a distance of about nine feet three inches from the ground. The defendants well knew that working thereon there was a risk that the plaintiff might fall to the ground below ";

and in para. 5:

> " While the plaintiff was endeavouring to remove one of the nuts holding the said clack box suddenly the said box spanner came off the said nut and/or the said bar came out of the said spanner and the plaintiff thereupon overbalanced and fell to the ground. The plaintiff's said fall was due to the negligence of the defendants their servants or agents."

Particulars of negligence are set out, and those that may be of importance on this appeal are those which deal with the staging on which the plaintiff stood and from which he fell. The defendants, by their defence, deny that they were negligent, and they allege that the plaintiff himself was guilty of contributory negligence.

After delivery of the defence the plaintiff desired to interrogate the defendants, and interrogatories were drafted, the first of which is:

> " Is it not a fact that workmen in the employ of the defendants have sustained accidents on previous occasions when required to work upon the tops of locomotives, by slipping or falling ? If yea, how many of such accidents have occurred, what were the dates and places of such accidents ? . . . "

When the summons for interrogatories came before the master, he suggested that the question at issue could better be dealt with by way of discovery and an order was made on Mar. 21

> "that within fourteen days the plaintiff deliver a list of documents relating to his special damage and industrial injury benefits and that within fifty-six days the defendants make and file an affidavit of documents limited to relevant documents since Nov. 7, 1948 and that there be inspection of documents within fourteen days of the delivery of the list and affidavit respectively."

No doubt from the discussion which had taken place before the master it was assumed that that order meant that documents of a kind envisaged in the proposed interrogatory which I have read should be included in the defendants' affidavit. On Mar. 22 the defendants served a notice of appeal, stating in effect that they objected to the order except in so far as it was (a) to relate to the Scottish region of British Railways, (b) to relate to fitters working on the top of steam locomotives of the 2-6-4 tanker type and falling off in the course of their work, and (c) to relate to such accidents in the period Nov. 7, 1948, to Nov. 7, 1951. They sought to limit the documents to those mentioned in their notice of appeal which was, in a sense, an offer to give discovery, but not to the extent of the master's order. That was not accepted by the plaintiff.

The appeal came before PEARSON, J.; ultimately, the matter was adjourned, and the defendants thereafter withdrew their offer to make that discovery which I have described as limited discovery. After the adjournment PEARSON, J., was not available, and the appeal came before DEVLIN, J. Counsel on behalf of the defendants told the judge that, as he understood the rule in regard to discovery, he was prepared to advise the defendants that their proper officer could properly swear an affidavit that there were no relevant documents of the kind which the plaintiff wanted. He further consented to the defendants' appeal being dismissed. Thereafter Mr. Campbell, who is motive power superintendent of the defendants' Scottish region, swore an affidavit setting out certain documents and deposing to the fact that there were no other relevant documents. When Mr. Campbell's affidavit was put on the file, Mr. Thompson of the plaintiff's solicitors swore an affidavit in which he deposed as follows:

> "In my belief the defendants have or have at some time had in their possession or power the following documents: (a) documents relating to accidents in which persons employed by the defendants or by the Railway Executive have since Jan. 1, 1947, fallen from, on or about the tops of locomotives including accident reports, accident books or records, copies or originals of statutory returns or analyses or compilations containing records of such accidents whether kept or made locally or in regions or centrally."

The first point which counsel for the defendants raises is that there is on the file the affidavit of Mr. Campbell saying that everything relevant has been disclosed and that there is nothing in the affidavit of Mr. Thompson which enables the court to go behind it; in other words, that the affidavit of Mr. Thompson, although it refers to documents in general, does not specify any document which he shows is in the possession of the defendants which is relevant to the issues in the action; secondly, that under the practice adopted by the court, there ought not to be ordered further discovery or any further affidavit. I think that is right; but there are other matters for consideration. One of them arises on the second point taken by counsel under the proviso to Ord. 31, r. 12, which reads:

> "Provided that discovery shall not be ordered when and so far as the court or judge shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs."

I do not think that an order in the terms sought is necessary for disposing fairly of the cause or matter, and I certainly do not think that it would save costs. In those circumstances, the second point appears to me to hold good; but that does not conclude the case.

The appeal from the order of DEVLIN, J., was made by counsel on the basis that the plaintiff in an action of this kind is entitled to support his case by showing, if he can, that the defendants had not taken reasonable care for the safety of their employees, and, that if he were able to show that the defendants had had a number of accidents of this kind, it would help the plaintiff from at least two points of view. On that, there at once arises the question: what does counsel mean by "accidents of this kind"? The summons refers to accidents in which persons employed have fallen from, on or about the tops of locomotives. It is far too wide. If the plaintiff could show that there had been recent accidents to employees of the defendants engaged on the type of work which he was doing, that the men engaged on that kind of work slipped in the way he slipped, and fell and were injured, evidence to that effect would be admissible in the action against the defendants. I am inclined to think, too, that if there were shown good ground for saying that there were reports of any such cases, the plaintiff might be able to get discovery if the accidents had occurred within a reasonable time of and in a district reasonably proximate to the place where the plaintiff's accident occurred. No good purpose would be served by my considering further how or in which form the information might be discovered. I can see that it might be relevant, if it were forthcoming, on a question whether the defendants had taken that care which a reasonable employer is expected to take to avoid unnecessary risk to his workmen. The plaintiff does not ask for that. His request goes much further, and may involve a great deal of work. If there have to be inquiries at every depot of the defendants throughout England, Scotland and Wales as to accidents in which men have fallen from, on or about the tops of locomotives, there is no end to it. The cost of such an inquiry and the time occupied in making it would be considerable; and, if it can properly be required in one accident, so it can be in others. In my view, it would be an undue burden to put on defendants.

The fact that this appeal fails does not mean that in this or a like case the plaintiff has no remedy or no means of getting some information if it is asked for in proper form. The offer made by the defendants in their notice of appeal of Mar. 22, 1955, went a long way, and I am impressed by the fact that that offer was made. I do not think it can be said that they were seeking to keep back all information from the plaintiff. In my judgment, they are entitled to succeed on both grounds raised by counsel on their behalf. The application in this form was not justified. After the offer which had been made by the defendants, the repetition of this broad request for particulars appears to show that the plaintiff's advisers—and this is a union case—desired to have this question tested with the Railway Executive. The appeal should be dismissed.

JENKINS, L.J.: I agree and cannot usefully add anything.

Appeal dismissed.

Solicitors: *W. H. Thompson* (for the plaintiff); *M. H. B. Gilmour* (for the defendants).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

Re APPLICATION OF VITAMINS, LTD.

[Chancery Division (Lloyd-Jacob, J.), October 6, 7, November 23, 24, 1955.]

Trade Mark—Application to register—Use of mark alleged to be contrary to Merchandise Marks Act, 1887*—Forging trade mark—Foreign mark protected by law in Convention country—Discretion over registration of trade mark—Possibility of confusion as result of foreign advertisements reaching England—Trade Marks Act,* 1938 (1 *&* 2 *Geo.* 6 *c.* 22), *s.* 11, *s.* 17, *s.* 52—*Merchandise Marks Act,* 1887 (50 *&* 51 *Vict. c.* 28), *s.* 2 (1), *s.* 3 (1), *s.* 4.

On Jan. 24, 1952, A. Co., a manufacturing company in the United States of America, applied for the registration as a trade mark in the United Kingdom of the word " Pabalate " in respect of pharmaceutical goods manufactured by them. They were already registered as owners of that trade mark in the United States and Canada. As a result of the investigation in the trade marks registry, A. Co. were directed to communicate with V. Ltd., a British manufacturing company who were proprietors of a trade mark " Pabavel ". V. Ltd. refused to consent to the application proceedings, and on Nov. 26, 1952, A. Co. withdrew their application in view of the controversy and the possibility that they might never seek to carry on business in the United Kingdom with goods bearing the name " Pabalate ". On Dec. 9, 1952, V. Ltd. applied for the registration of the same word " Pabalate " in respect of pharmaceutical goods, having completed the usual form of application, form T.M. No. 2, as prescribed by the Trade Marks Rules, 1938, r. 21, on which they claimed to be proprietors of the mark. A. Co. opposed the application on the ground that the registration would be contrary to the Trade Marks Act, 1938, s. 11, as being likely to deceive or cause confusion (which ground the evidence did not substantiate) and as being contrary to law. On the latter question A. Co. contended that the use of the word " Pabalate " without A. Co.'s consent would, under the Merchandise Marks Act, 1887, s. 2 (1), s. 4, and the definition of " trade mark " in s. 3 (1), amount to the offence of forging a trade mark, and that therefore the word was one which V. Ltd. was not entitled to protect by registration as a registered trade mark. There was no evidence that the period of six months prescribed by the Patents and Designs Act, 1907, s. 91, for the application for registration of a foreign trade mark had not expired as regards the trade mark of A. Co. in the United States and Canada. A. Co. further opposed the granting of the application as a matter of the discretion of the court under s. 52 and s. 17 of the Trade Marks Act, 1938. It was shown that A. Co. had used and advertised the word " Pabalate " as a brand name extensively in the western hemisphere since 1949; and that journals containing such advertisements were likely to reach England, but the evidence only established that one such journal had been sent to this country and that that journal was filed at the offices of the British Medical Association.

Held: (i) the opposition to the registration of the word " Pabalate " as a trade mark on the ground that its use by the applicants would be contrary to law in view of the provisions of s. 2 (1) and s. 4 of the Merchandise Marks Act, 1887, failed, because a foreign trade mark of A. Co. would only have been " protected by law " within the definition of " trade mark " in s. 3 (1) of the Act of 1887 if A. Co. had applied for its registration within the period prescribed by the Patents and Designs Act, 1907, s. 91, which A. Co. had not done, and therefore the foreign trade mark was not a " trade mark " within the Act of 1887 (*Imperial Tobacco Co.* (*Newfoundland*), *Ltd.* v. *Duffy* ([1918] A.C. 181) considered and not applied);

(ii) the application should not be permitted to proceed because

(a) the claim on form T.M. No. 2 that V. Ltd. were proprietors of the mark indicated an assertion of a present proprietary right and not that they claimed to become proprietors as and when the application was granted, and it was straining language to suggest that V. Ltd., as a result of the withdrawal of the application of A. Co., could claim proprietary rights; and

(b) it was possible that confusion might be caused by the use of the mark by V. Ltd., and the use and advertisement of the mark abroad by A. Co., whose advertisements might reach the United Kingdom, and the public interest would not be best served by permitting to be registered, as a brand name for a pharmaceutical substance, a name used by an American corporation abroad for the same material.

Per Curiam: (i) for the purpose of establishing in a prosecution for forging a trade mark that the trade mark has been forged, the prosecution must establish that the act alleged to constitute the forgery associated the mark with goods such as those with which the mark was associated in trade as a trade mark (cf. p. 831, letter A, post).

(ii) to satisfy the exception to the offence of forging a trade mark created by the words " unless he proves that he acted without intent to defraud " in s. 2 (1) of the Merchandise Marks Act, 1887, inadvertence or mistake must be proved; and even where the offence is charged in relation to a trade mark of foreign origin absence of reputation of the foreign owner in this country does not justify a wider or different scope being attributed to these words (cf. p. 830, letters A to F, post).

Dictum of Lord Goddard, C.J., in *Slatcher* v. *George Mence Smith, Ltd.* ([1951] 2 All E.R. at p. 392) applied.

[As to the offence of forging a trade mark under the Merchandise Marks Acts, 1887 to 1953, see 10 Halsbury's Laws (3rd Edn.) 685, para. 1314.

For the Merchandise Marks Act, 1887, s. 2, s. 3, s. 4, see 25 Halsbury's Statutes (2nd Edn.) 1114, 1116, and 1118; for the Trade Marks Act, 1938, s. 11, s. 17, s. 52, see ibid., 1189, 1194, 1222.

For the Trade Marks Rules, 1938 (S.R. & O. 1938 No. 661), r. 21, see 22 Halsbury's Statutory Instruments 30.]

Cases referred to:

(1) *Slatcher* v. *George Mence Smith, Ltd.*, [1951] 2 All E.R. 388; [1951] 2 K.B. 631; 115 J.P. 438; 2nd Digest Supp.

(2) *Imperial Tobacco Co.* (*Newfoundland*), *Ltd.* v. *Duffy*, [1918] A.C. 181; 35 R.P.C. 12; 43 Digest 215 *g*.

Motion.

This was an appeal by motion under R.S.C., Ord. 53E, r. 2, by the opponents, A. H. Robins Co., Inc., of Richmond, Virginia, United States of America, from a decision of W. H. Langmaid, Esq., assistant comptroller, acting for the registrar, the comptroller-general, dated May 31, 1954. On Dec. 9, 1952, Vitamins, Ltd., of 23, Upper Mall, London, W.6, filed an application for the registration in Part A of the trade mark register of the word " Pabalate " as a trade mark in class 5 in respect of pharmaceutical substances. On Apr. 16, 1953, the opponents gave notice of opposition on the ground that the registration in the name of the applicants would be contrary to the provisions of the Trade Marks Act, 1938, s. 11. The opponents further contended that the registration of this mark should be refused in the exercise of the registrar's discretion. The word " Paba " indicated the chemical substance, para-aminobenzoic acid. The opponents had used the word " Pabalate " widely in the United States and Canada since 1949, and spent $250.000 per year in advertising that word. " Pabalate " had been registered in those two countries by the opponents as a trade mark, but an application by them for registration in the United Kingdom was withdrawn on Nov. 26, 1952, after Vitamins, Ltd. gave notice of opposition to that application. At the hearing of the appeal the question arose whether the use of the word " Pabalate " by the applicants would constitute an offence under the

A Merchandise Marks Act, 1887, s. 2 (1). LLOYD-JACOB, J., adjourned the hearing in order that the comptroller-general's view might be heard.

R. G. Lloyd and *F. G. Guttman* for the opponents.
G. D. Everington for the applicants.
P. J. S. Bevan for the comptroller-general.

B **LLOYD-JACOB, J.:** This motion is by A. H. Robins Co., Inc., by way of appeal from a decision given in the trade marks registry in respect of the application for registration of a trade mark No. 703,005, in the name of Vitamins, Ltd., the mark consisting of the word " Pabalate ".

The application was opposed by the present appellants on a number of grounds. In the course of the hearing of the appeal it appeared that there were matters C which might be relevant which the assistant comptroller had not had the opportunity of considering. As it appeared to me to be of sufficient moment, I invited the comptroller-general, in his capacity as registrar, to attend, if he was so minded, by counsel, so as to assist the court in the determination of those additional matters. He took advantage of the opportunity and appeared by counsel, and I should like at the outset to express my indebtedness to the argument to D which I have listened.

In addition to the main ground of opposition under the Trade Marks Act, 1938, s. 11, counsel for the opponents urged that the mark applied for was not such, according to the terms of s. 9 of the Act, as would justify registration. It is unnecessary for me to deal with the submissions in detail, but I am quite satisfied that there was no foundation for any objection to this application based E on s. 9. The facts material to the opposition under s. 11 of the Act of 1938 are set out in the decision, from which it will be apparent that the opponents were relying on proprietary rights, which they claimed to possess in the mark applied for, by reason of their use of the mark in the United States of America in connection with a specific preparation said to be of value in the treatment of arthritic complaints, and of the advertisements in relation to that business F which they contended had reached this country; and, in addition, such rights as they possessed flowing from an application which they themselves had made in this country for registration of the same mark in respect of a pharmaceutical preparation.

The evidence that was filed on behalf of the opponents, when it came to be examined, was found merely to justify the finding of fact set out in the decision G that one copy only of a periodical primarily circulating in the United States of America had, prior to the date of the applicants' application, reached this country and was technically published, in the sense that it was filed at the offices of the British Medical Association in Tavistock Square in London, and that, by reason of such filing, it was available for members of that association for perusal as from Sept. 26, 1951. The application date in the present pro- H ceedings was Dec. 9, 1952. In the light of that evidence, the assistant comptroller held that the opponents had failed to establish such a reputation in the United Kingdom in respect of this mark " Pabalate " as would justify a conclusion that confusion or deception would occur on that account should registration be permitted. I am unable to find any ground on which I can come to the conclusion that that finding was incorrect. Accordingly, I have no alternative but I to adopt it and approve it.

In the further consideration that was given to this matter, it was urged before me that in addition to the objection under s. 11 to which that finding was directed, i.e., to the question whether or not the use of this mark by the applicants would be likely to deceive or cause confusion, it was submitted that the use of the mark applied for by the applicants would be disentitled to protection in a court of justice by reason of the provisions of the Merchandise Marks Act, 1887. It was mainly in respect of that submission that I felt that the assistance of the comptroller was desirable.

The point can, I think, be shortly stated as follows. By the Merchandise Marks Act, 1887, s. 2 (1) (a), it is provided that every person who forges a trade mark shall, subject to the provisions of the Act and unless he proves that he acted without intent to defraud, be guilty of an offence. An initial matter calls for determination, and that is the possible defence under this sub-section embraced by the words " unless he proves that he acted without intent to defraud." In a long line of decisions, to one of the most recent of which I turn merely as illustrative, it has been laid down that the intention to defraud referred to in s. 2 (1) may be, and, indeed, if I read the authorities correctly, must be, found in the deliberate commission of the act which comprises the forging of the trade mark. If any support for that proposition is required, it will be found in the judgment of LORD GODDARD, C.J., in *Slatcher* v. *George Mence Smith, Ltd.* (1) ([1951] 2 All E.R. 388). In the passage in the judgment which summarises the conclusion of the court, LORD GODDARD, C.J., after reciting a number of previous authorities in which the same principle had been expressed, said (ibid., at p. 392):

> " In this state of the authorities it seems to us that we must construe the words ' that otherwise he had acted innocently ' as meaning that he had acted inadvertently or under some mistake of fact. The fact that he had acted in good faith and had taken all precautions against committing an offence against the Act will not amount to proof that the defendant had otherwise acted innocently."

The words " that otherwise he had acted innocently " can be considered as equivalent to the words " without intent to defraud ".

It has been submitted that in the circumstances of the prosecutions under the Act of 1887 which arise in connection with trade marks of a foreign origin, some additional scope will be found for the phrase " without intent to defraud " so as to protect the person who applies to his goods deliberately, although in good faith, a mark which is in fact the property of a foreign owner, so that such a person can nevertheless be entitled to avoid conviction under this Act on the ground that the absence of any reputation of the foreign owner in this country effectively prevents any conceivable fraud on the public. In my judgment the true construction of the expression " without intent to defraud " in s. 2 (1) of the Act cannot depend on the particular facts of the case under consideration. I can find no justification for supposing that the meaning attached to this phrase in the long course of authorities to which I have referred can now be expected to be accepted as erroneous. For my own part, I would adopt the decisions of the various divisional courts that have considered this matter as my own.

It therefore becomes necessary to consider what is comprised within the phrase " forges any trade mark ". Section 4 of the Act of 1887 provides:

> " A person shall be deemed to forge a trade mark who either—(a) without the assent of the proprietor of the trade mark makes that trade mark or a mark so nearly resembling that trade mark as to be calculated to deceive; or (b) falsifies any genuine trade mark . . ."

I need not trouble with the second alternative. I have only to consider the consequences of the first. The construction of that section presents some difficulty by reason of the use of the phrase " makes that trade mark ". In my judgment, that necessarily conveys to the mind more than a delineation of the word or device which comprises the mark. By using the words " the trade mark " there is, the Act imports, in my judgment, an association of the word or device with a course of trade in goods, such as will truly constitute that which is done an act relating to goods in the course of trade. It would be most extravagant to suppose that, if a person used, for example, a word on and in relation to one type of goods, the legislature were constituting that to be an offence merely because there was an existing trade mark consisting of the same word but used in relation to totally different goods, in respect of which the person using the word was in no sense in competition. Accordingly I think that, for the purpose of establishing in any prosecution for forging a trade mark that the trade mark has been forged, it is necessary that the prosecution should establish that the act committed was the association of the mark in question by the accused on or in relation to such goods as those to which the word or device was associated in trade as a trade mark.

There remains only to be considered what is the scope of the expression " trade mark ". To assist in the interpretation of that expression the Merchandise Marks Act, 1887, contains a definition clause (s. 3), but I am saying nothing original when I draw attention to the fact that the definition of the expression " trade mark " is far from clear, and indeed introduces a very considerable measure of difficulty. Substantially similar words, it is to be observed, were to be found in a Newfoundland statute which fell for consideration before the Judicial Committee of the Privy Council in 1918 in *Imperial Tobacco Co. (Newfoundland), Ltd.* v. *Duffy* (2) ([1918] A.C. 181), the opinion of the Board being delivered by Lord Wrenbury. The Board was an extremely distinguished one, consisting of Lord Parker of Waddington and Lord Sumner in addition to Lord Wrenbury. The trade mark statute which was then being considered was the Newfoundland statute, ch. 112, and s. 2 of this contained a definition of " trade mark " in words which appear to me to be identical with the definition in s. 3 of the Merchandise Marks Act, 1887. The Board expressed the view that a person successfully securing registration under the Newfoundland statute could no longer be said, when he applied it to goods, to forge that trade mark: nor, said their Lordships, can it be said that he was falsely applying to goods any trade mark calculated to deceive. Although a decision of the Privy Council is not binding on me, none the less, for the reasons advanced in the judgment, I would arrive at precisely the same conclusion, which would have the result in the present case that, if this application should be successful, it would provide a complete answer to the proceedings under the Merchandise Marks Act, 1887, which it was the purpose of this submission to raise as an objection to registration. That provides at any rate one reason for giving this aspect of the case the closest consideration.

Their Lordships, having considered the definition of " trade mark ", indicated certain aspects of its true construction and arrived at this conclusion ([1918] A.C. at p. 183):

> " It results that for the present purpose s. 2 of ch. 112 may be read as providing that the expression 'trade mark' in ch. 112 includes any trade mark which either with or without registration is protected by law in the United States."

I have carefully read the report and the references which it gives to the arguments of counsel (35 R.P.C. 12). I think it clearly emerges that their Lordships were not presented with certain of the arguments which have been put to me.

The Merchandise Marks Act, 1887, s. 3 (1), provides:

> " The expression ' trade mark ' means a trade mark registered in the register of trade marks kept under the Patents, Designs, and Trade Marks Act, 1883, and includes any trade mark which, either with or without registration, is protected by law in any British possession or foreign state to which the provisions of the Patents, Designs, and Trade Marks Act, 1883, s. 103, are, under Order in Council, for the time being applicable."

I need not refer in detail to the provisions of s. 103 of that Act, or indeed to the comparable provision which, by amendment of the law, now obtains: suffice it to say that that is the statutory provision which provides for reciprocity as between the Convention countries so as to secure certain priority in this country for applicants for trade marks in a Convention country.*

It is perhaps unnecessary that I should point out all the difficulties presented by the language of s. 3 (1), but it is essential that I should mention that in form, first of all, it defines the trade mark by reference to a register in this country and goes on to say " and includes ", which prima facie I would suppose was intended to indicate that the register of trade marks would not be conclusive for the purpose of ascertaining whether or not a trade mark within the meaning of the Merchandise Marks Act, 1887, was in existence. Where s. 3 (1) deals with marks which are protected abroad, whether in a British possession or a foreign state, the enactment is deliberately expressed to relate to trade marks so protected either with or without registration. If that expression is accepted at its face value, it would indicate that the marks brought within the definition, so far as they originated abroad, were as to part in a different category from those within the definition originating in this country. It would appear prima facie to be most unreasonable that the marks in relation to which the criminal offence can be committed should be of a strictly limited character so far as nationals of this country are concerned and should be of a much wider category so far as concerns foreigners. In my judgment, the reference to " either with or without registration " is intended to cover the cases where protection for a trade mark is secured by law abroad either under a system which requires registration or under a domestic system abroad which does not require registration.

That leaves to be considered what is the scope of the phrase " protected by law ". As counsel for the comptroller pointed out, if the ordinary meaning is given to that expression, it must plainly include any brand name which, according to the domestic law of the country of origin, is maintained as a proprietary right in that person who has created or adopted it and applied it in the course of trade, and that that would be so whether the business with which it is concerned is limited to a particular foreign territory or whether it has extended into the sphere of international trade. He found no difficulty in giving illustrations wherein, given their widest signification, these words might bring within the purview of the Merchandise Marks Act, 1887, a mark which has been used in a small territory of no international trading significance in circumstances such that it is not only unlikely but practically impossible that any knowledge of the user could have reached this country. He says, as I understand his argument, that that is the fair and reasonable interpretation of s. 3 (1), and that any extravagant results which might flow from its application in practice might conceivably be guarded against by an interpretation of s. 2 (1) other than that which I have felt constrained to put on it.

It is clear that a statute must be interpreted according to the ordinary meaning of the words used therein, subject of course to any words or phrases of technical import being given their true technical meaning. That applies, as I understand the principles of construction, where the language does not permit any other meaning to be adopted. If one construction would involve absurdity or inconsistency, the court is bound to consider the possibility of an alternative construction equally consistent with the technical meaning of the words which will avoid such absurdity or inconsistency.

It seems to me that there is an alternative construction of this definition, viz., that the phrase " protected by law " is directed to that which will permit a trade mark originating in any British possession or foreign state to become included in those which are registered in the register of trade marks. The reference to the Patents, Designs, and Trade Marks Act, 1883, s. 103,

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* See the Patents and Designs Act, 1907, s. 91, s. 91A (1), added by the Patents, etc. (International Conventions) Act, 1938, s. 9; 25 Halsbury's Statutes (2nd Edn.) 1132, 1133.

A is a reference to a specific statutory provision which confers priority in respect of British applications on persons who have made application for protection in their own country. In my reading of this definition, the protection by law there referred to is the protection which is afforded by foreign countries to applicants for priority rights in respect of trade marks whether secured by application for registration or not, for the purpose and to the extent that that is required, so B as to make the right effective in this country. It leaves some possibility of difficulty in the way of British nationals in that to the marks entered on the register to which he has direct reference, if he is so minded, there is notionally added for a period of six months from the date of the foreign application the possibility of inclusion of the foreign trade mark with a priority date antecedent to that of the actual application in this country, but seeing that the definition C plainly conveys the intention of the legislature to secure such protection for overseas proprietors of trade marks, that is a difficulty which it was bound to envisage.

In my judgment, on its true construction, the definition of "trade mark" in s. 3 (1) of the Act of 1887 extends initially to trade marks entered on the register and notionally adds to them such trade marks as, following the provisions D of [the Patents and Designs Act, 1907, s. 91] the priority section, can be entered on the register in consequence. If, therefore, a foreign applicant fails to avail himself of the priority provisions therein set out by allowing the period to elapse from the date of his acquisition of a right in his own country, then in my judgment such mark as he has adopted and used is not within the expression "trade mark . . . protected by law" in this definition. In the present case, although E there is evidence that the opponents' mark is in fact registered in Canada, among other countries, there is no material before me that would enable me to come to the conclusion that, at the date of the application by the applicants, the priority period of six months in which the opponents could apply under the Convention provisions had not expired; and accordingly, on the construction which I feel bound to give to the material enactments of the Merchandise Marks F Act, 1887, there is no justification for the submission that by reason of the existence of the opponents' registration abroad the use of this mark by the applicants would be disentitled to protection in a court of justice.

Accordingly, I must hold that the objection to registration based on the Merchandise Marks Act, 1887, has no substance and cannot prevail.

G In the decision under review the assistant comptroller indicated that there appeared to him to be no ground for the exercise of his discretion adversely to the applicants and indeed it appears that, so far as he was assisted by argument by the parties, nothing was brought to his attention which would require him to exercise his discretion. It was urged before me on behalf of the applicants that the true inference from that passage in the decision is that the assistant comptroller had exercised his discretion in favour of the applicants. I cannot H so read it. It is to my mind a fair and clear indication that in the circumstances, so far as he apprehended them, there was no reason in the present case for him to exercise his discretion adversely to the applicants. The discretion vested in the registrar is, by s. 52 of the Trade Marks Act, 1938, vested in the court, and the court is directed to exercise the same discretionary powers as are conferred on the registrar in relation to hearings before him. When the matter was I further developed before me, two points emerged which call for consideration. The first one is the propriety or otherwise of the action of the applicants in making the application which they made for registration. Rule 21 of the Trade Marks Rules, 1938 (S.R. & O. 1938 No. 661)*, which have the force of statute†, provides that applications of this character shall be made on form T.M. No. 2, which requires that an application for registration shall assert, in the case of a mark which has not yet been the subject-matter of use in the trade, that it is proposed to be used by the applicant and that the applicant is claiming to be the proprietor thereof.

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* 22 HALSBURY'S STATUTORY INSTRUMENTS 30. The schedule of forms, Sch. 2, to the rules has been replaced by the Trade Marks (Amendment) Rules, 1955 (S.I.1955 No. 461).

† See the Trade Marks Act, 1938, s. 40 (2).

The circumstances of the present case are that, apart from some early application by some third party about which little information is available, the present opponents themselves applied for registration on Jan. 24, 1952, and they applied for registration of precisely the same word in application No. 704,302 in class 5, in respect of pharmaceutical goods. As a result of the investigation of that application in the trade marks registry, they were directed to communicate with the applicants for the trade mark in the present case, who were entered on the register as the proprietors of a trade mark " Pabavel ". The communication having been made, the applicants refused to consent to the application proceeding and on Nov. 26, 1952, the opponents withdrew their application and made a communication the substance of which I shall have to consider a little closely in the course of my judgment. Within about a fortnight of that date, on Dec. 9, 1952, the present application was made. The communication which the applicants received from the opponents is set out in the decision, and that communication contained as a quotation this extract from a communication from certain associate agents in the United States of America:

> " In view of the controversy over our ' Pabalate ' mark in Great Britain and the distinct possibility that we may never go into England with ' Pabalate ', we believe it would be best and avoid further expense to withdraw from the proceedings."

That was construed by the applicants as an indication that the opponents were relinquishing all claims to the mark in this country. It is true that the communication was perhaps a little ambiguous, but I am not satisfied that it could fairly be construed as indicating an intention to surrender entirely any rights in the mark. Indeed, the letter expresses a proprietary right by using the phrase " our ' Pabalate ' mark ". In my judgment the expression in the form which an applicant is required to sign, that he claims to be the proprietor, indicates an assertion of a present proprietary right. The applicants urge that in truth it is merely an assertion that he claims to become the proprietor or to assume proprietary rights as and when the application is granted, but I am not satisfied that that can be the true interpretation of a form intended to be completed before registration can be applied for. A proprietary right in a mark sought to be registered can be obtained in a number of ways. The mark can be originated by a person or can be acquired, but in my judgment, it is necessary that the person putting forward the application should be in possession of some proprietary right which, if questioned, can be substantiated. Where, as here, another party in respect of precisely the same field of activity in commerce or industry had already put forward, by an application to the trade marks registry, a claim to be the proprietor of the identical trade mark and had withdrawn the application because of a desire to avoid controversy over the mark, it seems to me to be straining language to suggest that the party who had by opposition secured that result had, as the result of the withdrawal, acquired proprietary rights. The mere fact that the evidence available may not have been sufficient to establish the right of that party to be entered on the register, does not of itself negative the proprietary right which that party had asserted by making the application which he did make: nor is that denied by the withdrawal of the application. In my view something more requires to be established than a mere desire to secure registration of a mark which it is thought will be of advantage in one's business. Accordingly, in the exercise of my discretion, I must consider whether, in making that claim to be the proprietors of this mark, the applicants were in fact making a proper representation to the trade marks registry.

There is a second factor which it seems to me to be right that I should have in mind when exercising a discretionary jurisdiction, and that is that the evidence discloses that the mark has been used by the opponents on and in relation to a remedy or an alleged remedy for arthritic conditions in human beings. The fact that the application was made in respect of pharmaceutical substances indicates that it is in a similar field that user by the applicants is contemplated. Having regard to the fact that the evidence discloses a genuine business on the part of the opponents in their country of origin and that it is possible that the advertisements made in respect of that business might reach this country and appear in libraries or places of reference to which medical men may resort, it seems to me that I am bound to consider the possibility that, with the passage of time, some confusion may occur in the minds of the trade between the use of the mark by the applicants and the advertisement and user of the mark overseas by the opponents. Having regard to the international character which medicine and the allied sciences have assumed and increasingly assumed during the last two decades, the court must be particularly careful to see that in exercising its discretion under the Act the public interest is not in any way imperilled. I am not satisfied that, in allowing to be used by manufacturers in this country as a brand name for a pharmaceutical substance a word which is in fact used by an American corporation in respect of the same material and advertised in journals, which on the evidence are received and referred to in this country, the public interest will be best served by permitting registration. Accordingly, on both those grounds it is my duty to indicate that in the light of the fuller consideration which the matter has received in this court the application should not be permitted to proceed.

I am satisfied that in arriving at that conclusion I have done so on materials which were not available to the assistant comptroller.

Appeal allowed.

Solicitors: *W. B. Blackwell & Co.* (for the opponents); *Faithfull, Owen & Fraser* (for the applicants); *Solicitor, Board of Trade* (for the comptroller-general).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

FRANCIS *v.* FRANCIS AND DICKERSON.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sachs, J.), December 2, 1955.]

Legal Aid—Costs—Taxation—Principles to be applied—Solicitor's duty to assisted client—Advice of counsel—What costs properly incurred—Divorce —Inquiry by respondent wife for evidence of husband's adultery where not alleged by her in answer—Legal Aid and Advice Act, 1949 (12 *&* 13 *Geo.* 6 *c.* 51), *s.* 1 (7) (*a*), *Sch.* 3, *para.* 4 (1)—*Legal Aid* (*General*) *Regulations,* 1950 (*S.I.* 1950 *No.* 1359), *reg.* 18 (3), *as amended by Legal Aid* (*General*) (*Amendment No.* 1) *Regulations,* 1954 (*S.I.* 1954 *No.* 166), *reg.* 27.

In March, 1953, the husband presented a petition for divorce on the ground of the wife's adultery, and did not ask for the discretion of the court to be exercised in his favour. The wife was granted a civil aid certificate "to defend proceedings for divorce brought by [the husband] including a prayer for relief, if necessary". The wife by her answer dated July 15, 1953, admitted adultery, alleged that it had been condoned by the husband and cross-prayed for a divorce on the ground that the husband had constructively deserted her. The wife filed a discretion statement. The wife suspected that the husband had committed adultery, and her solicitors accordingly caused inquiries to be made; in July, 1954, they obtained counsel's opinion that there was as yet insufficient material to justify an amendment to the pleadings but that certain further inquiries could reasonably be made. In November, 1954, information was obtained, though not as a result of those inquiries, which induced the husband to make a confession of adultery to an inquiry agent instructed by the wife's solicitors and to file a discretion statement. At the trial the judge refused the wife leave to amend her answer, granted the husband leave to amend his petition by praying for the discretion of the court, and granted decrees in favour of each party.

On taxation of the wife's bill of costs under the Legal Aid and Advice Act, 1949, the registrar (i) disallowed all disbursements to the inquiry agents except one item of three guineas; (ii) disallowed instructions to and advice of counsel relating to the inquiries; and (iii) reduced the fee for instructions for brief, etc., from eighty to twenty guineas. Objections were lodged and the registrar stated that he had taxed the bill on the footing that the civil aid certificate merely gave the wife authority to defend; that it was the duty of a solicitor to protect the legal aid fund and in the present case the wife's solicitors had gone beyond what was absolutely necessary in the interests of their client; and further that those inquiries which were continued after the cause had been set down for trial, when the pleadings had been closed without any allegation of adultery, were not justifiable. On a summons for review,

Held: (i) the primary duty of a solicitor acting for an assisted person and, so long as the case was conducted reasonably within the civil aid certificate, his only duty was to his client, and the solicitor had the same freedom in conduct of the case as where the client was not an assisted person, so that the question was whether costs were reasonably incurred not whether they were absolutely necessary, (ii) the words "including a prayer for relief" in the civil aid certificate entitled the wife to raise allegations which would result in a cross-prayer, and (iii) where there were good grounds for suspecting that a petitioner had committed adultery the respondent's solicitor's duty included the taking of reasonable steps to ascertain what was the true position; accordingly

(a) the items relating to the inquiries as to the husband's adultery, and the bulk of the other correspondence disallowed, would be allowed.

(b) the items relating to instructions and advice of counsel would be allowed, and

(c) the sum of twenty guineas allowed for instructions for brief on the basis of the work considered to be allowable by the registrar should stand, although it was the lowest figure allowable for that work, but a further twenty-five guineas should be allowed for work disallowed by the registrar, making forty-five guineas in all.

Per CURIAM: it is the standard, and proper, view of taxing officers that as a general rule a solicitor acting on the advice of properly instructed counsel can hardly be said to be acting unreasonably (see pp. 840, 841, post).

[**Editorial Note.** Although the court decided that the words " including a prayer for relief " in the civil aid certificate entitled the respondent to raise allegations which would result in a cross-prayer, yet it expressed the hope that further certificates would not be issued in that form, as it was essential that they should be clear so as to enable all concerned to understand exactly what they meant (see p. 839, letter D, post).

As to taxation of costs as between solicitor and client where party in matrimonial suit receiving legal aid, see 12 HALSBURY'S LAWS (3rd Edn.) 464, para. 1038; and for cases on the subject, see SUPPLEMENT to 27 DIGEST (Repl.) *5364 a-c*, and SUPPLEMENT to DIGEST (Practice) *1322 cc.*

For the Legal Aid and Advice Act, 1949, s. 1 (7) (a), Sch. 3, para. 4 (1), see 18 HALSBURY'S STATUTES (2nd Edn.) 534, 566.

For the Legal Aid (General) Regulations, 1950, reg. 14, see 5 HALSBURY'S STATUTORY INSTRUMENTS 213, 214, and for amendments thereto, see HALSBURY'S STATUTORY INSTRUMENTS SUPPLEMENT 1955; and for reg. 18 (3), as substituted by the Legal Aid (General) (Amendment No. 1) Regulations, 1954, reg. 27, see HALSBURY'S STATUTORY INSTRUMENTS SUPPLEMENT 1955.]

Cases referred to:

(1) *Giles* v. *Randall*, [1915] 1 K.B. 290; 84 L.J.K.B. 786; 112 L.T. 271; Digest (Practice) 936, *4756*.

(2) *Pêcheries Ostendaises* (*Soc. Anon.*) v. *Merchants' Marine Insurance Co.*, [1928] 1 K.B. 750; 97 L.J.K.B. 445; 138 L.T. 532; Digest Supp.

(3) *Lyon* v. *Lyon*, [1952] 2 All E.R. 831; [1953] P. 1; 3rd Digest Supp.

(4) *Re Lavey, Ex p. Cohen & Cohen*, [1921] 1 K.B. 344; 90 L.J.K.B. 246; 124 L.T. 572; Digest Supp.

(5) *Bellenden* (*formerly Satterthwaite*) v. *Satterthwaite*, [1948] 1 All E.R. 343; 27 Digest (Repl.) 624, *5835*.

(6) *Slingsby* v. *A.-G.*, [1918] P. 236; 87 L.J.P. 146; 119 L.T. 104; 42 Digest 150, *1483*.

(7) *White* v. *Altrincham Urban District Council*, [1936] 1 All E.R. 923; [1936] 2 K.B. 138 ; 105 L.J.K.B. 366; 154 L.T. 656; 29 B.W.C.C. 105; Digest Supp.

Summons.

This was a summons by the wife to review taxation. The summons was adjourned into court for judgment and the facts appear in the judgment.

T. G. Guest for the wife.

Cur. adv. vult.

Dec. 2. **SACHS, J.**, read the following judgment: The husband by his petition of Mar. 24, 1953, alleged adultery by the wife from February, 1940, onwards. The wife by her answer of July 15, 1953, admitted the adultery charged but alleged that it had been condoned by the husband's conduct. She further alleged that the same conduct constituted constructive desertion by the husband and accordingly in her turn asked the court for a decree. It was common ground that in 1938 the wife had obtained from the magistrates an order against the husband on the ground of his wilful neglect to provide reasonable maintenance for herself and their child. Whilst the wife asked for the discretion of the court to be exercised in her favour and filed a discretion statement accordingly, the husband made no such request and filed no such statement. On the wife informing her solicitors that she had grounds to suspect the husband of adultery, they caused inquiries to be made. In July, 1954, the solicitors being doubtful whether these inquiries were justifiable put the matter before counsel. The advice they received was to the effect that whilst there was a certain consistency in the material so far gathered, there was nothing as yet in that material which would justify an amendment of the pleadings; it was also advised that certain further inquiries could reasonably be made. The solicitors thereupon continued in their previous course, still without success; but whilst dealing with a different matter at the beginning of November, 1954, they chanced on vital information. The result was that on Nov. 6, two days before trial, an inquiry agent interviewed the husband and obtained a written confession. On Nov. 8 the case appeared in the list before DONOVAN, J., who in all the circumstances refused the wife leave to amend her answer, but granted the husband leave to amend his petition by asking for the discretion of the court. Thereupon the husband filed a discretion statement admitting adultery from June, 1953, onwards. The result of the trial was that both parties obtained decrees, the husband being told plainly that he was fortunate in the circumstances to have discretion exercised in his favour.

The matter then came before the district registrar at Lincoln on a taxation under the provisions of the Legal Aid and Advice Act, 1949. He disallowed all the disbursements to inquiry agents except one item of three guineas; he disallowed the items for the instructions to and advice of counsel above referred to, and he reduced the fee for instructions for brief, etc., from eighty guineas to twenty guineas. Objections were lodged and on those the district registrar has made his observations. The observations and this application relate solely to a legal aid taxation, there having been no party and party taxation. At this point I wish to express my appreciation for the detailed and helpful way in which those observations were put forward. It is always of high importance where an objection has been lodged that the registrar should in compliance with the duty cast on him by R.S.C., Ord. 65, r. 27 (40), set out fully, in relation to the objection, the grounds on which he disallows the whole or part of any expense. It is only when he does thus comply with this duty that the court can perform its proper function on a review, viz., that of checking whether amongst the factors which he took into account he has or has not acted in some degree on an erroneous principle. In the present case, too, it is to be noted that whereas objections were lodged in respect of more than twenty items, they have only been pursued in the present application as regards the matters above mentioned. The clear way in which the registrar dealt with the other objections was obviously a contributory cause to their being abandoned later.

As regards the items remaining in dispute he gave amongst his reasons several to which it is necessary to advert. The first relates to a doubt in his mind whether the form of certificate entitled the wife to the benefit of the provisions of the Legal Aid and Advice Act, 1949, in respect of her cross-prayer. He states: "I taxed the bill on the footing that she simply had authority to defend". Even if that were the true construction of the certificate it cannot properly be said that the inquiries made by the agents as to the husband's adultery were not covered by the certificate. Whenever a petitioner does not ask for discretion to be exercised in his favour it is obvious that the decision of the court is likely to be affected by proof that he has committed adultery. It being the duty of the court to act in accordance with the justice of the case, the moment it appears that the petitioner has failed to make proper disclosure to the court he stands at risk of the decree being refused.* It follows that where there are good grounds for suspecting such a petitioner of having committed adultery, the respondent's solicitor would be doing less than his duty in defence of his client's rights if he did not take reasonable steps to ascertain what was the true position and so enable his client either to seek to raise the issue in court, or at least to put the court in the position where the intervention of the Queen's Proctor could be sought. I now turn to the form of certificate which was

> "to defend proceedings for divorce brought by [the husband] including a prayer for relief, if necessary."

Where the court has before it a certificate which does not seem clear, it has to interpret it as a matter of legal construction. Here the registrar fell into the error of asking the area committee for an interpretation. In fact he has received two contradictory opinions from the same area committee, the earlier that the certificate only covered a defence, the later that it covered proceedings by way of cross-prayer. He has adopted the earlier opinion and here again, I am unable to agree with him. The words "including a prayer for relief" have no sense unless they entitle the wife to raise allegations which would and do result in a cross-prayer. I hope, however, that no further certificates will be issued in this unfortunate form. It is, of course, essential that civil aid certificates should be clear so as to enable all concerned to understand exactly what they mean.

I next turn to a passage in the observations of the district registrar that requires particular attention. He states:

> "To quote a former senior registrar it is the duty of solicitors 'to do all they properly can to protect the fund and thereby the interests of the taxpayer', a duty which [the wife's] solicitors have failed to discharge. They have also gone beyond what was absolutely necessary in the interests of their client."

That paragraph, apparently derived from some source regarded as authoritative by the district registrar, combines within itself two fallacies and so discloses an erroneous approach to the particular matters under consideration, and to legal aid taxations in general.

First, the primary and, so long as the case is conducted reasonably within the ambit of the civil aid certificate, the only duty of a solicitor in conducting an assisted case is to his client. Not only is that the general intent of the Legal Aid and Advice Act, 1949, but s. 1 (7) (a) specifically states that saving only certain express exceptions the solicitor's "relationship" with (which naturally includes "his duties to") his client remains unaffected by the fact that the client is an assisted person. Indeed one of the fundamental principles on which the legal aid system is based is that the assisted person, his solicitor and his counsel, have the same freedom in the conduct of an assisted case, and are entitled to the benefit of the same relationships, as in a similar matter where the lay client is not an assisted person. Solicitor and counsel have thus to approach the consideration of any problem as to incurring reasonable expense to attain justice in an assisted case in the same way as if the lay client were a person whose means enabled him to fight that particular case in a reasonable manner. The limitations to a solicitor's ability to act freely in accordance with this general rule are express, are laid down in the Act itself, and have no application to the present case. In so far as they limit freedom in the conduct of proceedings they are mostly to be found in the Legal Aid (General) Regulations, 1950, reg. 14, which deals, inter alia, in para. (3) with the leave necessary to appeal in interlocutory matters, the briefing of leaders and so forth. In referring to the conduct of an assisted case I have, of course, only been concerned with steps taken during the currency of a civil aid certificate to assert or dispute a right. Nothing I have said relates to the quite separate problem, with which the taxing officer is not concerned, as to the point at which it may become unreasonable to continue the proceedings at all (cf. reg. 14 (7) and (13) of the Regulations of 1950*).

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* And see *Burford* v. *Burford* (ante, p. 664).

The second fallacy inherent in the above cited observation lies in the phrase containing the words " absolutely necessary ". Such a phrase has certainly no place on a taxation as between solicitor and client

> ". . . where the costs are to be paid out of a common fund in which the client and others are interested "

as appears from the tenor of the observations of Buckley, L.J., in *Giles* v. *Randall* (1) ([1915] 1 K.B. at p. 295). Nor would it have made matters better if the word " absolutely " had been omitted. The words in R.S.C., Ord. 65, r. 27 (29), are " necessary or proper "; and " proper " has always been construed as " reasonably incurred " (cf. per Atkin, L.J., in *Pêcheries Ostendaises* (*Soc. Anon.*) v. *Merchants' Marine Insurance Co.* (2) ([1928] 1 K.B. at p. 762). Indeed " reasonable ", " proper " and " reasonable and proper " (cf. R.S.C., Ord. 65, r. 27 (38) and per Singleton, L.J., in *Lyon* v. *Lyon* (3) [1952] 2 All E.R. at p. 834) are obviously interchangeable expressions in the context under consideration, and all include something beyond what is meant by " necessary " in the sense in which it appears to be used in the above observation of the registrar. When considering whether or not an item in a bill is " proper " the correct viewpoint to be adopted by a taxing officer is that of a sensible solicitor sitting in his chair and considering what in the light of his then knowledge is reasonable in the interests of his lay client. That is, of course, a very different angle from that called to mind by the observation. It is wrong for a taxing officer to adopt an attitude akin to a revenue official called on to apply rigorously one of those Income Tax Act rules as to expenses which have been judicially described as " jealously restricted " and " notoriously rigid and narrow in their operation ". I should add that, as previously indicated, the lay client in question should be deemed a man of means adequate to bear the expense of the litigation out of his own pocket—and by " adequate " I mean neither " barely adequate " nor " super-abundant ". It may save misapprehension, too, if one remembers that neither in an unassisted nor in an assisted case has a solicitor any implied authority to take steps which are extravagant or over-cautious. A vital distinction, however, between an unassisted case and an assisted case is that in the latter there is no one who can even give an express authority to the solicitor enabling him to charge for such steps. That leads, of course, to an essential difference between taxations of the type now under consideration and a " solicitor and own client " taxation. But to express that difference either in the words imputed to a former registrar or by the reference to what is " absolutely necessary " can be definitely misleading.

The next sentence in the observations which needs consideration is that in so far as the 1954 inquiries were continued on counsel's advice they took place after the cause had been set down for trial,

> " when the pleadings were of course closed, there being no allegation of adultery against the [husband], and I cannot say what justification there was for continuing the inquiries."

My earlier remarks on the duty of the court to act according to the justice of the case indicate the fallacy underlying the above observation. Indeed it has before now happened in a divorce suit that the whole course of the proceedings has been changed by last moment discoveries which lead to amendment of the pleadings just before or even at trial. Further, the fact that the solicitor had at this stage obtained counsel's advice also does not seem to have been taken into account. It is the standard, and proper, view of taxing officers that as a general rule a solicitor acting on the advice of properly instructed counsel can hardly be said to be acting unreasonably, save perhaps in a very exceptional set of circumstances. There being accordingly points on which the registrar was in error in principle, I return to the actual items disallowed or reduced.

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* Regulation 14 (13) was added by the Legal Aid (General) (Amendment No. 1) Regulations, 1954: see Halsbury's Statutory Instruments Supplement, 1955.

First as to the inquiry agent's fees and the other expenses connected with inquiries about the husband's adultery. Where a solicitor bona fide acting in what he considers the best interests of his client has incurred expenditure which, unless allowed on legal aid taxation, will fall on him personally, it would be wrong for the court to be astute in seeking reasons to disallow the items, and in particular care must be taken not to be affected by what is colloquially termed " hindsight ". Indeed there is authority for saying that as regards such honestly incurred expenditure (assuming there is nothing that can fairly be termed unwarrantable or excessive about it) the taxing officer on a " common fund " taxation should take a " liberal view " (per HORRIDGE, J., in *Re Lavey, Ex p. Cohen & Cohen* (4) ([1921] 1 K.B. at p. 354). In no matter is this more important than when dealing with expenditure on inquiries, for otherwise a tendency towards " payments by results " might creep in, which would indeed be contrary to the best interests of justice. I have of course examined carefully the detailed remarks of the district registrar on specific items of expenditure on the inquiries. These were affected by his having approached the matter on a wrong principle. Suffice it, accordingly, to say that examining each item de novo I find myself unable to agree with the individual criticisms any more than I agreed with the general approach of the taxing officer. I do not think it would, in all the circumstances, serve a useful purpose to refer to each individual criticism as no further question of principle arises on them. In the result I have come to the conclusion that these expenses should be allowed as having plainly been reasonably incurred. I would have so held even if they had not eventually resulted in a confession. For on a solicitor and client taxation under Sch. 3 to the Act of 1949 such costs may well be reasonably incurred even if the inquiries proved fruitless; and I agree with the observations of His Honour JUDGE RICHARDSON as reported in *Lyon* v. *Lyon* (3) ([1953] P. at pp. 4, 5). Secondly, the district registrar should have allowed the bulk of the other correspondence which he disallowed acting on the same error in principle.

Thirdly, I allow the items in relation to the instructions to and advice by counsel. It is to the solicitor's credit and not, as the district registrar thought, the reverse, that he sought counsel's advice at the point he did. (I may add, too, that the district registrar seems to have misread the details of the instructions to counsel, as he refers to a passage which I cannot find.) Here the fact that the taxation is on a more generous scale than a party and party taxation is particularly relevant.

Fourthly, there is the item of instructions for brief, etc. Clearly there must be an addition to this item in respect of work relating to the issue of adultery on the part of the husband and to the considerable correspondence on other points which was disallowed in error. Before I reach that question, the point arises whether or not the present is a case in which the fee of twenty guineas can be successfully attacked as being inadequate even for such work as the registrar regarded as proper for the particular case. Where a sum for instructions for brief, etc., is fixed within the legitimate discretion exercised by a taxing officer, it cannot, of course, be challenged on quantum at a review by a judge. If, however, the figure allotted by the registrar is either above or below that " generous ambit within which reasonable disagreement is possible " (to use the words of ASQUITH, L.J., on a different discretionary matter in *Bellenden* (*formerly Satterthwaite*) v. *Satterthwaite* (5), [1948] 1 All E.R. at p. 345) then the mere fact that it comes outside that ambit may of itself provide good cause for a successful challenge by an aggrieved solicitor, for the very sum allowed may in exceptional circumstances show that some wrong principle has been followed (per SWINFEN

EADY, L.J., in *Slingsby* v. *A.-G.* (6), [1918] P. at p. 239, and see *White* v. *Altrincham Urban District Council* (7), [1936] 1 All E.R. at p. 927).

From my own knowledge of other bills in relatively short defended divorce causes, it was clear that the figure of twenty guineas was very much on the low side. In those circumstances it seemed right to make further inquiries from two available sources, and I would like to express my gratitude to both for the great deal of trouble they expended on this matter. The Law Society were good enough to make an analysis, from amongst the several hundred bills passing in any one week through their accounting department, of a considerable number relating to the shorter defended divorce causes as taxed all over the country; but in the event that analysis did not of itself provide a conclusive answer to this particular case. I also sought the benefit of the detailed views of the two senior registrars of this Division on this particular case. The result is that in my opinion the figure of twenty guineas for that particular portion of the work must stand, as it is not established that it comes outside the legitimate bracket of permissible figures. It is, in my view, the lowest permissible figure at which it could have been taxed, and one would normally expect something quite distinctly more; but on the authorities this does not warrant any interference with the quantum decided on by the district registrar. On the other hand, when making an addition for the work which should not have been disallowed (which was in volume but little less than that for which the twenty guineas was assessed), I can properly proceed on a more normal basis and I propose to allow an additional twenty-five guineas. Therefore the total for this item is increased to forty-five guineas. I would add that I do not consider that any registrar would have allowed this item at a figure quite as high as that at which it was originally put into the bill by the solicitors. Equally I do not consider fair the language of condemnation applied by the registrar of that figure.

The result is that on this application to review I make the adjustments above stated and order that there be a taxation on a legal aid basis of the costs of the present application with a certificate for counsel. The contribution of the parties towards their legal aid is of so low a nature that no risk arises in this particular case of the costs of this application falling on them, and so I need make no recommendation to the Law Society in that respect.

Order accordingly.

Solicitors: *Theodore Goddard & Co.*, agents for *Browne & Wells*, Northampton (for the wife).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

INSTITUTE OF FUEL *v.* MORLEY (VALUATION OFFICER) AND ANOTHER.

[HOUSE OF LORDS (Earl Jowitt, Lord Morton of Henryton, Lord Radcliffe, Lord Tucker and Lord Cohen), November 2, 3, December 12, 1955.]

Rates—Exemption—Scientific society—"Purposes of science exclusively"—Institute for the advancement of fuel technology—Object also to uphold the status of members—Authorised purposes—Scientific Societies Act, 1843 (6 *&* 7 *Vict. c.* 36), *s.* 1.

The appellant was incorporated by royal charter in August, 1946, which, in para. 7, set out the objects and purposes for which the appellant was constituted. Paragraph 7 (a) read: "To promote, foster, and develop the general advancement of the various branches of fuel technology as an end in itself, and as a means of furthering the more scientific and economic utilisation of fuel of all kinds for industrial, commercial, public, agricultural, domestic, transport and/or other purposes, and to promote, assist, finance and support such industrial and scientific research, investigation, and experimental work in the economical treatment, and application of fuel as the institute may consider likely to conduce to those ends, and to the benefit of the community at large." Paragraph 7 (d) read: "To uphold the status of members of the institute by holding or prescribing examinations for candidates for election and by requiring standards of knowledge and experience which can be approved". The appellant claimed that, under the charter, it was a society instituted for the purposes of science exclusively within the meaning of s. 1 of the Scientific Societies Act, 1843*, and, therefore, exempt from the payment of rates.

Held: the appellant was a society instituted for purposes of science exclusively within the meaning of s. 1 of the Act of 1843, because (i) para. 7 (a) of the charter prescribed one main object only, namely, the advancement of fuel technology pursued not merely as an end in itself but also to make known and available the knowledge so gained, (ii) no part of the sub-paragraph could be read as constituting a commercial purpose, and (iii) objects subsequently stated, including para. 7 (d), which was directed to ensuring that the members should attain standards of knowledge and experience which the appellant could approve, were ancillary to the main object; accordingly, the appellant was entitled to exemption from payment of rates under the section.

Dictum of LORD HANWORTH, M.R., in *Institution of Civil Engineers* v. *Inland Revenue Comrs.* ([1932] 1 K.B. at p. 162) applied.

Decision of the COURT OF APPEAL ([1955] 1 All E.R. 161) reversed.

[As to the exemption of scientific societies from rates, see 21 HALSBURY'S LAWS (2nd End.) 12, para. 26; and for cases on the subject, see 38 DIGEST 493-499, *485-540*.]

Cases referred to:

(1) *Institution of Civil Engineers* v. *Inland Revenue Comrs.*, [1932] 1 K.B. 149; 100 L.J.K.B. 705; 145 L.T. 553; 16 Tax Cas. 158; Digest Supp.

(2) *Inland Revenue Comrs.* v. *Forrest*, (1890), 15 App. Cas. 334; 60 L.J.Q.B. 281; 63 L.T. 36; 54 J.P. 772; 3 Tax Cas. 117; 38 Digest 496, *503*.

Appeal.

Appeal by the Institute of Fuel from an order of the Court of Appeal, dated Dec. 15, 1954, and reported [1955] 1 All E.R. 161, on an appeal by way of Case Stated pursuant to the Lands Tribunal Act, 1949, s. 3 (4), from a decision of the Lands Tribunal.

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* The terms of the section are printed at pp. 844, 845, post.

The appellant was the occupier of offices and other premises at 18, Devonshire Street, London, W.1. Until February, 1953, the premises had not been assessed to rates on the ground that the appellant was a scientific society within the meaning of the Scientific Societies Act, 1843, s. 1. On Feb. 20, 1953, the valuation officer made a proposal for the alteration of the valuation list for the Metropolitan Borough of St. Marylebone by the insertion of the premises occupied by the appellant at a gross value of £365 and rateable value of £301. The appellant objected, and the valuation officer appealed to a local valuation court for North-West London. On July 8, 1953, that court determined that the premises should be entered in the valuation list at the values proposed by the valuation officer. The appellant appealed to the Lands Tribunal, who found that the premises were occupied by the appellant for the transaction of its business, and for carrying into effect its purposes; that the appellant was constituted by royal charter and was instituted for the purposes of science within the meaning of the Scientific Societies Act, 1843, s. 1; that a certificate had been obtained under s. 2 of that Act that the appellant was entitled to the benefit of the provisions of the Act; that the appellant was supported wholly or in part by voluntary contributions, and did not, as by its charter it might not, make any dividend, gift, division or bonus in money to or between any of its members; and that bye-laws had been made under para. 19 of the charter. The Lands Tribunal came to the conclusion that the appellant was not instituted exclusively for purposes of science within the meaning of s. 1 of the Act of 1843, and dismissed the appeal. The question stated in the Case was whether the Lands Tribunal came to a correct decision in point of law in holding that the appellant was not a "society instituted for purposes of science exclusively" within the meaning of s. 1 of the Act of 1843.

Michael Rowe, Q.C., and *F. A. Amies* for the appellant.

Maurice Lyell, Q.C., and *P. R. E. Browne* for the respondents, the valuation officer and the rating authority.

The House took time for consideration.

Dec. 12. The following opinions were read.

EARL JOWITT: My Lords, I have had an opportunity of reading in print the speech which my noble and learned friend, LORD MORTON OF HENRYTON, is about to deliver. I agree with his conclusion and with his reasoning, and find it unnecessary to add any comments of my own.

LORD MORTON OF HENRYTON: My Lords, the question arising on this appeal, as set out in the Case Stated by the Lands Tribunal, is whether that tribunal

> "came to a correct decision in point of law in holding that the appellant institute is not a 'society instituted for purposes of science exclusively' within the meaning of s. 1 of the Scientific Societies Act, 1843."

It is claimed by the appellant institute that it is such a society and is, therefore, exempted by the section from being assessed or rated in respect of an office and premises occupied by it at 18, Devonshire Street, W.1.

The majority of the Court of Appeal (the Master of the Rolls (SIR RAYMOND EVERSHED) and BIRKETT, L.J.; JENKINS, L.J., dissenting) rejected the institute's claim and upheld the decision of the Lands Tribunal. Hence this appeal.

Section 1 of the Scientific Societies Act, 1843, so far as is relevant provides as follows:

> "No person or persons shall be assessed or rated, or liable to be assessed or rated . . . to any . . . local rates . . . in respect of any land, houses, or buildings, or parts of houses, or buildings, belonging to any society instituted for purposes of science, literature, or the fine arts exclusively, either

> as tenant or as owner, and occupied by it for the transaction of its business, and for carrying into effect its purposes, provided that such society shall be supported wholly or in part by annual voluntary contributions and shall not, and by its laws may not, make any dividend, gift, division, or bonus in money unto or between any of its members, and provided also that such society shall obtain . . ."

a certificate therein mentioned.

It is accepted by the respondents that the institute is instituted for purposes of science, and that it satisfies all the requirements of the section except the requirement that it shall be instituted for purposes of science *exclusively*. They contend that, though it is in part instituted for such purposes (namely, for purposes of fuel technology which they concede to be purposes of science within the meaning of the section), the institute was also instituted in part for other purposes which are not purposes of science.

The institute was incorporated by royal charter on Aug. 12, 1946, and I shall refer at once to the portions of the charter which were discussed at the hearing. The first recital shows that an association or institute incorporated under the Companies Acts, 1908 to 1917, and known as the Institute of Fuel had petitioned for a charter of incorporation, and para. 1 provides as follows:

> "The persons now members of the said association or institute known as the Institute of Fuel (hereinafter called 'the existing institute'), and all such persons as may hereafter become members of the body corporate hereby constituted . . . and their successors, shall for ever hereafter (so long as they shall continue to be such members) be by virtue of these presents one body corporate and politic by the name of 'The Institute of Fuel' . . ."

Paragraph 5 provides that the income and property of the institute shall be applied solely towards the promotion of the objects of the institute, and forbids the institute to carry on any trade or business or engage in any transaction with a view to the pecuniary gain or profit of the members thereof. Paragraph 6, while prohibiting the receipt of any profit by members, provides that

> "nothing herein contained shall prevent . . . the giving of privileges to the members of the institute . . ."

Paragraph 7 is the vital paragraph, and is in the following terms:

> "The objects and purposes for which the Institute of Fuel is hereby constituted are:—(a) To promote, foster, and develop the general advancement of the various branches of fuel technology as an end in itself, and as a means of furthering the more scientific and economic utilisation of fuel of all kinds for industrial, commercial, public, agricultural, domestic, transport and/or other purposes, and to promote, assist, finance and support such industrial and scientific research, investigation, and experimental work in the economical treatment, and application of fuel as the institute may consider likely to conduce to those ends, and to the benefit of the community at large. (b) To hold meetings in London and at established provincial centres for the reading and discussion of papers, to issue regularly a technical journal, to join with other institutions in promoting objects of mutual interest, and generally to take such a prominent and active part in the advancement of the knowledge and practice of fuel technology as its status requires. (c) To co-operate with government departments, universities, educational institutions, associations, companies, or individual persons in establishing or maintaining any investigation or research relating to any branch of fuel technology. (d) To uphold the status of members of the institute by holding or prescribing examinations for candidates for election and by requiring standards of knowledge and experience which can be approved. (e) To print and publish, sell, lend and distribute any communications made to the institute or any similar society, and any reports of the

> proceedings or transactions of the institute or any similar society, and to produce, purchase, reproduce, print, publish and distribute any other books, papers, treatises or communications relating to fuel technology and to establish and maintain a library. (f) To invite foreign delegates to attend any meetings, conferences or functions promoted or supported by the institute and to defray or contribute to their expenses; to defray or contribute to the expenses of any duly appointed officials or representatives of the institute attending any foreign scientific meetings or conferences at the request of the council of the institute, and to translate, print, publish and distribute any books, communications, papers or proceedings or abstracts or extracts thereof which are of scientific interest. (g) To provide facilities for conferences and functions in support of the objects of the institute. (h) To do all other things incidental or conducive to the attainment of the above objects or any of them."

Paragraph 14 sets out the classes into which the corporate members of the institute are to be divided, and para. 15 authorises the use by the several classes of members of certain distinguishing initials after their names. Paragraph 16 provides that the qualifications, method and terms of admission, privileges and obligations, including liability to expulsion or suspension of members of the various classes respectively, shall be such as the bye-laws for the time being of the institute shall direct. Paragraph 19 provides that

> " The corporate members or the majority of such members present in person and voting at any duly convened special general meeting . . . shall have power from time to time to make such bye-laws of the institute as to them shall seem requisite and convenient for the regulation, government and advantage of the institute, its members and property and for the furtherance of the objects and purposes of the institute . . ."

There follows a proviso that no such bye-law shall take effect until it has been allowed by the Lords of the Privy Council. Paragraph 20 provides that the first bye-laws to be made under the charter shall be made within six months from the date thereof. Paragraph 21 is as follows:

> " Pending the making and approval of the bye-laws to be made under these presents but no longer the articles of association and bye-laws of the existing institute shall be the bye-laws of the institute so far as the same may be applicable and shall have effect as though the institute, its officers and members had therein been referred to throughout in lieu of the existing institute, its officers and members."

In the course of the argument reference was made to the present bye-laws of the institute, which were made some months after the date of the charter, under the powers conferred by para. 19.

My Lords, if it had been suggested that it was relevant for the decision of this case to consider what were the activities of the institute at any time subsequent to the grant of the charter, and if your Lordships had accepted that suggestion, the bye-laws so made might possibly have thrown some light on the matter. But the only question which has been argued on this appeal is whether the purposes for which the institute was originally instituted were, or were not, exclusively scientific. I do not see how your Lordships can be assisted on this particular question by a consideration of bye-laws made after the grant of the charter. It might have been possible to gain some assistance from the bye-laws mentioned in para. 21 of the charter, which were existing at the date of the charter and were given temporary effect thereby; but these bye-laws were not brought to your Lordships' attention, and I conclude that neither party thought that they could assist the House.

I now turn to consider the terms of the charter, and, in particular, para. 7, which sets out the objects and purposes for which the institute was constituted.

A Sub-paragraph (a) was the subject of much argument on both sides. In my view, it states the main purpose of the institute, and I can best state my conclusion as to its effect in the words of JENKINS, L.J. ([1955] 1 All E.R. at p. 174):

> "The sub-paragraph, as a matter of construction, prescribes one object only, namely, the advancement of fuel technology, and goes on to say, in B effect, that this object is to be pursued not merely as an end in itself (that is, for the purpose of increasing the sum of academic or laboratory knowledge pertaining to this science), but also in order that the fuel-using public may benefit from the new and improved methods of fuel utilisation which the advancement of the science by the institute may be expected to produce. In other words, the institute is not only to increase this department of C scientific knowledge, but also to make known to the world and available for public use the knowledge thus gained. The rest of sub-para. (a), which relates to industrial and scientific research, investigation, and experimental work in the economical treatment and application of fuel, is, I think, clearly no more than ancillary to the advancement of fuel technology."

D Counsel for the respondents submitted that the sub-paragraph stated two purposes, whereof the first was scientific and the second was of a commercial nature. I think it is quite possible to read sub-para. (a) as stating two purposes, one beginning with the words "To promote, foster, and develop", and the other with the words "to promote, assist, finance and support". In my view, E however, such a sub-division does not assist the respondents, as each of the two purposes so stated is, to my mind, a scientific purpose. I cannot find in either of them any suggestion that the institute can embark on any commercial pursuit; they are both confined to the acquisition of knowledge in the realm of fuel technology, which is, admittedly, a science, and to the spread of such knowledge for the benefit of the community.

F I regard sub-para. (b) and sub-para. (c) as being merely ancillary to the main purpose or purposes stated in sub-para. (a). It was suggested that the concluding words of sub-para. (b) were ambiguous, as "its status" might refer either to the status of the institute or to the status of the knowledge or practice of fuel technology. I cannot doubt that the former is the correct view, but on either view sub-para. (b) remains, to my mind, purely ancillary.

G Counsel relied strongly on sub-para. (d). He submitted that this sub-paragraph, read in conjunction with other paragraphs and in particular with para. 6, para. 14 and para. 19, stated, in effect, that one purpose of the institute was to benefit its members in their profession of fuel technologists. In support of this submission, he invited your Lordships to read the concluding words H "which can be approved" as referring to approval by the public, the intent being that the public should be led to approve of the members of the institute, and to give them profitable employment. I do not so read these words. In my opinion, they refer to approval by the institute. If the institute is to pursue efficiently the scientific purposes stated in sub-para. (a), it is plainly necessary that its members should attain standards of knowledge and experience which I the institute can approve. It is in this sense, and for this purpose, that the status of members is to be upheld, and I cannot give to this sub-paragraph, read in conjunction with the charter as a whole, the meaning for which counsel contends.

Many passages in judgments bearing on this matter were cited in the course of the argument. I would apply to the present case the words of LORD HANWORTH, M.R., in *Institution of Civil Engineers* v. *Inland Revenue Comrs.* (1) ([1932] 1 K.B. at p. 162):

> "That its members should bring a certain knowledge and capacity for learning to the institution seems only to confirm its purpose of the general advancement of mechanical science and knowledge."

My Lords, I am ready to assume that to be a member of the institute is an advantage from a professional and pecuniary standpoint. But, in my view, that advantage is no more than

> ". . . an incidental, though an important and perhaps a necessary consequence of the way in which the institution does its work in the pursuit of science"

to use the words of Lord Macnaghten in *Inland Revenue Comrs.* v. *Forrest* (2) (1890) (15 App. Cas. at p. 354).

Sub-paragraphs (e), (f), (g) and (h) are to my mind ancillary and require no comment.

For these reasons, I am of opinion that the Lands Tribunal came to an incorrect decision, and I would allow the appeal.

LORD RADCLIFFE: My Lords, I agree that this appeal should be allowed.

LORD TUCKER: My Lords, it having been conceded that bye-laws made subsequent to the date of the charter cannot be used for the purpose of construing the charter—a concession which, in my opinion, was rightly and necessarily made—your Lordships are, I think, concerned only with sub-para. (a) and sub-para. (d) of para. 7 of the charter. Some reference was made to other provisions of the charter but they do not, in my view, afford any assistance. These two sub-paragraphs are as follows:

> "(a) To promote, foster, and develop the general advancement of the various branches of fuel technology as an end in itself, and as a means of furthering the more scientific and economic utilisation of fuel of all kinds for industrial, commercial, public, agricultural, domestic, transport and/or other purposes, and to promote, assist, finance and support such industrial and scientific research, investigation, and experimental work in the economical treatment, and application of fuel as the institute may consider likely to conduce to those ends, and to the benefit of the community at large.
>
> "(d) To uphold the status of members of the institute by holding or prescribing examinations for candidates for election and by requiring standards of knowledge and experience which can be approved."

Sub-paragraph (a) is, I think, expressed with unnecessary elaboration and in the end adds little if anything to the opening words, viz.:

> "To promote, foster, and develop the general advancement of the various branches of fuel technology."

I am quite unable to construe the words which follow, "and as a means of", as constituting a commercial purpose so as to prevent the institute from being held to have been instituted exclusively for purposes of science.

As regards sub-para. (d), I agree with Jenkins, L.J. ([1955] 1 All E.R. at p. 174), that its purpose is plain, namely, to ensure that membership of the institute shall be confined to persons who have attained a suitable degree of proficiency in the field of fuel technology which, whether it be regarded as a separate object or not, is purely ancillary to the object expressed in sub-para. (a).

This case, as it seems to me, depends solely on the construction of a particular charter, and I have not, therefore, thought it necessary to refer to the authorities which were cited in argument.

I agree that the appeal should be allowed.

LORD COHEN: My Lords, I had written some observations in this matter, but since doing so I have had the opportunity of reading in print the speech which has been delivered by my noble and learned friend, LORD MORTON OF HENRYTON. I find myself so completely in agreement with his reasoning and with that of JENKINS, L.J., in the Court of Appeal, that I am content to say only that I agree that the Lands Tribunal came to an incorrect conclusion. I, too, would allow the appeal.

Appeal allowed.

Solicitors: *Philip Conway, Thomas & Co.* (for the appellant); *Solicitor of Inland Revenue* (for the respondent, the valuation officer); *Sharpe, Pritchard & Co.* (for the respondent, the rating authority).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

EAVES *v.* EAVES AND POWELL.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sachs, J.), December 2, 1955.]

Legal Aid—Costs—Taxation—Counsel's fee—Divorce petition heard outside London—Undefended suit—Normal fee for counsel reduced on taxation—No special facts or circumstances stated by taxing officer—Legal Aid and Advice Act, 1949 (12 *&* 13 *Geo.* 6 *c.* 51), *Sch.* 3, *para.* 4 (1).

Costs—Taxation—Review by court—Reasons for taxing officer's decisions on objection should be fully stated—R.S.C., Ord. 65, *r.* 27 (40).

The husband who had obtained a civil aid certificate under the Legal Aid and Advice Act, 1949, petitioned for divorce on the ground of the wife's desertion. The suit was heard at Bournemouth and was undefended. The husband was granted a decree, with costs against the co-respondent, and on May 26, 1955, his bill of costs was taxed. On taxation the registrar reduced the fee on counsel's brief from seven to five guineas both in the solicitor and client column (relating to taxation under Sch. 3 to the Act of 1949) and the party and party column. Objection in writing was carried in under R.S.C., Ord. 65, r. 27 (39) in which it was submitted that the fact that counsel had more than one case on the same day should not affect the issue (*Self* v. *Self*, [1954] 2 All E.R. 550). The registrar gave as the reason of his decision that in accordance with the discretion vested in him he had fixed the fee " having regard to the merits of the case and all other relevant circumstances ". Subsequently the registrar was asked pursuant to R.S.C., Ord. 65, r. 27 (40) to state his reasons for the reduction and what were the " other relevant circumstances "; and he replied that he had given the matter full consideration and had read the brief and all other papers, and that he was unable to assist further. On a summons to review,

Held: prima facie, the appropriate fee for counsel briefed to appear in an undefended divorce cause at a town such as Bournemouth was more than five guineas; as the registrar had not stated that there were any special facts or circumstances relating to his decision it was to be assumed that none existed; where something had been done which was not normally right, and where no explanation appeared why that course had been taken, a clear inference arose that some irrelevant circumstance had been taken into consideration; accordingly, the registrar had gone wrong in principle, the taxation would be reviewed, and the sum of seven guineas would be allowed as the fee for counsel in both the solicitor and client and party and party columns of the bill.

Isaacs v. *Isaacs* ([1955] 2 All E.R. 811) applied.

Per CURIAM: the duty of a taxing officer when answering an objection is to make a full statement of all his "grounds and reasons" in relation to the objection (see p. 851, letter F, post).

[As to taxation of costs as between solicitor and client when party in matrimonial suit receiving legal aid, see 12 HALSBURY'S LAWS (3rd Edn.) 464, para. 1038; and for cases on the subject, see SUPPLEMENT to 27 DIGEST (Repl.) *5364 a-c*, and SUPPLEMENT to DIGEST (Practice) *1322 cc.*

As to the review of taxations of costs and the stating of decisions on objections and reasons therefor, see 31 HALSBURY'S LAWS (2nd Edn.) 228, para. 251.

For the Legal Aid and Advice Act, 1949, Sch. 3, para. 4 (1), see 18 HALSBURY'S STATUTES (2nd Edn.) 566.

For the Legal Aid (General) Regulations, 1950, reg. 18 (3), as substituted by the Legal Aid (General) (Amendment No. 1) Regulations, 1954, reg. 27, see HALSBURY'S STATUTORY INSTRUMENTS SUPPLEMENT, 1955.]

Cases referred to:

(1) *Isaacs* v. *Isaacs,* [1955] 2 All E.R. 811.
(2) *Self* v. *Self,* [1954] 2 All E.R. 550; [1954] P. 480; 3rd Digest Supp.
(3) *Dashwood* v. *Magniac,* [1892] W.N. 54; Digest (Practice) 937, *4773.*
(4) *Young* v. *Young and Kohler,* [1955] 1 All E.R. 796.
(5) *Huddleston* v. *Furness Ry. Co.,* (1899), 15 T.L.R. 238; 22 Digest (Repl.) 290, *2964.*

Summons.

This was a summons by the husband to review taxation. The summons was adjourned into court for judgment and the facts appear in the judgment.

D. H. Robson, Q.C., and *R. Armitage* for the husband.

Cur. adv. vult.

Dec. 2. **SACHS, J.,** read the following judgment: This is an application under R.S.C., Ord. 65, r. 27 (41), on behalf of a petitioning husband for a review of taxation of a four column bill of costs. I will deal first with the application in so far as it relates to the legal aid columns. The following are the circumstances. The petition was heard on Apr. 14, 1955, at Bournemouth and was undefended. On May 26, 1955, the bill of costs was taxed by the district registrar, Mr. CHIEVELEY WILLIAMS, who on Mar. 30, 1955, had taxed the bill which was the subject of an appeal in *Isaacs* v. *Isaacs* (1) ([1955] 2 All E.R. 811), which came before COLLINGWOOD, J.

In the present case (as in *Isaacs* v. *Isaacs* (1)) the registrar taxed counsel's brief fee down from seven guineas to five guineas. On June 1 an objection to this reduction was carried in under R.S.C., Ord. 65, r. 27 (39). That objection and the registrar's answer were in the following terms:

> "Reasons for objections. 'Counsel in this case attended the court from London and relying on *Self* v. *Self* (2) ([1954] 2 All E.R. 550) feels that seven guineas is a proper fee in this case. Counsel considers that because he had more than one case on the same day it should not affect the issue as a co-respondent should not benefit by the fact of counsel having more than one brief. Counsel therefore respectfully contends that each case should be allowed on its merits and that the proper and correct fee in this case should be seven guineas'. Remarks of district registrar. 'In accordance with the discretion vested in me I have fixed this fee having regard to the merits of the case and all other relevant circumstances'."

Just before the present application to me was due to be heard the solicitors to the husband, on the advice of leading counsel, very properly wrote to the registrar a letter calling attention to the terms of R.S.C., Ord. 65, r. 27 (40), and specifically asked him inter alia for the " reasons for the reduction " and for information as to what were the " other relevant circumstances " to which the above answer refers. The registrar's reply of Nov. 8 reads:

> " I regret that I am unable to assist you further in this matter. As you are aware, I gave the matter very full consideration and read the brief and other papers in this matter before fixing fee for counsel."

The relevant part of R.S.C., Ord. 65, r. 27 (40), reads:

> ". . . the taxing officer . . . if so required by either party . . . shall state either in his certificate of taxation or allocatur, or by reference to such objection, the grounds and reasons of his decision thereon, and any special facts or circumstances relating thereto."

The main object of the above cited provision is to enable an aggrieved party to ascertain what the taxing officer has or has not taken into account as being relevant factors. If he has taken into account factors which are irrelevant or if he has not taken into account all the factors which should have been in his mind, an appeal lies as regards principle. Normally, however, no appeal lies as to quantum. The importance of the parties being made aware of these reasons by the registrar is mentioned in *Dashwood* v. *Magniac* (3) ([1892] W.N. 54). It is perfectly obvious that in a case such as the present a taxing officer is not entitled to take cover, so to speak, under an omnibus statement that he has taken " all relevant circumstances " into account. Such a statement tends to oust the jurisdiction of the court on a review of taxation and can only too easily result in there not being disclosed the grounds on which a discretion is exercised, despite the admonition of statutory force that those grounds must be stated.

This is not the first time I have observed a district registrar to state his answer to an objection in terms which, no doubt by inadvertence, were abbreviated and unduly uninformative. It should be emphasised that the duty of a taxing officer when answering an objection is to make a full statement of all his " grounds and reasons " in relation to the objection, a duty which may well, as in the present case, entail stating specifically whether or not the matter complained of was taken into account. In no instance is compliance with the above duty more important than in legal aid taxations, where the remuneration of both branches of the legal profession depends so much on taxing officers and where nothing should be done in a form which would entrench on such rights as have been given to those concerned to seek a judge's review in appropriate instances. In the present case the formula used by the registrar is all the more to be deprecated because he refrains from dealing with the one specific point raised in the objection—as to account having been taken of the fact that counsel had more than one case on the same day. This was a point which had in fact been raised on this taxation by the registrar himself, as appears from matter to which I will later refer.

Taking, however, the material as it thus stands the position is as follows. First, there is the prima facie case that according to normal practice the appropriate fee for counsel briefed to appear in an undefended divorce cause at a town such as Bournemouth is more than five guineas. The reasons for that being so are set out in *Self* v. *Self* (2). I am fortified to note that WALLINGTON, J., in *Young* v. *Young and Kohler* (4) ([1955] 1 All E.R. at p. 800) stated that he identified himself entirely with, and fully agreed with, all the reasons there given. Secondly, despite the registrar's duty to give information as to " any special facts or circumstances " relating to the item in issue, he has not stated that there were any, and so it is to be assumed that none exists. Thirdly, where something is done which prima facie is not normally right, and where no explanation appears why that course has been taken, a clear inference arises that some irrelevant circumstance has been taken into consideration. On that footing the registrar has gone wrong in principle on this matter of counsel's fee, and it is my duty to review the taxation. This I have done and I allow counsel's fee at the same figure as COLLINGWOOD, J., in *Isaacs* v. *Isaacs* (1), viz., seven guineas.

I now turn to the alternative grounds on which counsel for the husband urged that the decision be reviewed. When the attempts to get the registrar to comply with the provisions of R.S.C., Ord. 65, r. 27 (40), proved unsuccessful, an affidavit was sworn to by the costs clerk of the husband's solicitors, who attended the taxation on May 26. Of this para. 5 reads:

> " The learned district registrar asked if counsel had had more than one case on that date and I informed him that my firm had only instructed counsel in that one case but he instructed his clerk to refer to the court papers and it appeared that another solicitor had also instructed the same counsel on the same day in another case."

Counsel urged, not unnaturally, that in the light of the views stated by the same registrar on Mar. 30, 1955, in *Isaacs* v. *Isaacs* (1) on reducing the fee of counsel who there held more than one brief, the inference to be drawn from the facts set out in the above para. 5 was that he continued wrongly to hold that view on May 26. (I have since ascertained that the application to the judge in *Isaacs* v. *Isaacs* (1) was filed on June 3.) When, however, it is the function of a court to review a taxation it seems to me to be undesirable that it should have to resort to inferences of that type, and I have preferred to act on general grounds arising from such material as above set out before me in the present case, and to reserve the question whether or not in certain circumstances inferences may be drawn from what a taxing officer has done in other cases.

Similarly, as R.S.C., Ord. 65, r. 27 (40), provides the specific method by which this court is to be informed of a registrar's reasons, it seems doubtful whether the court can as a general rule look at statements aliunde as to what the registrar may have said as to his reasons (compare the reasoning in *Huddleston* v. *Furness Ry. Co.* (5) (1899), 15 T.L.R. 238). Accordingly I merely note that para. 6 of the above affidavit reads:

> " I duly quoted to the learned district registrar *Self* v. *Self* (2) . . . but in spite of this he disallowed the two guineas and it appeared from his observations that the reason was because counsel had two cases on that date."

To have had regard to that statement might have paved the way to undesirable and unseemly conflicts of evidence between aggrieved parties and officers of the High Court acting in their judicial capacities. The mere fact, however, that it should, quite reasonably, have been thought necessary in the interests of those concerned to file an affidavit of the above type underlines from another angle how essential it is that taxing officers should state fully and freely the reasons on which they ground their decisions. I order that the legal aid costs of the present application be taxed under the provisions of the Legal Aid and Advice Act, 1949, leave having been given by the area committee under reg. 14 of the Legal Aid (General) Regulations, 1950, for this application to be made. I certify for one counsel and thank leading counsel for the assistance he has in the interests of justice given to the court.

There remain two further matters which call for attention. In *Self* v. *Self* (2) I referred to the difficulties which a court feels when the interests of the legal aid fund are not represented on these applications. I understand some progress has been made in this matter, but the mere fact that neither in this nor the preceding application* for a review of taxation in a legal aid case was there anyone present as amicus curiae or otherwise to represent the interests of the legal aid fund shows that the problem still requires attention. Secondly, there is a further point which has before now been discussed in chambers in other cases. These applications for review can at present only be brought in the name of and by authority of the lay client. Not only has that client no beneficial interest in the result, but the mere fact that such an application is made often may (as in *Isaacs* v. *Isaacs* (1) and, I think, the present case) adversely affect the lay client irrespective of success or failure; for technically the costs of the objection and the application under R.S.C., Ord. 65, r. 27 (41), are chargeable against his contribution, and in a marginal case (as the present) may reduce the amount paid back to the lay client by the legal aid fund. I can do no more in the present case than recommend the Law Society to take such steps as it can to obtain Treasury consent to refrain from charging these costs against the contribution. The practical importance of this point is shown by the fact that in *Isaacs* v. *Isaacs* (1), the taxed costs of the objection and the application to COLLINGWOOD, J., amounted to £23 6s. 5d., of which the solicitor's profit costs were £19 19s. 3d., compared with his profit costs of £30 5s. 9d. for all the rest of the proceedings to decree absolute. Turning from the present case to the general position I would suggest that the question of the procedure and of the incidence of liability for costs on taxation points arising under Sch. 3 to the Act of 1949 may need review in the light of the problems which have now become evident. This seems particularly necessary where points of principle emerge, the determination of which is desirable for the better functioning and administration of the scheme. I realise, however, that the position may be met if it were made known that the legal aid fund would waive its right to charge the assisted person's contribution in respect of such costs.

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* *Francis* v. *Francis and Dickerson* (ante, p. 836).

I turn now to the application in so far as it relates to the party and party columns of the bill. The district registrar there similarly reduced counsel's fee. On the particular facts of the present case there appears to me to be no difference between the fee to be allowed in the party and party columns and the legal aid columns. Accordingly, I adjust the fee in the former likewise to seven guineas. Having regard to the smallness of the amount involved and to the circumstances of the present applications as a whole, I make no order for costs against the co-respondent.

Order accordingly.

Solicitors: *Kinch & Richardson*, agents for *Cyril Clark*, Bournemouth (for the husband).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

Re B. KARSBERG, LTD.

[COURT OF APPEAL (Birkett and Romer, L.JJ.), November 28, 29, 1955.]

Company—Winding-up—Company in voluntary liquidation—Right of creditor to compulsory winding-up order—Majority of creditors opposing petition—Circumstances in which order will be made—Companies Act, 1948 (11 *&* 12 *Geo.* 6 *c.* 38), *s.* 270 (1), *s.* 307 (1).

On July 19, 1955, the receiver of a private limited company (who was appointed under a debenture issued on July 15, 1955) informed the creditors of the company that it was proposed to put the company into liquidation. On July 20, 1955, a petition was presented by two creditors for the compulsory winding-up of the company. On Sept. 2, 1955, a meeting of the creditors of the company held pursuant to the Companies Act, 1948, s. 293, passed a resolution that the company should go into a creditors' voluntary liquidation and the receiver (who was a chartered accountant) was appointed liquidator. The two petitioning creditors claimed that the company owed them £5,350. Fifty-one creditors (out of a total of fifty-six creditors of the company) whose debts amounted to over £41,000, opposed the petition. The state of the company's affairs was such that a thorough examination of the way in which the company had been managed seemed to be needed. The petitioners contended, among other contentions, that for this purpose the fact that power to order persons to attend for public examination would be available under s. 270 (1)* of the Companies Act, 1948, in a compulsory winding-up was a ground for making an order for compulsory winding-up.

Held: the order for compulsory winding-up of the company should not have been made because—

(i) it was opposed by the great majority in number and value of the creditors of the company and the general principle was that, on a question whether a compulsory winding-up order should be made when a voluntary liquidation was in progress, the court should have regard to the wishes of the majority of the creditors (*Re Home Remedies, Ltd.*, [1942] 2 All E.R. 552, and *Re Ithaca Shipping Co., Ltd.* (1951) (84 Lloyd's Rep. 507) applied), and

(ii) no ground of hardship or injustice on which the court could base a departure from the general principle was shown (*Re Northumberland & Durham District Banking Co.* (1858), 2 De G. & J. 357, distinguished), as the majority of the creditors would see that full advantage was taken of means of investigation of the company's affairs and, by virtue of s. 307 (1)† and s. 270 (1) of the Companies Act, 1948, there was jurisdiction in a voluntary winding-up to order persons to be publicly examined (*Re Campbell Coverings, Ltd.*, [1954] 1 All E.R. 222, applied).

Appeal allowed.

[As to the consideration of the wishes of creditors in a winding-up, see 6 HALSBURY'S LAWS (3rd Edn.) 552, para. 1064; and for cases on the subject, see 10 DIGEST 1035, 1036, *7186-7196*.

For the Companies Act, 1948, s. 270, s. 307 and s. 310, see 3 HALSBURY'S STATUTES (2nd Edn.) 671, 693, 694.]

Cases referred to:

(1) *Re Home Remedies, Ltd.*, [1942] 2 All E.R. 552; [1943] Ch. 1; 112 L.J.Ch. 36; 167 L.T. 362; 2nd Digest Supp.

(2) *Re Millward (James) & Co., Ltd.*, [1940] 1 All E.R. 347; [1940] Ch. 333; 109 L.J.Ch. 161; 162 L.T. 257; 2nd Digest Supp.

(3) *Re Ithaca Shipping Co., Ltd.*, (1951), 84 Lloyd's Rep. 507.

(4) *Re Campbell Coverings, Ltd.*, [1954] 1 All E.R. 222; [1954] Ch. 225; 3rd Digest Supp.

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* The terms of the sub-section are printed at p. 861, letter H, post.

† The terms of the sub-section are printed at pp. 861, 862, post.

(5) *Re Campbell Coverings, Ltd.*, [1953] 2 All E.R. 74; [1953] Ch. 488; 3rd Digest Supp.

(6) *Re Northumberland & Durham District Banking Co.*, (1858), 2 De G. & J. 357; 44 E.R. 1028; 10 Digest 961, *6590*.

Appeal.

Appeal by the company and opposing creditors from an order of VAISEY, J., dated Oct. 17, 1955, that B. Karsberg, Ltd., be wound up by the court and that the official receiver be appointed provisional liquidator of the affairs of the company.

G. G. Blackledge, Q.C., *L. M. Jopling* and *J. T. Woodhouse* for the company and respondent creditors.

J. E. Vinelott for the petitioning creditors.

BIRKETT, L.J.: I will ask ROMER, L.J., to deliver the first judgment.

ROMER, L.J.: This is an appeal from an order made by VAISEY, J., on Oct. 17, 1955, for the compulsory winding-up of a company, called B. Karsberg, Ltd. The company opposed the petition, as did also the great majority of the creditors of the company. The appellants are the company and the opposing creditors, and the respondents to the appeal are the petitioning creditors. It is always with hesitation and diffidence that I differ from the views which VAISEY, J., takes, and especially on company matters, of which he has such great experience; but I have come to the conclusion that the appeal should be allowed.

Certain facts and dates are undisputed. The company was incorporated in September, 1949, as a private company with its registered office in London and with a nominal and issued capital of £10,000. Its objects were to carry on business as manufacturers, importers and exporters, factors, and agents for the sale of and wholesale and retail dealers in carpets, rugs, linoleum, mats, and other floor coverings and other objects set forth in its memorandum of association. The company is one of a group of six associated and closely linked companies, all carrying on business in London. At the times when the petitioners had the transactions with the company which are the foundation of the present petition, all six companies to which I have referred, including B. Karsberg, Ltd., were controlled, directly or indirectly, by a Mr. and Mrs. Fredman. They were the directors of this company. The group carries on business in several shops in North London as sellers of furniture, carpets, and so on. The petitioners claim to be creditors of the company for a total sum of £5,350 under three alleged loans, all of which fell due for payment in June or July, 1955. On July 12, 1955, a Mr. Lubbock and a Mr. Fine were appointed directors of this company, at the instance of certain creditors, in place of the Fredmans. On July 15, 1955, a debenture was issued to a creditor of the company in order to secure a cash advance which that creditor had made for the purposes of the company. On July 19, 1955, Mr. Fine was appointed receiver under that debenture, and on the same day he sent out to the creditors of all the companies in this group a letter. That letter, after referring to the appointment of Mr. Lubbock and Mr. Fine (both of whom are partners in a firm of chartered accountants) as the directors and referring to the debenture which I have mentioned, proceeded as follows:

> " The object of this letter is to invite you to submit to us immediately full and detailed particulars of your trading and other transactions with the above-named companies and any other undertaking with which Mr. A. Fredman has been connected. We would emphasise that the action recently taken by [the company to which the debenture had been given] has been directed solely to conserve the assets of the various undertakings concerned and to ensure that the position which is now under investigation by us shall not in any way be allowed to deteriorate. The action has been taken solely for the purpose of protecting all the creditors concerned and it is to be hoped that we may rely on your full co-operation in the investigation

> which we have to undertake and which from present indications will be most complicated. It is proposed to take the necessary steps for the purpose of putting the companies into liquidation at the earliest moment and formal notices will reach you during the course of the next few days."

On the following day, July 20, 1955, this petition was presented, and on the same day an application was made for the appointment of a provisional liquidator of the company. On July 21, 1955, Mr. Lubbock and Mr. Fine resigned from the board of the company and two new directors were appointed to act in their place. On July 25, 1955, the application for the appointment of a provisional liquidator came before the registrar, and he made no order on the application on the receiver giving certain undertakings as to dealing with the company's assets. On Sept. 2, 1955, there was a meeting of the creditors of this company, duly convened under the Companies Act, 1948, s. 293, at which the creditors passed a resolution that the company should go into a creditors' voluntary liquidation and Mr. Fine was appointed liquidator. We are told that since then all the creditors of the other companies in this group have adopted the same course, and the result is that all six associated companies are now in voluntary liquidation and Mr. Fine is the liquidator in all those liquidations.

On Oct. 17, 1955, this petition came before VAISEY, J., and he made an order for the compulsory winding-up of the company. We are told (and I do not think there is any dispute about this) that fifty-one creditors, representing a total value of over £41,000, out of fifty-six creditors opposed the petition. There were one or two creditors who had given notice to support the petition including, I think, the Inland Revenue and some insurance companies, but (possibly with one exception) when the petition came on for hearing they expressed their willingness to have a supervision order made under s. 311 of the Act of 1948. That was apparently the position before the learned judge and is the position now in so far as all these fifty-one creditors are asking this court to reverse VAISEY, J's., order and dismiss the petition. None of the creditors is opposing this appeal other than the petitioning creditors.

The petition by para. 5 says:

> " The company is indebted to your petitioners in the aggregate in the sum of £5,350, being as to a cheque drawn by the company in favour of your petitioner Moishe Rokach on the National Bank, Ltd. . . . for £1,350, which cheque on presentation was dishonoured by being referred to the drawer thereof, and a cheque drawn by the company in favour of A. B. Kahan, otherwise known as M. H. Kahan, on the National Bank, Ltd. for £1,350, which cheque on presentation was dishonoured by being referred to the drawer thereof, and the burden and benefit of such cheque having been assigned by deed of assignment dated July 19, 1955, to your petitioner Norman Rokach and further by an agreement dated Jan. 27, 1955, made between the company of the one part and your petitioner Norman Rokach of the other part, the company received from your petitioner Norman Rokach the sum of £3,100 of which there remains due the sum of £2,650, for which sum your petitioner Norman Rokach holds post-dated cheques in respect of which Philip Fine, a director of the company, has intimated the company's inability to pay these cheques on their respective dates for maturity. 6. The company is insolvent and unable to pay its debts. 7. In the circumstances it is just and equitable that the company should be wound up."

It is to be observed there that the statement that " it is just and equitable that the company should be wound up " is founded on the circumstances of the petition, and the only circumstances to which reference is made in the petition relate to the alleged insolvency of the company.

The petition was supported by the usual statutory affidavit. A further affidavit was sworn by the petitioners in support of their application for the appointment of a provisional liquidator. I need only refer to certain portions of the latter affidavit. By para. 2, after stating that which I have already mentioned with regard to the business of the company, the petitioners said:

> "The business of the company is an extensive business and one which would carry a considerable amount of stock and involve the turnover of large sums of money. The goodwill of the company is of considerable value and would be seriously damaged if not destroyed in the event of the company's business being hampered, mismanaged or closed down, or if the large amount of stock required to carry on the business were depleted."

By para. 5 and para. 6 the petitioners said:

> "5. The company appears to be the main company of a number of companies which are all associated but which carry on different businesses and we verily believe that that business of the company is the most substantial of all the companies and it is therefore essential that the company's businesses and undertakings shall be protected. 6. We have caused certain inquiries to be made as a result of which we find that two alleged substantial creditors of the company appear to have forced the issue with the previous directors of the company [the Fredmans] and apparently in fact arranged for the appointment of two of their nominees [Mr. Lubbock and Mr. Fine] . . . as directors of the company . . ."

They said by para. 9:

> "From further inquiries we have made we are informed by . . . Mr. Fine that there appear to be no records, stock sheets or other usual company's books and accounts of the company, and we are informed that it is suspected that these books and papers were taken away by a former director of the company, who since the appointment of the two present directors has disappeared completely together with his wife."

Mr. Fine put in an affidavit, sworn on Oct. 7, 1955, in answer to the petition. I shall have to read it because without it it is difficult to comprehend the way in which the matter came before the learned judge and the arguments which have been addressed to us here. After stating that the company (with the other companies) went into a creditors' voluntary liquidation on Sept. 2, 1955, he said:

> "3. Prior to the said winding-up my said firm conducted an investigation into the affairs of the company on behalf of a creditor and the facts and matters hereinafter set forth or referred to are matters within my own knowledge acquired both during the said investigation and as liquidator as aforesaid. 4. I dispute the allegations set forth in para. 5 of the said petition and deny that the company was or is indebted to the petitioners herein or either of them in the sum of £5,350 in the said petition mentioned or any sum at all. 5. At all material times the company was one of a group of private companies (being the companies referred to in para. 2 hereof) which were controlled either directly or through nominees by [Mr. Fredman and his wife] . . . 6. The petitioners are unregistered moneylenders and neither of them has been or is a trade creditor or loan creditor with respect to the company, nor has either of them been in any way connected with the company or the business thereof. 7. During the course of many months prior to the said voluntary liquidation of the company the petitioners (and others including one M. H. Kahan in the said petition referred to) either jointly or severally advanced moneys by way of loan to Mr. Fredman in his personal capacity altogether unrelated to his activities as a member or director of the company. The said loans were advanced at unconscionable rates of interest and were utilised by Mr. Fredman for his own personal use and benefit. 8. Notwithstanding the fact that not one of the said loans was ever made to, at the request or for the benefit of the company or is recorded in any entry whatsoever in the company's books, Mr. Fredman without any authority right or power so to do repaid the said loans and the said interest thereon out of banking accounts standing in the names of the company, the said associated

> companies, the directors thereof and their nominees. The said accounts were very numerous and, as at present ascertained, number over seventy. The said accounts were brought into being and operated by Mr. Fredman for his own private purposes as aforesaid. It appears from the books of the company that the repayments made to the petitioners by the company as aforesaid with respect to the said loans are debited to a loan account with the company in the name of Mr. Fredman."

He then says that the petitioners' alleged loan of £5,350 represents loan transactions of the sort that he has just been mentioning. He says that

> "neither of the petitioners nor the said N. H. Kahan ever at any time had any connection with the company whether as a loan or trade creditor or howsoever otherwise. (iii) There is no entry in the books of the company recording the payment to the company of the said sum of £5,350, or any part thereof or at all. (iv) That the company has never been and is not now indebted to the petitioners or either of them."

He goes on to say that the petitioners started bankruptcy proceedings against Mr. Fredman, and eventually they withdrew those because Mr. Fredman

> "consented to a receiving order being made against him on a bankruptcy petition brought by another of his creditors. Mr. Fredman was duly adjudicated bankrupt on Sept. 29, 1955."

The affidavit ends by repeating the contention that the company is not indebted to the petitioners in the sum which they claim.

That affidavit elicited an affidavit in reply from the petitioners, sworn on Oct. 14, 1955, which, we are told, came to the hands of the company very shortly before the hearing and was not, for that reason (so we are told) dealt with by an affidavit in rejoinder. First of all, Mr. Moishe Rokach said:

> "on May 2, 1955, I advanced the sum of £1,350 as a loan to the above-named company. Of the said sum of £1,350, £1,250 was paid by cheque and the balance of £100 was paid in cash. The said sums were paid to Mr. Alec Fredman and to his wife Mrs. Betty Fredman (formerly Mrs. Betty Karsberg) who was then a director of the company and was paid to them as a loan to the company."

Then he refers to an agreement under which the company acknowledged that it had received that sum and undertook to repay it on June 6, 1955; and that agreement was signed on behalf of the company by Mrs. Fredman. He continues:

> "At the same time she handed to me a cheque dated June 6, 1955, and drawn on the company's account with the National Bank, Ltd., for the sum of £1,350. The said cheque was duly presented for payment on June 6, 1955, and was dishonoured . . . I do not now nor have I ever carried on business as a moneylender."

Then Mr. Norman Rokach for himself said that on June 16, 1955, Mr. Moishe Kahan

> "advanced the sum of £1,350 as a loan to the above-named company. The said sum was paid in cash and was paid to the said Mr. Alec Fredman and the said Mrs. Betty Fredman, who was then a director of the company."

He continues, by para. 8:

> "By an agreement in writing dated June 16, 1955, the above named company acknowledged that it had received the sum of £1,350 from Mr. Moishe Kahan (there described as Mr. A. B. Kahan) and undertook to repay the same on July 14, 1955. The said agreement is signed on behalf of the company by Mrs. Betty Fredman under the name of 'B. Karsberg' at the same time handed to me a cheque drawn on the company's account with the National Bank, Ltd., for the sum of £1,350. The said cheque was duly presented on July 14, 1955, by the said A. B. Kahan and was dishonoured."

Then he says that on July 19, 1955, Mr. Kahan assigned the debt of £1,350 to him; and he exhibits the agreement and the cheque, and the deed of assignment. He further says:

> "11. By a memorandum under seal dated Jan. 27, 1955, the company acknowledged that it had received from me sums totalling £3,150 and the company undertook to repay the same to me in the manner and on the dates therein referred to, and it was further agreed by the company that if the company should suffer any act of bankruptcy or insolvency the whole of the said sum should become immediately repayable. 12. The said memorandum under seal was signed by the said Mr. Alec Fredman and the said Betty Fredman on behalf of the company."

Mr. Norman Rokach then produces the memorandum, and says, by para. 14: "I do not nor have I ever carried on business as a moneylender." By para. 16 they jointly say:

> "By a letter dated Aug. 29, 1955, the said Mr. Alec Fredman informed us that all moneys advanced by us to Mr. Alec Fredman and Mrs. Betty Fredman were borrowed on behalf of the above-named company and was used for the benefit of the said company."

They produce that letter. By para. 18 they say:

> "On Sept. 2, 1955, a meeting of its creditors was called by the above-named company pursuant to the provisions of s. 293 of the Companies Act, 1948, and at the said meeting it was resolved that the said company be wound-up voluntarily and that the said Mr. Philip Fine be appointed liquidator of the company. No notice of the said meeting was given to us or to either one of us notwithstanding that the petition herein had been filed."

Those affidavits and the exhibits were the material which was before the learned judge when he dealt with the petition. We have no notes of any reasons which were expressed by the judge which led him to the conclusion that this company should be wound-up, but we have been told that, while he realised the strength of the opposition of the creditors, he thought that the facts as disclosed by the evidence raised a proper case for investigation and a public examination, and came to the conclusion that it was in the interests of the creditors that there should be a compulsory winding-up in the course of which such an examination as he thought was desirable could most efficiently and thoroughly be carried out. But the creditors do not take before us the view, nor indeed did they take the view before the learned judge, that it was in their interests that a compulsory winding-up order should be made, and it is for that reason that they and the company have appealed.

Counsel for the company put his case in various ways. In the first place, he said that the petitioners' debt was genuinely disputed on the grounds, first, that the petitioners were unregistered moneylenders, and that the loans on which the petition is founded were usurious in character; and, secondly, that in any event the loans, if made, were made to the Fredmans for their own personal use and not for the use of the company. As to the first objection, it is clear that the court will not in general make a winding-up order on a disputed debt, and will not determine the validity of the debt itself, but will leave the alleged creditor to establish it by proper proceedings. But for my part I feel a difficulty in taking the view that the petition should have been dismissed on the first ground on which counsel for the company relies, because there was a complete conflict of evidence on the affidavits on the question whether the petitioners are moneylenders or not. The petitioners have sworn that they are not; and there was no cross-examination on the point.

As to the alleged usurious rate of interest, the matter is only one of speculation, based on the form which the transactions took and the documents which were before the court. It is enough, I think, if I say that suspicion has arisen and been expressed on certain aspects of these loans, an example of which is sufficiently found in the petitioners' affidavit in reply, where, by para. 3 Mr. Moishe Rokach said that he advanced £1,350, of which £1,250 was paid by cheque and the balance of £100 was paid in cash. It is suggested that that would lead either to the inference that this gentleman was lending the company this considerable sum for no interest at all, or, as a matter of inference arising from the improbability of such a transaction, that in fact the £100 cash was either never paid at all or, having been paid, was immediately restored into the pockets of Mr. Moishe Rokach. That is an example of the approach which the company makes to these alleged loan transactions. On the evidence before us it is a matter merely of surmise, and inasmuch as the petitioners' debt will have to be dealt with if and when it is submitted to proof, I propose to say no more about that approach to the matter.

As to the suggestion that, in any event, if the loans were made they were made to the Fredmans for their personal use and not for the use of the company, the cheques and various agreements and acknowledgments which were produced by the petitioners show on their face that the loans were in fact made to the company, that the company was liable to repay them, and that that liability was merely coupled with a personal guarantee by the Fredmans which would be collateral to the liability of the company.

Accordingly, I think there is much to be said in favour of the submission of counsel for the petitioners that the company has not shown, on the material which is before us, that there are grounds on which the debts can be said to be bona fide disputed. That is a matter, however, which will have to be dealt with hereafter.

Counsel for the company's second point is the point on which, in my opinion, this appeal must succeed. His point is that where (as is the case here) practically the whole of the company's creditors, both in value and in number, oppose a compulsory winding-up order, the court should regard their wishes in the matter, and should not force an order on them merely because the petitioners themselves want it. Here there is no doubt whatever that the creditors as a whole are opposed to an order being made. They have faith in Mr. Fine, whom their committee appointed liquidator in this and the other voluntary liquidations; and, as the group of companies is in their view so essentially interlocked, they want the affairs of all the companies to be in Mr. Fine's hands. It is, of course, true that notwithstanding a voluntary liquidation a creditor can petition for a compulsory order under the Companies Act, 1948, s. 310, but the general principle is, as counsel for the company submitted it to be, that the court will pay great regard to the wishes of the majority of the creditors. That was clearly laid down by SIMONDS, J., in *Re Home Remedies, Ltd.* (1) ([1942] 2 All E.R. 552). In that case it was decided that the rule still prevails that, where a company is in voluntary liquidation and a petition is presented for its compulsory winding-up, the court is bound to have regard, not only to the wishes of the petitioning creditor, but also to those of all the creditors. The rule was not affected by the provision in s. 255 of the Companies Act, 1929,* that the voluntary winding-up of a company should not bar the right of any creditor to have it wound-up by the court. SIMONDS, J., dismissed the petition. He said ([1942] 2 All E.R. at p. 553):

> " No reason is shown why a compulsory order is necessary to protect the rights of the petitioning creditor or of any other creditor. Counsel for the petitioner claims that the court is bound to make an order in his favour in spite of the opposition. In *Re James Millward & Co., Ltd.* (2) ([1940] 1 All E.R. 347) it was decided that, on the true construction of the Companies Act, 1929, s. 255, a creditor of a company in voluntary liquidation on proving his judgment debt and that his debt has not been satisfied, is, as

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* Now s. 310 of the Companies Act, 1948.

> between himself and the company, entitled ex debito justitiae to an order for the compulsory winding-up of the company. That case, however, did not decide that the old rule of the court, that, where a company is in voluntary liquidation, the court is bound to have regard to the wishes not only of the petitioner but of the other creditors, is abrogated. It is true that the Companies Act, 1929, s. 255, has made an alteration in the law so that it is no longer necessary for a petitioning creditor to show that he is prejudiced by a voluntary liquidation, but, as between himself and the other creditors the old rule, as I see it, remains, and the court has to consider the wishes of all the creditors. If the creditors wish to continue the voluntary liquidation and no valid reason is shown why effect should not be given to their wishes, the court will not make a winding-up order. There is nothing in the decision in *Re James Millward & Co., Ltd.* (2) to the contrary. Here the great majority of creditors are in favour of a continuance of the voluntary winding-up and no suggestion has been made that in such winding-up the interest of any creditor will be prejudiced."

ROXBURGH, J., in *Re Ithaca Shipping Co., Ltd.* (3) (1951) (84 Lloyd's Rep. at p. 507) (which was a petition for the winding-up of a company which was opposed by creditors) said:

> "The petitioning creditor is a judgment creditor for some £60, or thereabouts. He is supported by a creditor for £133. As against the company, the petitioner and his supporting creditor would be entitled to a winding-up order ex debito justitiae. But it is said on behalf of Mr. Vlassopoulos, whose position I will describe in a moment, that he is a creditor for £3,000 and that he opposes the petition, and that, in those circumstances, as it is opposed by a majority in value of the creditors, an order ought not to be made. As a general proposition that is quite true, but it is a proposition which is always subject to the proof of special circumstances, and, in my judgment, those special circumstances have in this case been clearly demonstrated."

In my judgment, it follows from the principles as stated in those cases (and, indeed, the principles are long and well-established) that in the present case an order should not have been made, unless a "valid reason" or "special circumstances" were shown by the petitioners why effect should not be given to the wishes of the majority of the creditors that the voluntary liquidation should continue. Counsel for the petitioners relied on the desirability (in which indeed the opponents themselves concur) of having a thorough examination into the management (or mismanagement) of the company in the past. In compulsory liquidations facilities for that are afforded by the Companies Act, 1948, s. 270, of which sub-s. (1) provides:

> "Where an order has been made in England for winding-up a company by the court, and the official receiver has made a further report under this Act stating that in his opinion a fraud has been committed by any person in the promotion or formation of the company or by any officer of the company in relation to the company since its formation, the court may, after consideration of the report, direct that that person or officer shall attend before the court on a day appointed by the court for that purpose and be publicly examined as to the promotion or formation or the conduct of the business of the company or as to his conduct and dealings as officer thereof."

But under s. 307 of the Act these facilities can be made available in, and in fact are frequently extended to, a voluntary winding-up on an application being made to the court by the liquidator or a contributory or a creditor in the voluntary winding-up. Section 307 provides:

> "(1) The liquidator or any contributory or creditor may apply to the court

> to determine any question arising in the winding-up of a company, or to exercise, as respects the enforcing of calls or any other matter, all or any of the powers which the court might exercise if the company were being wound-up by the court. (2) The court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as it thinks fit or may make such other order on the application as it thinks just."

In the recent case which was before WYNN-PARRY, J., *Re Campbell Coverings, Ltd.* (4) ([1954] 1 All E.R. 222) the learned judge held (and in so holding he was following an indication of an opinion which SIR RAYMOND EVERSHED, M.R., had expressed in *Re Campbell Coverings, Ltd.* (5) ([1953] 2 All E.R. 74) an earlier decision in the same liquidation) that under s. 307 the court has jurisdiction to order the public examination of a director, pursuant to s. 270 (1). So that by conjunction of s. 270 (1) and s. 307 (1) it will be open to the liquidator or a creditor in the existing voluntary winding-up to apply to the court for directions and for a public examination of the past directors or other persons in the same way as could be done in a compulsory winding-up. Furthermore, s. 334 of the Act, of which sub-s. (1) is applicable to compulsory liquidations and sub-s. (2) to voluntary liquidations, provides by sub-s. (2):

> " If it appears to the liquidator in the course of a voluntary winding-up that any past or present officer, or any member, of the company has been guilty of any offence in relation to the company for which he is criminally liable . . . "

he shall report the matter to the Director of Public Prosecutions.

Accordingly, it would appear to me that the objection founded on the ground that an investigation of the affairs of the company is both desirable and should be carried out (and there is much to be said in favour of that view) is sufficiently met by the fact that such an investigation can both conveniently and adequately be made in the course of the existing voluntary liquidation. There are some cases which one can imagine where the court would make a compulsory order against the wishes of the majority of the creditors; and, indeed, counsel for the petitioners referred to one such case, namely, *Re Northumberland & Durham District Banking Co.* (6) (1858) (2 De G. & J. 357). I do not think that any principle is to be extracted from that case. It was a very special case, and, having regard to the very peculiar circumstances which were proved to exist, the court thought it right to make a compulsory order in preference to allowing the voluntary liquidation to continue. But I am clearly of opinion that no such circumstances exist here. It appears to me that while it may truly be said, as counsel for the petitioners submitted, that the necessity of investigation may constitute in some cases a "special circumstance" within the language of ROXBURGH, J., in the case which I have just quoted, it ought not to have much weight in the present case, where both Mr. Fine and all the creditors who stand behind him in the matter and who constitute practically the whole of the creditors of the company will obviously take full advantage of the means for investigation and inquiry which are afforded in voluntary liquidations. There are many matters which will require thorough investigation in this case, as far as I can see, but it will be obviously in the interests of the creditors themselves (who include banks and other responsible bodies) to see that every possible investigation is made with stringency. For my part, I think that there are no circumstances shown here, such as were shown in *Re Northumberland & Durham District Banking Co.* (6) which should disturb the view that the majority of the creditors should have their wishes fully regarded and given effect to.

Counsel for the petitioners suggested that a reason personal to the petitioners why there should be a compulsory winding-up is that Mr. Fine (who is the liquidator under the voluntary winding-up) has, so it is said, shown prejudice against the petitioners: that, as appears from the evidence, the liquidator has said that

A the petitioners are moneylenders and usurious, and also that he ignored their position as petitioning creditors when he convened a meeting of the creditors. In my opinion, that is no sufficient reason to force a compulsory order on the majority of the creditors. I have no doubt that Mr. Fine, who is a responsible and reputable professional gentleman, will approach the petitioners' position and claims with impartiality, and if he is satisfied as to the bona fides of the B debt, he will treat the petitioners with complete fairness and justice. No other reason was suggested apart from that why the petitioners would be prejudiced if the voluntary liquidation were allowed to continue, and it is indeed difficult to see why a course which is desired by practically the whole of the creditors of the company and which in their view will be of the greatest advantage to them should also not be of advantage to the petitioners themselves.

C Finally, it was suggested that the learned judge had made an order partly on the ground (which is one of the statutory grounds for presenting a petition under s. 222) that it is just and equitable that the company should be wound-up. Counsel for the company said that an order could not be made on that ground because no circumstances were disclosed in the petition, other than insolvency itself, which brought the case within the " just and equitable " provision and, D indeed, that the petitioners only stated in their petition that it was just and equitable to wind-up the company because of the alleged insolvency. I think that counsel was probably right in saying that if no case were made out in the petition for a " just and equitable " ground, then the court could not, if all the matters on which the petitioners relied failed, make an order on the ground that it was just and equitable. For my part, I do not think that the learned judge made an E order on that ground at all, and, indeed, I understood counsel for the petitioners to say that his clients do not rely on the " just and equitable " provision as distinct from insolvency. Although we do not know unfortunately very much of what happened before the learned judge, it appears to me as most probable that he decided this question as to the validity of the debt adversely to the company, and, accordingly, made the winding-up order on that ground, and F simply resorted to the suggestions in the evidence as to irregularity in the conduct of the company as confirming his view that the petitioners were entitled to an order and as justifying a departure from the usual rule that the interests of the majority of the creditors should be considered. Having regard to the ample and powerful facilities which are open to a liquidator and creditors for investigation and inquiry in a voluntary winding-up, I do not think that that is G an objection to the voluntary liquidation being allowed to continue.

I would, accordingly, allow this appeal, on the ground that the overwhelming majority of the creditors of this company are against the making of a compulsory order, that they are content that the voluntary liquidation should continue, and that the petitioners have shown no ground of hardship or injustice on which the court could base a departure from the ordinary principles to which I have referred.

H

BIRKETT, L.J.: I agree with the judgment which has just been delivered, and there is nothing that I can usefully add.

Appeal allowed.

Solicitors: *A. Bieber & Bieber* (for the company and the respondent creditors); *Harewood & Co.* (for the petitioning creditors).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

ESSO PETROLEUM CO., LTD. AND ANOTHER *v.* SOUTHPORT CORPORATION.

[HOUSE OF LORDS (Earl Jowitt, Lord Normand, Lord Morton of Henryton, Lord Radcliffe and Lord Tucker), October 17, 18, December 12, 1955.]

Negligence—Pleading—Damage arising from stranding of vessel—Pleading of negligence in navigation—No allegation of unseaworthiness in statement of claim—Whether plaintiffs entitled to rely on negligence in sending ship to sea.

In December, 1950, an oil tanker belonging to the appellants bound from Liverpool to Preston developed a steering fault when approaching an estuary in rough weather. In view of the weather and the danger of turning round, the master decided to continue into the channel. Soon after, the vessel took a heavy sheer to starboard and ran aground on a revetment wall. To save the vessel and the crew from grave danger, the master discharged a considerable quantity of oil to lighten the vessel, which oil became deposited on the respondents' foreshore, causing damage. In an action for trespass, nuisance and negligence brought by the respondents against the appellants and the master, the respondents pleaded as negligence, negligent navigation by the master and no more, and no complaint was made of any act or default on the part of the appellants. The trial judge found that there was no trespass or nuisance, that the master had not been negligent and, therefore, that the appellants had not been negligent. The respondents contended that there was an onus on the appellants to show inevitable accident, and thus, e.g., that the stern frame of the ship was in sound condition at the start of the voyage.

Held: (i) the findings of the trial judge had negatived all allegations of negligence against the master and, as the relevant cause of action pleaded against the appellants was vicarious responsibility for the master's negligence, the action must fail also against them, and

(ii) (by LORD MORTON OF HENRYTON and LORD RADCLIFFE, LORD NORMAND concurring) the contention of the respondents that the onus was on the appellants to show inevitable accident was not open to the respondents as it rested on acts or default which were not raised by the pleadings.

The Merchant Prince ([1892] P. 9, 179) considered and distinguished.

Per EARL JOWITT: if a judge comes to the conclusion that the case is one in which he would profit by the presence of an assessor it is manifestly more satisfactory that the assistance should be available during the trial rather than after its completion (see p. 868, letter D, post).

Per LORD TUCKER: in actions between users of the highway and between the occupier of premises adjoining the highway which have been damaged by a person lawfully using the highway, the person who has suffered damage cannot recover in trespass in the absence of negligence on the part of the person who has caused the damage (see p. 873, letter F, post).

Decision of the COURT OF APPEAL (sub nom. *Southport Corpn.* v. *Esso Petroleum Co., Ltd.*) ([1954] 2 All E.R. 561) reversed in part.

[**Editorial Note.** The causes of action for trespass and nuisance were not in issue before the House of Lords. LORD RADCLIFFE, however, stated that he shared the view of DENNING, L.J. (see [1954] 2 All E.R. 561) that the appellants were not responsible for a private nuisance (see p. 871, letter I, post). Nor was he prepared to say that the appellants' action constituted a trespass (ibid.) and LORD TUCKER agreed with the view expressed by DENNING, L.J., when the case was before the Court of Appeal, that trespass did not lie.

The discharge of oil into United Kingdom waters may, however, be an offence under s. 3 of the Oil in Navigable Waters Act, 1955, but the fact that the discharge was necessary for the purpose of securing the safety of the vessel is a defence (ibid., s. 4 (1)).

A As to the function of pleadings in an action, see 25 HALSBURY'S LAWS (2nd Edn.) 235, para. 388; and for cases on the subject, see DIGEST (Pleading) 7, *6-14*.

As to oil in navigable waters, see 33 HALSBURY'S LAWS (2nd Edn.) 603, paras. 1060 et seq.

As to negligence causing damage in exceptional cases and the responsibility of a shipowner for it, see 30 HALSBURY'S LAWS (2nd Edn.) 826.]

B Cases referred to:

(1) *The Merchant Prince*, [1892] P. 9, 179; 67 L.T. 251; 36 Digest (Repl.) 163, *866*.

(2) *Jones* v. *Llanwrst Urban Council*, [1911] 1 Ch. 393; 80 L.J.Ch. 145; 103 L.T. 751; 75 J.P. 68; 36 Digest (Repl.) 288, *359*.

C (3) *Smith* v. *Great Western Ry. Co.*, (1926), 135 L.T. 112; 36 Digest (Repl.) 298, *429*.

(4) *Sharrod* v. *London & North Western Ry. Co.*, (1849), 4 Exch. 580; 20 L.J.Ex. 185; 154 E.R. 1345; 38 Digest 286, *215*.

(5) *River Wear Comrs.* v. *Adamson*, (1877), 2 App. Cas. 743; 47 L.J.Q.B. 193; 37 L.T. 543; 42 J.P. 244; 36 Digest (Repl.) 166, *890*.

D (6) *Gayler & Pope, Ltd.* v. *Davies (B.) & Son, Ltd.*, [1924] 2 K.B. 75; 93 L.J.K.B. 702; 131 L.T. 507; 36 Digest (Repl.) 109, *540*.

Appeal.

Appeal by the respondents from an order of the Court of Appeal, dated June 3, 1954, and reported sub nom. *Southport Corpn.* v. *Esso Petroleum Co., Ltd.*, [1954] 2 All E.R. 561, reversing in part an order of DEVLIN, J., dated Oct. 21, 1953, and reported [1953] 2 All E.R. 1204.

E The facts appear in the opinion of EARL JOWITT.

H. I. Nelson, Q.C., and *G. B. H. Currie* for the appellants.

Kenneth Carpmael, Q.C., and *A. E. Baucher* for the respondents.

The House took time for consideration.

Dec. 12. The following opinions were read.

F

EARL JOWITT: My Lords, this was an appeal from the decision of the Court of Appeal, by which that court by a majority (MORRIS, L.J., dissenting) reversed a decision of DEVLIN, J., and entered judgment for the respondents, the Southport Corporation. The action was brought by the respondents, the owners of the foreshore, against the appellants, the owners of the s.s. Inverpool, G and against Mr. McMeakin, her master, in respect of the damage occasioned to the foreshore by the discharge of a quantity of oil from the s.s. Inverpool. DEVLIN, J., delivered judgment for the then defendants, the present appellants and Mr. McMeakin. The Court of Appeal dismissed the appeal so far as Mr. McMeakin, the master of the s.s. Inverpool, was concerned; and that part of the decision of the Court of Appeal has not been the subject of an appeal H to this House. The Court of Appeal allowed the appeal against the owners of the s.s. Inverpool, the present appellants. The facts are fully stated in the judgment of DEVLIN, J., and it is only necessary for me to refer to them briefly.

The s.s. Inverpool is a small tanker of six hundred and eighty tons gross. Her master and chief engineer were experienced seamen and she carried a crew of eleven hands all told. On Dec. 3, 1950, she left Liverpool at 7.30 a.m. on a I voyage to Preston. She arrived at the Nelson Buoy at 11.40 a.m., and waited there for the tide, high water at Preston being at 5.17 p.m. She left the Nelson Buoy at 2.30 p.m. The wind was N.N.W., force seven or eight, and the sea was moderately rough. Shortly after leaving the Nelson Buoy, she shipped some heavy seas; and, for some unexplained reason, her steering thereafter became erratic and she began sheering four or five points to starboard and to port. The master decided, notwithstanding his knowledge of the defective steering, to continue on his course towards Preston, although this involved the navigation of a comparatively narrow and shallow channel.

On the south side of the channel there is a revetment wall about seven or eight feet wide and about three to six feet above datum. When the s.s. Inverpool had passed Salters Buoy, she took a heavy sheer to starboard and ran aground on the revetment wall. She was lying in a dangerous position, and was in danger of breaking her back. The safety of the ship was at stake and the lives of her crew were in peril. The engines were put full astern, but it was found that the propeller was fouling some hard object, and the chief engineer feared that the main steam pipe might fracture. This was reported to the master, who ordered the engineer to stop the engines. In these circumstances, the master decided to discharge considerable quantities of the cargo of oil to lighten the ship. The oil so discharged was carried by the action of the wind and tide on to the premises of the Southport Corporation, the respondents to this appeal. They were put to considerable expense in cleansing their premises from the oily discharge and brought their action against the appellants, the owners of the s.s. Inverpool, and against her master, to recover such expenses.

It is obvious that a well-found ship, if properly navigated, would, in the absence of abnormal circumstances, not have run aground on the wall and would not have got herself into such difficulties that it became necessary to discharge a considerable part of the oil which constituted her cargo. What, then, were the circumstances which made this course necessary ?

The judge found—and his conclusion was not challenged—that the stern frame of the ship had sustained a fracture after leaving the Nelson Buoy. He pointed out that it was most improbable that the stern frame, if in sound condition, could have been fractured merely by heavy seas. He was advised by the Elder Brother, whom he consulted after the conclusion of the hearing, that the stern frame might have been broken against the bed of the channel; but the judge felt that it was too speculative to accept this theory, as it had not been advanced at the trial and there had been no evidence from the master or the chief engineer in its support. The judge, therefore, came to the conclusion that no explanation had been given to account for the fracture of the stern frame. He found that this fracture, however caused, had affected the steering; that the defective steering had caused the ship to run aground; that, being aground, the master took the right course in discharging the oil in order to lighten the ship; and that this course was necessary not merely in an endeavour to save the ship but also to save the lives of the crew.

The action which the respondents brought against the appellants, the owners of the s.s. Inverpool, and against Mr. McMeakin (her master), was based on trespass, nuisance and negligence. Devlin, J., decided that the fact that it was necessary to discharge the oil in the interest of the safety of the crew afforded a sufficient answer to the claim based on trespass or nuisance. I agree with him in this view, and think it unnecessary to consider whether, had this fact not been established, the cause of action in trespass or nuisance would have succeeded.

There remains the question of negligence. The statement of claim alleged that there had been negligence in the navigation of the s.s. Inverpool whereby she grounded on the revetment wall, and that her master had taken no sufficient steps to prevent such grounding. It further alleged that the discharge of the oil was unnecessary and unreasonable, and that the master ought, under the circumstances, to have obtained the assistance of a pilot or of tugs. All these allegations were disposed of adversely to the plaintiffs, the present respondents, by the findings of the trial judge.

There remained, however, one further allegation, which was added to the statement of claim by amendment; namely, that it was negligent to cause the s.s. Inverpool to enter and navigate the channel when it was known that her steering was erratic. Devlin, J., disposed of this suggestion as follows ([1953] 2 All E.R. at p. 1210):

> "The plaintiffs contend that the master, knowing before he entered the channel that there was something wrong with his steering, ought to have anchored or turned about and hove to or put back to sea. The master answered that in the weather at the time, to anchor was impossible and to turn about more dangerous than to proceed. He recognised the danger of proceeding into a narrow channel with defective steering gear; he weighed up the two evils, he said, and considered that the lesser of the two was to attempt to get into sheltered water. I should not without assistance be able to say whether he made the right choice or not, but I should feel able to say that his choice was not a careless or unskilful one, which would be enough to dispose of the charge of negligence. In fact, the Elder Brother advises me that, in his opinion, the master's decision was the right one, and I accept that advice."

It follows, therefore, that every allegation in the statement of claim, and the particulars thereunder, was decided by the judge in a sense adverse to the respondents.

Counsel for the respondents relied on the doctrine of *The Merchant Prince* (1) ([1892] P. 9, 179), and claimed that it was for the appellants to prove how the accident happened. He rightly asserted that they had not explained how it came about that the stern frame had fractured. The facts in *The Merchant Prince* (1) were that, under weather conditions by no means exceptional and in broad daylight, a ship under way had collided with a ship at anchor. The court decided that, in these circumstances, the onus lay on the colliding ship to negative the charge of negligent navigation which had been made against it. The defendant in such a case, to discharge the onus thus cast on him, must show that the accident was inevitable. In that particular case, the steering wheel had become jammed, and, in consequence of this jamming, the collision took place. The question for determination was whether it had become jammed through some negligence on the part of the defendants' servants.

SIR CHARLES BUTT, the President of the Admiralty Division, came to the conclusion that the owners of the Merchant Prince had shown that there had been no negligence and as, in this view, the accident was inevitable, he decided in favour of the defendants. This decision was reversed in the Court of Appeal. That court pointed out that the steering gear was connected with the rudder by a stud-link chain; and that, if the chain was allowed to become too tight, it would not work, and, if it was allowed to become too loose, it was liable to kink. The court decided that the probable cause of the jamming was that the chain had been allowed to become too loose, with the result that two of the links kinked as they went round the leading wheel. The chain was a new one, and in a new chain links are liable to stretch. This, in the view of the Court of Appeal, was a danger which ought to have been foreseen and could have been guarded against. It followed, in the opinion of the Court of Appeal, that the defendants had failed to show that the accident was inevitable, and accordingly, as the defendants had not discharged the onus which was on them, judgment was entered for the plaintiffs.

My Lords, I do not think that the respondents in this case can derive any assistance from the decision in *The Merchant Prince* (1). No one has ever suggested that the fracture of the stern frame, which caused the steering of the s.s. Inverpool to become defective, was in any way caused, or contributed to, by the negligence of those in charge of the navigation of the ship. There was, and there could be, nothing analogous to the improper adjustment of the chain; nor was there any allegation of unseaworthiness made in the statement of claim. Throughout the course of the case no question was directed to the master or chief engineer in any way bearing on the question of unseaworthiness; and the case made against the present appellants at the trial rested entirely on their responsibility for the acts of the master as their servant. If the respondents' case had been put in the alternative, either that there was some navigational error or that the ship was unseaworthy, the case would, no doubt, have been developed on wholly different lines. Had any such case been made, the ambit of discovery would have been enlarged, and the theory advanced by the Elder Brother that the s.s. Inverpool may have broken her stern frame against the bed of the channel would have been explored. It is idle to speculate what would have happened if such a case had been made.

In the present case, every allegation of negligence has been answered by the finding of the judge, and there was no allegation of unseaworthiness. That being so, I do not think that the present appellants, the owners of the s.s. Inverpool, can be held responsible because they did not negative some possible case which had never been alleged against them in the pleadings or made against them in the course of the trial.

For the reasons I have given I am in favour of allowing the appeal and restoring the judgment of DEVLIN, J.

I merely desire to add that I am in entire agreement with the observations of DEVLIN, J. ([1953] 2 All E.R. at p. 1206), in regard to the assistance of the Elder Brother. In the present case he did not have that assistance during the hearing, but obtained it after the trial was concluded. He indicated that, in similar cases in the future, he would take steps to secure the presence of an Elder Brother to act as assessor during the trial. I should like to express my concurrence with this expression of intention. If a judge comes to the conclusion that the case is one in which he would profit by the presence of an assessor, it is manifestly more satisfactory that this assistance should be available during the trial rather than after its completion.

LORD NORMAND: My Lords, it is unnecessary for me to add anything on trespass and nuisance. I agree with my noble and learned friends, whose opinions I have had the advantage of reading, that the real issue in the appeal is that of negligence.

On negligence, the appellants' first and main contention was that the Court of Appeal have travelled beyond the negligence alleged by the respondents. The respondents' allegations are set out in the opinion of my noble and learned friend, LORD MORTON OF HENRYTON. I need not repeat them. They show (i) that the owners and master of the ship were charged with the same negligent acts or omissions, for which the owners would be liable vicariously and the master directly, if they were proved; (ii) that all these acts and omissions were errors in the navigation of the ship; (iii) that they began when, and not before, the ship was about to enter the channel of the River Ribble on her way to Preston; (iv) that after the respondents had seen the master's report, which disclosed that the stern frame had been fractured, the rudder damaged, and the propeller blades broken, they amended their pleadings by adding an allegation of negligence in navigating the vessel into the channel when the steering was erratic. These were the allegations which the respondents set out to prove. There was no notice in the pleadings of any other cause of action, such as that the appellants negligently sent the vessel to sea in an unseaworthy condition.

The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them. In fact, the evidence in the case was concerned only with the negligence alleged. The result was that the master of the vessel was acquitted by DEVLIN, J., of the negligence alleged, and the logical consequence was that the owners were also acquitted by him.

The majority of the Court of Appeal, however, held that the *onus* lay on the owners to show that the accident which caused the damage was inevitable, and to do this it would have been necessary to show that no care which they might have taken would have avoided the damage. As the appellants had made no attempt to lead evidence to discharge this *onus*, the majority of the

A Court of Appeal found them liable in damages. I do not wish to speculate on what might have been alleged, nor on what evidence might have been adduced by either side on other allegations, nor on how the *onus* might have shifted in consequence of other allegations and evidence. Confining myself to the actual allegations of negligence and to the evidence in the case, I find the conclusion inevitable that, since the master has been acquitted of the faults alleged against B him, the owners must also be acquitted. I wish to associate myself with the observations of my noble and learned friend, LORD RADCLIFFE, on the value of the pleadings. To condemn a party on a ground of which no fair notice has been given may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded.

I would allow the appeal.

C **LORD MORTON OF HENRYTON:** My Lords, this appeal arises out of an action in which the respondents were plaintiffs and the appellants, as owners of the s.s. Inverpool, and one George McMeakin as master of that vessel, were defendants. The events leading up to the action have already been stated by my noble and learned friend on the Woolsack.

D The first submission of counsel for the appellants was that, having regard to the pleadings and to the fact that the Court of Appeal affirmed the judgment of DEVLIN, J., in favour of the master, that court should also have affirmed the judgment of the learned judge in favour of the appellants, instead of deciding against them on an issue which was not raised by the pleadings. This submission leads me at once to a consideration of the pleadings, in order to see exactly what were the issues raised thereby.

E By para. 1 of their statement of claim, the respondents alleged that they were the owners and occupiers of the foreshore and the marine lake situate on part thereof in Southport; that the appellants were at all material times the owners, and had the management and control, of the oil tanker s.s. Inverpool, and that the second-named defendant (Mr. McMeakin) was at all material times the master of the said tanker and the servant or agent of the appellants. F Paragraph 2 was as follows:

> "In the afternoon of Dec. 3, 1950, the said oil tanker was proceeding under the management, control and command of the second-named defendant into the channel or estuary of the River Ribble with a cargo of about eight hundred and fifty tons of oil, when owing to the negligent navigation, G management and control of the said oil tanker, by the said defendant, the said oil tanker struck the revetment wall on the southerly side of the said channel and grounded on a sandbank behind the said wall, and after striking the said revetment wall the said defendant caused approximately four hundred tons of the said cargo of oil to be discharged overboard from the said oil tanker into the waters of the said channel or estuary. The H oil so discharged became deposited on the said foreshore and in the said marine lake and thereby caused damage to and created a trespass and/or nuisance upon the said foreshore and marine lake, and the plaintiffs thereby sustained damage.
>
> Particulars.
>
> "The second-named defendant was negligent in the navigation, manage- I ment and control of the said oil tanker in that:— . . ."

There followed particulars of alleged negligence of the master, and the statement of claim continued as follows:

> "By reason of the said negligence in the navigation, management and control of the said oil tanker and the acts and defaults hereinbefore mentioned and the wrongful discharge of the said oil from the said tanker into the waters of the channels or estuary of the said River Ribble, the said oil lodged and settled on the said foreshore and in the said marine lake,

> and the plaintiffs have incurred much expense in the removal and clearing and endeavour to remove and clear the said foreshore and marine lake of the said oil and the reinstatement of the plaintiffs' said property to its former condition, and have suffered loss and damage."

Particulars of the sum so expended by the respondents were then set out, and the claims were for

> "(i) damages in respect of such expense, loss and damage by reason of the matters aforesaid; (ii) such further and other relief as in the circumstances the court may see fit to award."

The appellants by their defence denied the alleged negligence, trespass, nuisance and damage, and then set out fully their account of the events leading up to the discharge of oil from the tanker—an account which was, in substance, accepted by DEVLIN, J. The defence ended with the following allegation:

> "In the premises it was necessary to discharge oil from the Inverpool in order to protect the vessel and the lives of those on board her and such discharge was carried out without negligence on the part of those on board the Inverpool."

On May 26, 1953, the appellants asked for further and better particulars of the statement of claim. These were supplied on June 13, 1953. By that date, the respondents had seen the master's report. They knew that the steering of the Inverpool had become very erratic, and they knew also that, when the vessel was examined, after the disastrous events of Dec. 3, 1950, it was found that there was a fracture of the stern frame and serious damage to the rudder; the propeller had one blade broken off and three blades broken at the top. These facts were set out in the particulars delivered on June 13, 1953, and the following sub-paragraph was added by amendment to para. 2 of the statement of claim:

> "a. the said oil tanker was caused to be navigated into and enter the said channel when the steering of the said oil tanker was erratic and steering badly and when the helm could not be got over and was slow to move and when having regard to these conditions it was dangerous to enter the said channel;"

My Lords, I have set out the pleadings in detail in order to show that no complaint was made of any act or default on the part of the appellants, either in the original statement of claim or at the time when the respondents had the opportunity of amending it with full knowledge of the facts already mentioned. As against the master, it was alleged that he had been negligent, that his negligence was the cause of the discharge of oil from the tanker, that such discharge had resulted in "a trespass and/or nuisance" and had caused damage to the respondents. It was sought to make the appellants liable only on the ground of vicarious responsibility for the acts and defaults of the master.

All the attacks on the master's conduct were fought out before DEVLIN, J., and they all failed. The victory of the master destroyed the only ground on which the respondents, by their statement of claim, had sought to cast liability on the appellants. Counsel for the respondents then sought to make a case of which no hint appeared in the pleadings. He contended that, in the circumstances, the onus was on the defendants in the action to prove inevitable accident, and he quoted the observation of FRY, L.J., in *The Merchant Prince* (1) ([1892] P. at p. 189):

> "The burden rests on the defendants to show inevitable accident. To sustain that the defendants must do one or other of two things. They must either show what was the cause of the accident, and show that the result of that cause was inevitable; or they must show all the possible causes, one or other of which produced the effect, and must further show with regard to every one of these possible causes that the result could not have been avoided."

Counsel submitted that the appellants had not discharged this burden. For instance, the stern frame might have been in an unsound condition when the tanker started her voyage, and might have been fractured by heavy seas which would not have fractured a sound stern frame. This argument failed before Devlin, J., but succeeded with the majority of the Court of Appeal. Devlin, J., after referring to *The Merchant Prince* (1), said ([1953] 2 All E.R. at p. 1213):

> "That decision does not enable the plaintiffs to succeed otherwise than on a charge of negligence which they have pleaded. The only negligence alleged in this case is against the master, who is the second defendant, in respect of his navigation and management of the Inverpool in relation to this voyage; the owners of the ship, the first defendants, are sued only as answerable for the master's wrongdoing."

Having acquitted the master of negligence, he dismissed the action. From that decision the present respondents appealed, and the majority of the Court of Appeal held that the burden lay on the present appellants to show that they had exercised proper care, and that they had failed to discharge that burden. The court, therefore, directed that judgment be entered against the present appellants for an amount of damages to be ascertained, but affirmed the judgment of Devlin, J., in favour of the master. My Lords, it may well be that the respondents' case might have been pleaded in such a way as to cast on the present appellants the burden of proving that they had exercised proper care. In that event, as my noble and learned friend on the Woolsack has said, the case would, no doubt, have developed on different lines. The respondents, however, as I have already pointed out, had pleaded negligence of the master, and trespass and nuisance and damage resulting from such negligence; as against the appellants, they chose to rely only on the responsibility of the owners for the master's negligence.

In this state of the pleadings, it seems to me to follow that the Court of Appeal, having affirmed the judgment of Devlin, J., in favour of the master, and having thereby acquitted the master of any negligence, should also have affirmed his judgment in favour of the present appellants.

My Lords, I do not regard the first argument of counsel for the appellants as a merely technical one. I think that the course taken by the majority of the Court of Appeal cast on the appellants a burden which they should not have been called on to shoulder, and caused substantial hardship to them. In my opinion, counsel's first argument ought to succeed, and I would allow the appeal.

LORD RADCLIFFE: My Lords, I think that this case ought to be decided in accordance with the pleadings. If it is, I am of opinion, as was the trial judge, that the respondents failed to establish any claim to relief that was valid in law. If it is not, we might do better justice to the respondents—I cannot tell, since the evidence is incomplete—but I am certain that we should do worse justice to the appellants, since, in my view, they were entitled to conduct the case and confine their evidence in reliance on the further and better particulars of para. 2 of the statement of claim which had been delivered by the respondents. It seems to me that it is the purpose of such particulars that they should help to define the issues, and to indicate to the party who asks for them how much of the range of his possible evidence will be relevant, and how much irrelevant, to those issues. Proper use of them shortens the hearing and reduces costs. But, if an appellate court is to treat reliance on them as pedantry or mere formalism, I do not see what part they have to play in our trial system.

In my view, the trial turned on the issue of negligence. It is true that the fact that the oil spread itself over the respondents' foreshore was the subject of alternative claims in nuisance and in trespass. So far as nuisance goes, I share the view of Denning, L.J., in the Court of Appeal, that the appellants were not responsible for a private nuisance in any ordinary sense. What was done may possibly have constituted a public nuisance from which the respondents suffered

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special damage. But since it seems to be conceded that it would be a defence to such a claim to show that the discharge of oil was reasonably necessary to prevent loss of life in the ship's crew, unless the appellants' own carelessness had brought about the danger of that loss, the essential issue comes round again to one of negligence. As to trespass, I am not prepared to say that I think that the appellants' action did constitute a trespass at all. Certainly, I do not regard such decisions, as *Jones* v. *Llanwrst Urban Council* (2) ([1911] 1 Ch. 393), and *Smith* v. *Great Western Ry. Co.* (3) (1926) (135 L.T. 112), as having any real bearing on the circumstances of this case in which the oil was jettisoned at sea, committed to the action of wind and wave, with no certainty, so far as appears, how, when or under what conditions it might come to shore. But the issue of trespass was only touched on before us, presumably because it was common ground that there would again be a good defence unless negligence were established.

As to the proof of negligence, I can summarise my view as follows. The respondents might have undertaken to make good their claim in more than one way. One way would have been to follow the line taken in *The Merchant Prince* (1) ([1892] P. 179), on which so much of the argument in this case has turned. That would have meant relying on the view that the mere fact that the ship had grounded on the training wall at all was evidence of negligence, and calling on the appellants to discharge the onus of disproof thus placed on them. I do not think that we have sufficient material to enable us to say with certainty whether such an opening attack would have succeeded. Running a ship on to the training wall of a channel in the conditions of weather which prevailed at the time of the accident is, at any rate, not the same thing as running into a stationary vessel in the Mersey. But, assuming that the event was itself prima facie evidence of negligence, and that the respondents had so framed their case, I do not doubt that the majority of the Court of Appeal were right in saying that the appellants would not have displaced that evidence by merely showing that their failure in navigation was due to a failure in the steering apparatus of the ship. They would have had to go further and show that they had not omitted any reasonable precaution to ensure that failures did not occur in their steering apparatus or in their control of the steering.

But the point is that the respondents did not undertake to make good their case on these lines. It is quite clear from the particulars which they were invited to furnish, and which they furnished, that they decided to rely on certain actions of the master in his navigation of the ship. He was careless, they said, in taking his ship into the channel when its steering apparatus was working so badly and/or when its stern frame, rudder and propeller had sustained damage. Knowing what he did about the conditions, he ought to have stayed outside, or called for a pilot or tug, or had the damage inspected and remedied before going in, or, at any rate, managed to navigate so as not to run into the wall. There were further grounds of complaint relating to the master's decision to jettison the oil, challenging the necessity or propriety of that decision. I find it impossible to read the statement of claim and the particulars without coming to the clear conclusion that, while the respondents were announcing it to be one of their heads of complaint that the master had brought his ship into the channel with defective control of steering, they were not putting it forward as a ground of complaint that the appellants, the shipowners, had allowed their ship to be at sea in such a defective condition. And that is what they now wish to complain of.

The respondents called evidence in chief, expert evidence, in support of their heads of claim. In their turn, the appellants called their evidence on these heads. The trial judge, after weighing the evidence, came to the conclusion that the respondents had not made good their case on any of the particulars. There, he thought, the case ended, and I am of the same opinion. I think it quite wrong that the respondents should, nevertheless, be entitled to say that the appellants must lose because they did not cover at the trial a range of evidence, how the stern frame came to break, the condition of the steering apparatus, the measures taken by the appellants to ensure that their ship and gear were in good order, which the respondents, by their own pleading, had excluded from the trial.

I am not unmindful that the respondents' counsel told us that he had conducted his case throughout on the lines of *The Merchant Prince* decision (1), although there did not seem to be unanimity between him and counsel for the appellants as to the stage at which what I will call *The Merchant Prince* argument (1) first appeared during the hearing. In my view, where the question is, as here, as to sufficiency of evidence, the state of the pleadings is of more importance than the way in which the case is shaped in argument. It is clear that no application was made to the trial judge to amend the pleadings by altering or extending the particulars, and it is equally clear from what he says at the close of his judgment that he did not regard himself as having expressly or impliedly authorised any such amendment. That being so, I am of opinion that the appellants called as much evidence as was required of them to defend themselves from the charges of negligence that were made in this case.

I agree that the appeal should be allowed.

LORD TUCKER: My Lords, I agree that, having regard to the issues raised in the pleadings, it was not open to the Court of Appeal to substitute for the judgment of the trial judge in favour of the appellants a judgment in favour of the respondents, based on the failure of the appellants to prove that the s.s. Inverpool was seaworthy when she left Liverpool on Dec. 3, 1950.

I desire only to add a word or two about the alleged cause of action in trespass. I am inclined to agree with DENNING, L.J., that trespass does not lie on the facts of this case as the discharge of the oil was not done directly onto the foreshore, but outside in the estuary. Furthermore, it would seem from the decision in *Sharrod* v. *London & North Western Ry. Co.* (4) (1849) (4 Exch. 580), that, even if trespass would lie against the master, it would not have been available against the appellants. Apart, however, from such considerations as these, it is, in my view, well settled that, in actions between users of the highway, and between the occupier of premises adjoining the highway which have been damaged by a person lawfully using the highway, the person who has suffered damage cannot recover in trespass in the absence of negligence on the part of the person who has caused the damage. See per LORD BLACKBURN in *River Wear Comrs.* v. *Adamson* (5) (1877) (2 App. Cas. at p. 767), where he says:

> "My Lords, the common law is, I think, as follows:—Property adjoining to a spot on which the public have a right to carry on traffic is liable to be injured by that traffic. In this respect there is no difference between a shop, the railings or windows of which may be broken by a carriage on the road, and a pier adjoining to a harbour or a navigable river or the sea, which is liable to be injured by a ship. In either case the owner of the injured property must bear his own loss, unless he can establish that some other person is in fault, and liable to make it good."

This was the principle applied by McCARDIE, J., in *Gayler & Pope, Ltd.* v. *B. Davies & Son, Ltd.* (6) ([1924] 2 K.B. 75), in rejecting the contention that the plaintiffs in that case could succeed in trespass in the absence of negligence.

Appeal allowed.

Solicitors: *Thomas Cooper & Co.* (for the appellants); *Sharpe, Pritchard & Co.*, agents for *Town clerk*, Southport (for the respondents).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

Re HANBEY'S WILL TRUSTS.
CUTLERS' COMPANY (SHEFFIELD) *v.* LONDON CORPORATION AND ANOTHER.

[CHANCERY DIVISION (Danckwerts, J.), December 2, 1955.]

Charity—Cy-près doctrine—Gift over—Whether scheme defeating gift over will be ordered.

Will—Condition subsequent—Charitable bequest—Gift over on failure of trustees to carry out trust—Subsequent impossibility for trustees to perform trusts—Operation of gift over.

By his will dated Jan. 12, 1782, a testator directed that after the death of his wife a sum of £8,000 bank annuities should be transferred to trustees on trust to apply the income of part on June 29 in each year for the benefit of " Poor House Keepers " in a certain parish and to provide each such person with a blue cloth coat and a black hat and 20s., and on trust to apply part of the income of the rest of the bank annuities in making an annual payment of £10 to the master for the time being of the Charity School of Sheffield, and other small annual payments, and on further trust to apply the rest of the income for the purpose of maintaining and educating in the Charity School of Sheffield as many children of " Poor House Keepers " of the said parish as the income would permit. The testator further provided that on June 29 in each year the said children should be clothed in a blue uniform and that they and the " said Poor House Keepers " should go in procession to the parish church and hear a sermon by the vicar. The testator also declared that if " all or any part of the clear yearly dividends and proceed thereof shall not from time to time be paid applied laid out and disposed of in pursuance of and according to the directions hereinbefore by me willed . . . Then and from thenceforth . . . the said sum of £8,000 bank annuities shall absolutely vest in and become the property of the . . . president and governors of Christ's Hospital London for the time being and their successors for the benefit of the said hospital and the right and interest of [the trustees] in the said sum of £8,000 bank annuities and the several charitable uses aforesaid shall from thenceforth cease and be utterly void ". In 1917, the trustees found it impossible to obtain blue coats and black hats of the kind required to be given to the " Poor House Keepers " and instead thereafter they gave each such person 20s. extra. In 1939 the buildings in which the Charity School (then called the Sheffield Blue Coat School) was conducted and the playground were requisitioned by the War Office and remained requisitioned until April, 1946. In August, 1946, the school buildings and playground were requisitioned by the Minister of Education for use by the local education authority for school purposes and the original charitable foundation ceased to have any separate existence. On the question whether the gift over to Christ's Hospital had taken effect, it was argued on behalf of the trustees that the court should order a scheme for the carrying out of the testator's intention so far as it was practicable.

Held: it was within the discretion of the court to order a scheme notwithstanding that the gift over would be defeated thereby, but no scheme would be ordered because (a) the gift over to Christ's Hospital had long since taken effect, (b) the scheme, in defeating the gift over, would defeat the intention of the testator rather than give effect to it, and (c) it would be difficult to settle any useful scheme which would substantially carry out the testator's objects; accordingly, the trust funds and arrears of income should be paid to Christ's Hospital.

Christ's Hospital v. *Grainger* (1849) (1 Mac. & G. 460) applied; *Re Richardson's Will* (1887) (58 L.T. 45), *Re Orchard Street Schools* (*Trustees*) ([1878] W.N. 211) and *Re Upton Warren* (*Parish*) (1833) (1 My. & K. 410) considered.

[As to the direction of schemes, see 4 Halsbury's Laws (3rd Edn.) 309-312, paras. 634-638; and for cases on the subject, see 8 Digest (Repl.) 450, 451, *1458-1483*.

As to conditions with a gift over being strictly enforced, see 4 Halsbury's Laws (3rd Edn.) 299, para. 616; and for cases on the subject, see 8 Digest (Repl.) 435-437, *1257-1272*.]

Cases referred to:

(1) *Re Faraker*, [1912] 2 Ch. 488; 81 L.J.Ch. 635; 107 L.T. 36; 8 Digest (Repl.) 419, *1102*

(2) *Re Richardson's Will*, (1887), 58 L.T. 45; 8 Digest (Repl.) 460, *1603*.

(3) *Re Orchard Street Schools* (*Trustees*), [1878] W.N. 211; 8 Digest (Repl.) 473, *1760*.

(4) *Re Upton Warren* (*Parish*), (1833), 1 My. & K. 410; 39 E.R. 736; 8 Digest (Repl.) 460, *1607*.

(5) *Christ's Hospital* v. *Grainger*, (1849), 1 Mac. & G. 460; 19 L.J.Ch. 33; 15 L.T.O.S. 497; 13 J.P. 778; 41 E.R. 1343; 8 Digest (Repl.) 435, *1259*.

(6) *Re Randell*, (1888), 38 Ch.D. 213; 57 L.J.Ch. 899; 58 L.T. 626; 8 Digest (Repl.) 435, *1253*.

Adjourned Summons.

The plaintiffs, the master, wardens, searchers, assistants, and commonalty, of the Company of Cutlers of Hallamshire in the county of York (commonly called the Cutlers' Company), trustees of a charitable bequest of £8,000 bank annuities bequeathed by the testator, Thomas Hanbey, applied to the court by originating summons for the determination of the question (among others) whether on the true construction of the will of the testator and in the events which had happened the gift over to the first defendants, the Corporation of London as Governors of Christ's Hospital, of the capital of the charitable bequest of £8,000 consolidated bank annuities contained in the will had or had not taken effect and whether the plaintiffs now held the trust fund in trust in whole or in part for the first defendants absolutely.

T. A. C. Burgess for the plaintiffs, the Cutlers' Company, Sheffield, the trustees of the bequest.

N. S. S. Warren for the first defendants, the Corporation of London as Governors of Christ's Hospital, beneficially entitled under the gift over.

B. J. H. Clauson (*Denys B. Buckley* with him) for the Attorney-General.

DANCKWERTS, J.: The question that I have to decide in this case relates to a bequest of £8,000 contained in a will which was dated as long ago as Jan. 12, 1782. The testator died on Dec. 25, 1786. After a number of bequests and after referring to £10,000 in bank annuities, which he directed to be held on trust to pay the annual dividends and profits to his wife, Mary Hanbey for her life, the testator proceeds:

> "And from and immediately after the decease of my said dear wife Mary Hanbey and due payment of all arrears of the said dividend up to the day of her death upon trust, to assign and transfer the sum of £8,000 part of the said sum of £10,000 bank annuities unto the master, wardens, searchers, assistants and commonalty of the said Company of Cutlers, of Hallamshire in the county of York, for the time being and their successors upon the trusts and for the purposes hereinafter mentioned (that is to say) upon trust that they the said master, wardens, searchers, assistants, and commonalty, and their successors for the time being shall and do at or upon June 29 being my birth day yearly and every year for ever pay apply, lay out, and

dispose, of the clear yearly dividends and proceed of the sum of £5,000 part of the said sum of £8,000 bank annuities to and for the benefit of as many Poor House Keepers living and residing in the said parish of Sheffield being members of the Church of England of a sober life and conversation, and each of them of the age of fifty years or upwards, whereof I will that two thirds shall be men, and one third women as such yearly dividends will extend to relieve yearly, with one great blue cloth coat, and one black hat and 20s. in money to each such poor man; and with one blue cloth coat, and one black hat and 20s. in money to each such poor woman. And I will, that the said poor men and poor women shall be annually named, and appointed to receive the said charity by the persons following (that is to say) the master and two wardens for the time being and all those that have served the office of master of the said Company of Cutlers and by the said twelve burgesses for the time being (commonly called church burgesses) of the said town of Sheffield, and by the vicar and churchwardens for the time being of the old parish church of Sheffield aforesaid, or by the greater part of them present at a meeting to be had every year for that purpose, and that at every such yearly distribution of the said charity, such of my kindred as shall apply for the same, and shall be qualified as aforesaid, shall always have the preference to all others—And upon further trust, that they the said master, wardens, searchers, assistants, and commonalty, and their successors for the time being, shall and do yearly and every year for ever, pay apply lay out and dispose of the yearly sum of £16 10s. part of the clear yearly dividends and proceed of the sum of £3,000 (residue of the said sum of £8,000 bank annuities) unto the persons and for the purposes hereinafter mentioned (that is to say) the sum of £10 part thereof, yearly for ever, unto the master for the time being of the Charity School of Sheffield finished in the year of our Lord 1710, wherein twenty-eight blue coat boys and three green coat boys are now maintained and educated for his care and trouble in teaching and educating the poor children hereinafter provided for by me, in the said school over and above and in addition to his yearly salary and the sum of 20s. other part thereof yearly for ever to the vicar or minister that shall preach the sermon hereinafter by me directed and the sum of 10s. other part thereof unto the clerk and sextons of the said parish church for their attendance at such sermon to be divided amongst the said clerk and sextons in such proportions as my said trustees then present shall think fit and the sum of £5 remainder thereof for ever for a dinner for my said trustees after their return from church and subject to the said yearly charge of £16 10s. upon further trust that they the said master, wardens, searchers, assistants and commonalty and their successors for the time being shall and do yearly and every year for ever pay apply lay out and dispose of all the rest residue and remainder of the clear yearly dividends and proceed of the said sum of £3,000 bank annuities into and for the maintaining and educating in the Charity School of Sheffield aforesaid, finished in the said year of our Lord 1710 of as many more children (either boys or girls or both) of Poor House Keepers living and residing or if dead who did live and reside in the said parish of Sheffield being or when alive having been members of the Church of England and in the annually clothing of such children as the said residue of the said yearly dividends and proceeds will extend to maintain educate and cloathe until they shall be fit to be placed out as apprentices or servants and my will and meaning is that all the said poor children shall from time to time for ever as often as occasion shall require be nominated and appointed to the said charity by the master, and two wardens for the time being and all those that have served the office of master of the said Company of Cutlers, and by the said twelve burgesses for the time being (commonly called church burgesses) of the said town of Sheffield, and by the vicar and churchwardens for the time being of the old parish church of Sheffield aforesaid or by the major part of them present at a meeting to be had for that purpose from time to time and that the children of such Poor House Keepers as shall be of my kindred, and shall apply for the same, and shall be qualified as aforesaid shall have the preference over all others And that the said poor children shall be maintained lodged, and kept in the said Charity School and shall be taught and instructed to read and write English and also common arithmetic and shall at or upon the said June 29 yearly and in every year for ever be clothed in a blue uniform in the same manner as the poor children in Christ's Hospital, London, are clothed And my further will is, that the said master and two wardens for the time being, and all those that have served the office of master of the said Company of Cutlers, and the said twelve burgesses for the time being . . . or the major part of them shall yearly and every year for ever and at or upon the said June 29 at nine of the clock in the forenoon meet in the said Charity School, or in such other convenient place in the said town of Sheffield, as they shall from time to time think fit, to supervise and see all the clear yearly dividends and proceed of the said several sums of £5,000 and £3,000 bank annuities, be from time to time respectively paid applied laid out and disposed of, according to the true intent and meaning of this will; and that then and so often at every such meeting all the said Poor House Keepers, and poor children, shall go in procession in their new clothing before my said trustees, to the old parish church of Sheffield aforesaid and there hear a sermon preached in the forenoon by the vicar of the said parish, for the time being or by such other minister as my said trustees shall for that purpose appoint and that they my said trustees shall return from church and dine together in such convenient place in the said town of Sheffield, as they shall from time to time think fit. Provided always and my express will and meaning is that in case the said master, wardens, searchers, assistants and commonalty of the said Company of Cutlers and their successors for the time being shall not within the space of three calendar months next after the decease of my said dear wife Mary Hanbey accept take and receive the said sum of £8,000 bank annuities upon the trusts and for the purposes aforesaid or in case it shall happen that after they have so taken accepted and received the same that all or any part of the clear yearly dividends and proceed thereof shall not from time to time be paid applied laid out and disposed of in pursuance of and according to the directions hereinbefore by me willed and given of and concerning the same Then and from thenceforth in either of the said cases (which shall first happen) the said sum of £8,000 bank annuities shall absolutely vest in and become the property of the said president and governors of Christ's Hospital London for the time being and their successors for the benefit of the said hospital and the right and interest of the said master and wardens searchers assistants and commonalty and their successors in the said sum of £8,000 bank annuities and the several charitable uses aforesaid shall from thenceforth cease and be utterly void and I do hereby declare it to be my further will and meaning that they the said John Tappenden and James Mitchell and the survivor of them and the executors and administrators of such survivor shall and do from and immediately after the decease of my said dear wife Mary Hanbey and payment of all arrears of interest up to her death assign transfer and make over the sum of £2,000 bank annuities residue of the said sum of £2,000 like annuities unto the president and governors of Christ's Hospital London for the time being."

The testator then gives further directions in relation to the said sum of £2,000 bank annuities which formed part of the legacy of £10,000 which was directed to be held on trust for his wife during her life.

As long ago as 1917 the trustees found it impossible, with the funds available, to obtain blue coats and black hats of the kind required for the carrying out of those trusts. Without any application to the court or to the Charity Commissioners and, I suppose, in what they thought was a practical way of dealing with the matter, they proceeded to add another pound to the sum to be paid to the Poor House Keepers in Sheffield and discontinued the provision of coats and hats. As regards the school to which the pupils were directed to go, it was formerly in the middle of Sheffield, near the parish church which has now become the cathedral, but in 1911 it moved to a new site with more suitable amenities in another part of Sheffield and took the name, the Sheffield Blue Coat School. After 1926 the distinctive mode of dress worn by the boys was abandoned in favour of ordinary clothing. On Sept. 12, 1939, the school and playground were requisitioned by the War Office and remained requisitioned until Apr. 20, 1946. On Aug. 26, 1946, the school buildings and playground were again requisitioned, this time by the Minister of Education for use by the Sheffield Corporation as the local education authority for school purposes in the neighbourhood and the original charitable foundation as such has now no separate existence. The school is now the subject of a scheme made by the Minister of Education which was sealed on Mar. 23, 1954.

That scheme, which has been exhibited, shows that the funds which were available for the carrying on of that school for, as it appears, elementary education have been diverted by the scheme of the Minister of Education to purposes which are more in the nature of higher education. As stated in cl. 11 of the scheme they are to be applied,

> " in any of the following ways for the benefit of children resident in or near the City of Sheffield, who, in the opinion of the trustees, are in need of financial assistance:—(a) Exhibitions tenable at any secondary school, training college for teachers, university, or other institution of further (including professional and technical) education, approved by the trustees, to be awarded under rules to be made by the trustees, including rules as to the value and period of tenure of the exhibitions, and the qualifications, and method of ascertainment and selection, of candidates; (b) Financial assistance, outfits, clothing, tools, instruments or books to enable beneficiaries on leaving school, university, or any other educational establishment, to prepare for, or to assist their entry into, a profession, trade or calling; (c) In otherwise promoting the education (including social and physical training) of beneficiaries."

It is plain that for some considerable period of time the directions of the testator in regard to those sums of £5,000 and £3,000 have not been carried out. Therefore, prima facie, it would appear that the gift over has taken effect. It was not the fault of the trustees that the poor scholars ceased to attend the school because the requisitioning of the site first by the War Office and subsequently by the Minister of Education diverted the school from the purposes for which it was intended to be used, against the will of the persons who were concerned in the matter. Until now the trustees have made no attempt to obtain any directions or a scheme from the court. Indeed, the present summons does not ask for a scheme though I am asked to treat it as if it did.

The persons representing Christ's Hospital claim that the gift over has taken effect and that the whole amount of the legacy including the arrears of income should be paid over to Christ's Hospital for the purposes of the school. On the other hand, it was contended by the trustees that the court should make a scheme which will have the effect of preserving the original charities designated by the testator and therefore the gift over will not take effect and, so far as one can see if a scheme is made, will never take effect.

It is no doubt true that if the court makes a scheme for the purposes of the administration of a charitable trust that charitable trust is not destroyed but continues. It is merely the same trust continuing in a manner altered in due accordance with the law: see *Re Faraker* (1) ([1912] 2 Ch. 488). Questions arise, first, whether the court has power to direct a scheme so as to defeat the gift over, and, secondly, if the court has power to make a scheme, whether in all the circumstances the court should exercise that power in the present case. The authorities on this question are by no means clear. *Re Richardson's Will* (2) (1887) (58 L.T. 45), *Re Orchard Street Schools* (*Trustees*) (3) ([1878] W.N. 211) and *Re Upton Warren* (*Parish*) (4) (1833) (1 My. & K. 410) are cases in which schemes have been made which undoubtedly had the effect of preserving the original trusts which had been neglected by the trustees, and which defeated any gift over for charitable purposes contained in the wills in those cases.

It is said by reference to a quotation from 4 HALSBURY'S LAWS OF ENGLAND (3rd Edn.) 295, para. 610,* that the mere default of the trustee is not fatal to the continuance of a trust unless, perhaps, it would appear the default of the trustee is made the exact reason for the gift over or forfeiture.

In *Christ's Hospital* v. *Grainger* (5) (1849) (1 Mac. & G. 460) the gift over on the default of the trustees did produce a forfeiture and no scheme was made, although there was another suit pending by the Attorney-General for the settlement of a scheme in such a way as to defeat the gift over. LORD COTTENHAM, L.C., in his judgment says (ibid., at p. 461):

> "The Corporation of London, as governors of Christ's Hospital, by the bill claimed certain property which had been left by the testator, John Hendricke, in 1624, to the Corporation of Reading, for certain charitable purposes in that town, with a direction that if the donees should for a year neglect, omit, or fail to perform the directions of his will, such gift should be utterly void, and should forthwith be paid and transferred to the Corporation of London for the benefit of Christ's Hospital."

It was held that the gift over took effect. The case is generally cited on the point whether a gift over of that kind is obnoxious to the rule against perpetuities.

I find it a little difficult to see what is the distinction between the cases where the default of the trustees to apply property in accordance with the testator's direction is not allowed to defeat the gift and the cases in which the default of the trustees does defeat the gift and results in the gift over taking effect. It seems to me practically impossible to discover what is the dividing line. The cases to which I have already referred cannot be regarded as very satisfactory authorities on the question because the real point which I have to consider today does not appear to have been argued in any of those cases—at any rate, it does not appear to have been entirely present to the minds of the courts.

In the later case of *Re Randell* (6) (1888) (38 Ch.D. 213) there was only a gift to the charity named in the first instance for a limited period and on the conclusion of that period the charitable gift came to an end. In the present case the charitable gift is a perpetual one subject to the effect of the forfeiture clause and the gift over. The trustees are directed to do something yearly and in every year for ever so that it is quite clear that it was intended in the first instance to be a perpetual charitable gift.

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* The passage in 4 HALSBURY'S LAWS (3rd Edn.) 295, reads:—

"The negligence or default of a trustee is not sufficient to nullify a charitable purpose, whether there is or is not a gift over, unless the testator expressly makes the gift over depend upon the conduct of the trustee."

In those circumstances three questions arise. First of all, has the court power to direct a scheme? It seems to me that the court has power to direct a scheme. Secondly, if the court does direct a scheme, will that scheme, continuing the original trusts in a different form, have the effect of defeating the gift over? It seems to me that the answer to that must also be in the affirmative that is to say, that directing such a scheme will defeat the gift over because the original trust will continue although it will be in an altered form which is authorised by law. The third question is this: is the court bound to direct a scheme in circumstances of this kind, or, if the court is not bound to do so, should it, in the present circumstances, direct the settlement of a scheme?

It was not really contended that the court was absolutely bound to direct a scheme. It seems to me that the court must have discretion to decide whether a scheme should be directed in the circumstances or not. Having regard to all the circumstances of this case, it seems to me it is not a case in which I should direct a scheme. The considerations which affect me in that regard are the following. It is plain that, unless a scheme is directed the vesting of the £8,000 in Christ's Hospital under the trusts of the will has already taken place. The trustees have clearly been committing breaches of trust, though no doubt in perfect good faith, for their actions were without the authority of the court or of any other body which has power to authorise what they have been doing. Further, if I defeat the forfeiture clause or the gift over in the present case I shall be defeating what appears to me to be the intention of the testator. Another consideration is that it would be difficult to settle any useful scheme which would really apply the trust properly cy près with the objects that the testator had in mind in his will. In all the circumstances I come to the conclusion that this is not a case in which I should direct the settlement of a scheme. It seems to me plain, therefore, that the gift over in favour of Christ's Hospital has taken effect and that Christ's Hospital are entitled to the funds in question.

Declaration accordingly.

Solicitors: *Peacock & Goddard*, agents for *Younge, Wilson & Co.*, Sheffield (for the plaintiffs); *Beachcroft & Co.* (for the first defendants); *Treasury Solicitor.*

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

[END OF VOLUME THREE.]

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